UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LAND REGISTRATION – BENEFICIAL INTERESTS, TRUSTS AND RESTRICTIONS – jurisdiction – whether FTT has jurisdiction to quantify beneficial interests under a trust of land – whether non-binding indication appropriate - section 73(7), Land Registration Act 2002 - appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

LAURENCE JOHN HALLMAN

Appellant

and

TRACY HARKINS **Respondent**

Re: 19 Durham Avenue,
Bootle
L30 1RE

Martin Rodger QC, Deputy Chamber President

Liverpool Civil & Family Court Centre

3 May 2019

Both parties appeared but neither was professionally represented

The following cases are referred to in this decision:

Avon Ground Rents v Child [2018] UKUT 204 (LC)

Blair v Curran (1939) 62 C.L.R. 464

Dibble v Pfluger [2010] Fam Law 1279

Essex County Council v Essex Incorporated Congregational Church Union [1963] AC 808

Inhenagwa v Onyeneho [2018] 1 P & CR 10, [2017] EWHC 1971 (Ch)

Jayasinghe v Liyanage [2010] 1 WLR 2106

Jones v Kernott [2011] UKSC 53 *Oxley v Hiscock* [2005] Fam 211

Silkstone v Tatnall [2012] 1 WLR 400

Stack v Dowden [2007] UKHL 17

Thoday v Thoday [1964] P 181

Whitehouse v Jervis [2017] UKFTT 805 (PC)

Introduction

1. Does the First-tier Tribunal have jurisdiction to resolve a dispute over the extent of the beneficial interests of an unmarried couple in their former family home when they have separated and that home is registered in the sole name of one of them? That is the important question raised by this appeal from a decision of the FTT made on 18 July 2018.

2. The conclusions I have reached are:

    (a) the FTT was entitled to find that Ms Harkin has a beneficial interest which should be protected by a restriction;

    (b) the FTT had no jurisdiction to determine the extent of that beneficial interest and its conclusion is not binding on the parties; and

    (c) in any event the FTT's view that Ms Harkin's interest was 35% was based on an incomplete assessment of the evidence and was wrong in principle.

3. The decision arose out of an application made to the Land Registry by the respondent, Ms Tracy Harkins, for the entry of a restriction against the registered title to a house at 19 Durham Avenue, Bootle to protect a beneficial interest which she claims to have. Her former partner, the appellant, Mr Laurence Hallman, from whom she had separated in 2016 after 13 years together, is the sole registered proprietor of the house. He objected to the application. The FTT (to which the dispute was referred under section 73(7), Land Registration Act 2002) concluded, as a matter of inference from the facts it found, that the parties had had a common intention from January 2013 that Ms Harkin should have a beneficial interest in the house. It directed the Chief Land Registrar to give effect to her application for a restriction to be entered on the Register.

4. The FTT also decided to quantify Mr Harkin's share, saying that it had been invited to do so by the parties. By an arithmetical calculation based on the duration of the couple's engagement relative to the total length of their relationship it then concluded that her beneficial interest in the property was 35% of the whole.

5. Permission to appeal was granted by this Tribunal on 10 December 2018, having been refused by the FTT. When he applied for permission to appeal Mr Hallman had not questioned the jurisdiction of the FTT to determine the extent of Ms Harkin's beneficial interest, but the Tribunal said that it would be necessary for it to resolve a long-standing uncertainty whether the FTT had such a jurisdiction at all.

6. Neither party was represented at the hearing of the appeal. The Tribunal did not receive any additional evidence at that hearing but Mr Hallman and Ms Harkin each gave a helpful account of the financial aspects of their relationship by reference to the documents which had been before the FTT and made constructive observations on its decision. I am grateful to them both for their assistance.

Grounds of appeal

7. The two issues on which the Tribunal granted permission to appeal were, first, the FTT's conclusion that the couple had pooled their resources (which Mr Hallman argued was reached without regard to relevant parts of the evidence) and, secondly, the FTT's approach to the quantification of Ms Harkin's beneficial interest (which Mr Hallman argued was arithmetically incorrect, but which is also open to the more fundamental objections that it is contrary to principle and beyond the FTT's jurisdiction).

