



# State of play

*Jennifer Ridgway and Karen Bayley* review case law concerning the revocation of a power of attorney, constructive trusts and the management of a compensation award to a vulnerable client

## CONSTRUCTIVE TRUST

### *Bhushan and Ors v Chand*

The parties in this case were five brothers who owned various properties and businesses, each registered in one or other of their sole names. A dispute arose between the claimants (the four younger brothers) and the defendant (the eldest) as to the ownership of these assets.

The parties' father had died in 1968, after which their mother became head of the household. Each brother had initially been employed outside the family and all wages had been passed to their mother.

Funds had been supplied by the mother at different times for the purchase of various properties and later, businesses. The brothers then worked closely together in different groupings and different businesses over the years.

According to the claimants, all the properties and businesses had been acquired and run under a general agreement by all five brothers, to work together for their joint benefit. It was simply a matter of convenience whose name a property or business was

registered in, and all income had been shared between them.

As such, by a common intention constructive trust and/or proprietary estoppel, all properties and businesses were beneficially owned in equal shares by all five. The defendant denied this agreement and submitted that each property and business was beneficially owned by whichever brother was its registered owner.

The court found in favour of the claimants. The claimants' evidence (although not wholly reliable) fitted better with the objective and external evidence and supported the existence of a common intention constructive trust.

The overall impression was that of a traditional family under the close control of the mother, and there was no evidence that she had kept money separate for each son. She had simply acquired money from various sources, mixed it and applied it for the family's benefit as she saw fit.

By mixing the pot of money she had become the beneficial owner of the money that each son paid to her.

When she bought an asset from the pot, the ownership of the asset depended

on her intention as expressed at the time (and not the brothers' respective contributions to the pot).

At the very beginning, several houses had been purchased in the defendant's name, and there was no evidence to reverse the assumption that the defendant had been both the legal and beneficial owner.

However once those properties were sold and the proceeds given back to the mother, the ownership was vested in her again. From 1976 onwards, as the brothers grew older, there was strong evidence that the family had agreed to work together and build up assets in common.

The necessary 'detriment' element of a common intention constructive trust was clearly made out, as each brother worked in the various businesses in circumstances in which he was not, on the face of it, entitled to any reward.

The defendant's case – that he was entitled to the whole or a share of the assets purchased from that pot, merely because of his contribution of wages to it – was therefore dismissed.

See *Bhushan & Ors v Chand* [2015] EWHC 1298 (Ch) (08 May 2015)

## TRUSTS

*P v P*

In this case, following a divorce, a post-nuptial settlement had been varied by way of ancillary relief, potentially forcing the sale of the only trust asset (a farmhouse). The trustees appealed against the decision.

The trust, established by the husband's parents in 2009, held the farmhouse (the former matrimonial home) for the husband during his lifetime, after which it would pass to other family members.

In 2012 the husband and wife separated and a joint residence arrangement was reached between them in relation to their child. The wife split her time between the farmhouse (when she was caring for the child) and her parent's spare room. The husband was living in another property owned by his family.

At first instance, Mr Justice Mostyn varied the trust to provide £23,000 for the wife absolutely, and a further £134,000 to be held for her benefit for life (to use towards the purchase of a property to live in). The effect of this was that the farmhouse, where the husband intended to reside, would have to be sold unless his family could satisfy the order (which was a possibility if not a probability).

The trustees appealed, saying that the order exceeded the proper ambit of the judge's discretion, or failed to properly balance the relevant factors, including the husband's housing needs, the wife's ability to provide for herself and the settlor's intentions.

In the Court of Appeal, Lady Justice Black held that the breadth of discretion to vary a nuptial settlement was considerable, even including the power to exclude a beneficiary entirely, and was certainly wide enough to encompass Mostyn's order. Mostyn J's exercise of his discretion was not flawed.

He had based the award upon the wife's need to rehouse herself, and had had no option but to turn to the trust to provide for the wife.

Black LJ was in no doubt that Mostyn J had given full attention to 'trust considerations'. His choice of a life interest for the bulk of the money, rather than an outright payment, reflected that this was not a straightforward ancillary relief situation. In the circumstances, significant weight should not be given to the settlor's intentions in setting up the trust.

## “ A life interest to the wife... did not therefore prejudice them materially ”

First, had the marriage persisted, the wife would have enjoyed the property for life anyway. The order merely built upon this foundation by providing assistance for her accommodation needs. Second, the other beneficiaries would probably have waited a long while before the husband died and they could benefit.

A life interest to the wife (who was of a similar age) did not therefore prejudice them materially. Third, trust powers allowed for the transfer of the farmhouse to the husband absolutely, thus the other beneficiaries may have been deprived in any event (e.g. if he had chosen to sell).

Overall the settlement had not been varied with an inappropriate disregard for the intentions of the settlor, or further than was necessary to make provision for the wife and the child when with her. The route chosen by the judge was the 'least intrusive available'. Accordingly, the appeal was dismissed.

See *P v P* [2015] EWCA Civ 447 (06 May 2015)

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## COMPENSATION AWARD

*Newcastle CC v PV*

This was an interesting case involving the interaction between the Criminal Injuries Compensation Authority (CICA) and the Court of Protection (COP).