The facts

8. The FTT did not attempt to resolve all of the issues of fact which arose on the evidence, and there remains a substantial issue between the parties over some important aspects of their relationship, especially concerning money. The following facts are taken from the FTT's decision, or from the documents which were before it.

9. From July 1999 until April 2015 Mr Hallman was a self-employed driving instructor. He and Ms Harkin met in October 2002, and began their relationship in January 2003. Mr Hallman is 12 years older than Ms Harkin and had three teenage daughters from an earlier marriage which had been dissolved. When the couple met, he was living in a small flat, making visits by his children difficult. In June 2003, with the assistance of a mortgage, he purchased 19 Durham Avenue, a three-bedroom family house. At that stage he and Ms Harkin had not begun to live together and the house was registered in his sole name. The FTT found that Mr Hallman had not promised Ms Harkin an interest in the house at that stage and that he had bought it so that his daughters could live there with him and as an investment for their future.

10. In October 2003 Ms Harkin became pregnant and in April 2004 she took maternity leave from her employment as a teaching assistant and moved in to live with Mr Hallman at 19 Durham Avenue. In due course she gave birth to twins. The FTT did not accept her evidence that Mr Hallman told her when she moved in that he would "add her name to the mortgage". He re-mortgaged the property in 2005 for £54,000 and again in 2007 for £55,250, but the FTT found that it was not until January 2013 that the couple discussed obtaining a joint mortgage.

11. Following an argument, the couple separated in February 2009 and Ms Harkin moved out. They were reconciled in July the same year and resumed living together.

12. In December 2011 Mr Hallman obtained a personal loan of £7,500 from his bank, which he said was used to supplement the family income.

13. In January 2013 the couple became engaged to be married. In August the same year they obtained a joint loan of £12,000, part of which was used to repay the balance of the loan taken out by Mr Hallman in December 2011 with the remainder being spent on home improvements (replacement windows and a new door) at a cost of £4,400. It was paid into a bank account which had originally been in Mr Hallman's sole name but which became the couple's first and only joint bank account when Ms Harkin became a signatory in August 2013. The couple also insured the house in their joint names, paying premiums from the joint account, from at least 2015.

14. In March 2015 the couple obtained a second joint loan of £10,000, which was used to pay off the balance of the previous loan. At about this time Mr Hallman gave up his self-employed status and took a job as a driving test examiner.

15. In December 2015 the couple's relationship ended and in June 2016 Ms Harkin moved out permanently.

16. Ms Harkin had not returned to work immediately after the birth of the couple's twins in May 2004. She began a college course in 2007, when the children went to school, and in March 2012 she resumed employment as a classroom assistant. During the period from 2004 until March 2012 Ms Harkin's income consisted of Child Tax Credits of about £540 a month, which she received into her own bank account. When she returned to work her salary was also paid into her own account.

17. It was Mr Hallman's case before the FTT that Ms Harkin had made no significant financial contribution to the family finances between May 2004 and March 2012. He was the sole breadwinner and the money she received in Tax Credits was treated by Ms Harkin as her own and used for her own expenses. Having resumed employment in March 2012 she began to contribute by making monthly payments into the joint account. These were taken in cash from her personal account and paid in to the joint account in varying amounts, usually of £400, but from August 2012 of £800 and, on one occasion, £1000. No payments were made for a period of four or five months in the first half of 2015.

18. Ms Harkin's evidence to the FTT concerning the couple's joint expenses was very different. She maintained that she had made monthly contributions of £400 towards family expenditure from the Tax Credits she received from 2004 until March 2012. Initially she had paid for weekly shopping in cash taken from her own account, but in 2006 the couple had obtained a joint Asda store card. From then on, she used the store card for weekly shopping and gave Mr Hallman £400 a month in cash to go into his account to pay off the store card bill. There came a time when the Asda account was closed and she resumed paying cash for shopping. When she returned to work in March 2012 she paid £400 a month which she would withdraw in cash from her own account, £100 at a time until she had £400 which she would then hand over. From October 2012 she started contributing between £700 and £1000 a month, withdrawn in amounts of £250 at a time. For a few months at the start of 2015 she resumed paying in cash for the weekly shopping.

19. It is not possible to verify either party's account of their expenditure by reference to documents. Apart from a few of Mr Hallman's bank statements in 2006 the earliest statements available begin in 2009. No transfers can be seen leaving Ms Harkin's account and arriving in Mr Hallman's sole account. Withdrawals of cash from her account may have been paid in to his account, but as he was usually paid in cash by his driving school students it is impossible to see any pattern in the sums being paid in or to identify their source. Mr Hallman made a number of calculations showing that, during the period of the joint account, the sums he agreed had been paid by Ms Harkin mostly comprised the Tax Credits with only a small contribution from her salary.

20. Mr Hallman also relied heavily on a letter Ms Harkin had written to the District Judge in proceedings in the Family Court in 2016, which the FTT had relied on when it rejected Ms Harkin's evidence that she had been promised an interest in the house as early as 2003. In the same letter Ms Harkin refers to Mr Hallman having claimed that she "did not contribute significantly to the household during the relationship". Ms Harkin informed the Court that this statement was untrue and referred to having given up work when their children were born, and not to having worked while they were at school to avoid paying for child care. She then went on "Since starting work in March 2012 I made monthly contributions to the household bills of approximately £600 - £1000 per month". Mr Hallman said that this statement was true and that Ms Harkin had indeed started making contributions from any source only when she resumed work in 2012.

21. On 24 June 2016, very shortly after Ms Harkin moved out of 19 Durham Avenue, she applied to the Land Registry to enter a restriction in the register, claiming to have made a financial contribution to the improvement of the house.

The FTT's decision

22. The FTT's decision begins with an explanation of the relevant law on the acquisition of beneficial interests, referring to well-known authorities and text books. None of that treatment is controversial in this appeal. It included reference to section 37 of the Matrimonial Proceedings and Property Act 1970, which provides that a contribution of a substantial nature by a husband or wife to the improvement of property in which either of them has a beneficial interest will cause the contributor to acquire a share (or a greater share) in that beneficial interest of such an extent (in default of agreement) as may seem just in all the circumstances. The same rule is applied to engaged couples by section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970. Although I have not had the benefit of argument it appears to me that the approach which ought to be taken in quantifying the share of the contributor ought in principle to be no different from that taken to the quantification of interests under a common intention constructive trust.

23. The FTT made no attempt to reach a conclusion on the dispute over contributions towards the family finances from 2004 to 2012. It appears to have considered that it was unnecessary to do so because it accepted Mr Hallman's positive case that the couple had had no joint intention that Ms Harkin should have a beneficial interest in the house before they became engaged in 2013. It regarded that event as significant because it demonstrated a greater commitment by the couple to each other. The FTT also accepted that at that time they had discussed obtaining a joint mortgage as soon as they were able to (although Mr Hallman's self-employed status and the restricted mortgage market meant they could not yet do so).

24. In paragraphs 54 to 57 of its decision the FTT arrived at its conclusion that Ms Harkin had acquired a beneficial interest by two routes.

25. First, on the basis of her financial contribution towards home improvements by becoming jointly liable for the loan used to pay £4,400 for the new door and windows. At the time of that expenditure, which was joint expenditure of them both, the couple were engaged to be married, and as the FTT put it Ms Harkin "is entitled to a beneficial interest in the

house accordingly" under section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970.

26. Secondly, the FTT inferred the existence of a common intention that Ms Harkin was to have a beneficial interest in the house from January 2013, when the couple became engaged. In drawing this inference, the FTT regarded the opening of the joint bank account in August 2013 as being "of considerable significance". It was said to be "the first time the parties had pooled their resources, the applicant paying her salary into it." Reliance was also placed on the joint household insurance policy from at least 2015.

27. The FTT then turned to the quantification of Ms Harkin's interest. In paragraph 58 of its decision it dealt with that issue as follows:

> "The remaining question relates to the amount of the applicant's interest. I have to look at all the relevant circumstances to impute what the common intention of the parties would have been. The parties' relationship while they lived in the house together began in April 2004 and ended in December 2016. That is 4 years. This equates to 32% of the time the parties spent together. In addition, the applicant has contributed towards improvements. Doing the best I can, I determine the applicants' interest as 35%."

The appeal – issue 1: did the FTT overlook or misunderstand relevant evidence in concluding the respondent had a beneficial interest?