PV was five months old when he suffered a non-accidental brain injury in the presence of his mother, her brother and her, then, partner. The CICA made an award of over £2.8m to PV and issues arose as to how the money should be managed, given that his closest family were implicated in his injuries.

Senior Judge Lush looked at cases in which the CICA requires a trust to be created in order to exclude any possibility that an assailant might benefit from the compensation award. These cases arise almost exclusively in the context of domestic violence, as here, where the assailant is a family member.

It was necessary to review the law that existed before the Mental Capacity Act 2005 (MCA 2005), when personal injury claims were required to be approved by the Master of the COP and, by tradition, CICA awards were also approved in this manner.

Senior Judge Lush also reviewed the powers of the COP to authorise the creation of a trust or settlement of a protected beneficiary's assets, under section 18(1)(h) of the MCA 2005.

The facts of the case and the various hearings that had taken place were examined. Senior Judge Lush considered several legal issues, including who can conduct an application to the CICA on behalf of an incapacitated person.

He further looked at the role of the COP in respect of CICA awards, i.e. who sets up the trust, (the CICA or the COP) and who approves its terms.

Also considered, and of wider application than to just this case, if a trust is set up, is there any need for an ongoing deputyship? If so, can the deputy and the trustee of the CICA settlement be the same person or organisation?

The issue of a 'Peter's undertaking'

was also considered; an undertaking given by a deputy regarding public funding for care, who should give the undertaking and in what terms.

Senior Judge Lush reviewed all the law and considered that it was in PV's best interests for the CICA award be accepted. The deputy (Newcastle City Council) was authorised to accept the award from the CICA and to give a valid receipt.

**“ Issues arose as to how the money should be managed, given that his closest family were implicated in his injuries ”**

A separate application for a trust would be made and the COP would then make an order pursuant to section 18(1)(h) MCA 2005, for the settlement of PV's property. At that point, the existing deputyship would be discharged.

The deputy and an independent solicitor would be the trustees of the trust. The trustees would authorise the filing of tax returns and make elections regarding disabled persons' trusts.

The case is worth reading for its very full review of the law. While the circumstances of this case will hopefully not arise too often, the commentary on the exercise of functions by the COP relating to trust creation and the roles of trustees and deputies, is helpful and could apply in a wider context.

See *Newcastle City Council v PV & Anor* [2015] EWCOP 22



## ENDURING POWER OF ATTORNEY

### Re ED

**R**e ED involved an application to the Public Guardian for the revocation of an Enduring Power of Attorney (EPA). It is of particular interest as it involved an amendment made to an EPA, after it was executed and the attorneys were both professional people.

ED made her EPA in September 2007, just before the 1 October deadline for making an EPA. ED appointed her daughters JD and GB jointly. JD was a retired doctor and GB was a radiographer. The sisters did not get on at all.

At some point after the EPA was made, possibly as early as 2008 or as late as 2013, the EPA was amended. JD downloaded a 'page 2' from the internet and the appointment of the attorneys was changed from 'joint' to 'joint and several'.

GB became aware of the amendment when an application was made to register the EPA in 2013 and she telephoned the Office of the Public Guardian (OPG) to enquire about progress. Despite GB's protests, registration went ahead in September 2013. The validity of the EPA was then challenged.

In December 2013 Senior Judge Lush ordered JD and GB to submit witness statements about the creation of the original EPA and its amendment. A date was then scheduled for an attended hearing in February 2014.

JD submitted a witness statement explaining how the EPA was amended with her mother and her aunt present, but said it did not occur to her to have the amendment signed or dated. JD said this was through 'naivety or ignorance but certainly not through malevolence'.

Laura Knight of the OPG examined all the evidence. She said that she found it difficult to believe that a professional person with all of the responsibilities of JD, would not understand the two appointment types or not think to consult either a solicitor, the OPG or another source of legal information.

At a hearing in March 2015, various matters were considered including paragraph 4(7) schedule 4 Mental Capacity Act 2005, regarding penalties for a person who applies for registration or makes a statement known to be false.

Senior Judge Lush indicated that a criminal sanction for JD via the CPS would be possible, but would not serve any purpose here or be in ED's best interests.

**“ Senior Judge Lush indicated that a criminal sanction for JD via the CPS would be possible ”**

Senior Judge Lush took the view that the EPA was incorrectly amended after execution, and that the deed presented for registration was not the same deed the donor had created; it was therefore of no legal effect.

Senior Judge Lush considered the circumstances and various cases such as *Re W (Power of Attorney)* [1999]2FLR 1163, and concluded that both JD and GB were unsuitable to be their mother's attorneys, and were also unsuitable to be deputies because of the 'obvious hostility' between them.

Senior Judge Lush revoked the EPA pursuant to paragraph 16(4)(g) schedule 4 Mental Capacity Act 2005. The Public Guardian was directed to cancel its registration and appoint a panel deputy as an independent person to make decisions on behalf of ED, relating to financial property and affairs which she was incapable of making herself.

See *Re ED* [2015] EWCOP 26

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