28. The essence of Mr Hallman's appeal against the FTT's finding that Ms Harkin was entitled to a beneficial interest concerned its appreciation of the facts. He was concerned about a number of aspects of the evidence which he said had been overlooked or misunderstood and which, taken together, showed that the FTT had had no reliable understanding of the couple's financial relationship.

29. First, the FTT had failed to have regard to the prolonged period during which Ms Harkin had made no contribution to joint expenditure. This was confirmed (Mr Hallman suggested) by her 2016 letter to the District Judge and had been acknowledged by Ms Harkin during the hearing in response to questions from the FTT Judge, yet the FTT had not recorded her answer to that questioning in its decision nor reached any conclusion.

30. Secondly, the FTT had given no weight to the parties' relative contributions or to the fact that the contributions which Ms Harkin did make were to a large extent covered by the Tax Credits she received because the couple had two children, rather than coming from her own earned income. The relative contributions of the couple to their joint expenditure, which Mr Hallman demonstrated on detailed spreadsheets, showed he had made substantially the most significant contribution while Ms Harkin's was initially non-existent, increasing only to a modest level in the later years.

31. Thirdly, the FTT had exaggerated the extent to which the couple had "pooled their resources" after they became joint signatories to their bank account in August 2013. In particular, the FTT had wrongly stated that Ms Harkin had paid her salary in to the joint account. The true position (which Ms Harkin did not dispute) was that her salary was paid into her personal current account, as were the Tax Credits she was entitled to, and

part of the income she received was then paid by her in cash into the joint account. Ms Harkin was also able to build up savings in her personal accounts at a time when Mr Hallman had been borrowing from friends and from their children's savings accounts, and obtaining additional credit cards to cover household expenditure.

32. It is certainly the case that the FTT did not reach a conclusion on the disputed evidence concerning Ms Harkin's contributions to joint expenses. If she made a concession during the hearing that Mr Hallman's version of events was correct, it was not recorded by the FTT in its decision. The FTT dealt with the period 2004 to 2012 by accepting what it called Mr Hallman's "positive evidence" that the parties did not have an intention that Ms Harkin was to have a beneficial interest. That might be said to have made it unnecessary, at that stage of its decision making, for the FTT to try to resolve the disputed evidence. But the FTT was also incorrect to say that Ms Harkin's salary was paid in to the joint account, a matter on which it relied as evidencing a pooling of resources on which it placed considerable weight.

33. In considering the importance of the suggested omissions and misconceptions which form the subject of these grounds of appeal it is necessary to distinguish between those aspects of the evidence which supported the FTT's two reasons for concluding that Ms Harkin had acquired a beneficial interest in the family home.

34. As I have explained above, the FTT arrived at its conclusion by two separate routes. The first of these relied entirely on section 2(1), Law Reform (Miscellaneous Provisions) Act 1970, the rule of law governing the treatment of contributions made by those who are engaged to be married and which applies the same approach as is taken to contributions by married couples by section 37, Matrimonial Proceedings and Property Act 1970. The rule applies where a husband or wife (or either of an engaged couple) contributes in money or money's worth to the improvement of a house in which either or both of them has or have a beneficial interest. If the contribution is of a substantial nature and if there is no express or implied agreement between them to the contrary, the person making the contribution is treated as having acquired a share, or an enlarged share, in that beneficial interest by virtue of the contribution. The extent of the share acquired is whatever may have been agreed between them at the time or, in default of agreement, is whatever may seem just in all the circumstances to any court asked to determine the existence or extent of the beneficial interest of the contributor.

35. At paragraphs 54 and 55 of its decision the FTT found that the sum of £4,400 which was borrowed jointly by the couple as part of the larger joint loan in August 2013, and which was used in part to pay for home improvements, was sufficient to entitle Ms Harkin to a beneficial interest in the property. It cross-referred to those paragraphs of its decision in which it had set out section 2(1) and section 37. It directed itself correctly on the sequence of questions which it should ask by reference to the decision of the Court of Appeal in *Dibble v Pfluger* [2010] Fam Law 1279. Those were: whether the sum was a contribution to the improvement of the property, whether it was a contribution of a substantial nature, and whether there was any contrary agreement which would prevent it from giving rise to a beneficial interest.

36. There was no suggestion that there had been any contrary agreement, and it was not disputed that improvements costing £4,400 had been funded by a joint loan paid into and

serviced from the joint bank account. Mr Hallman pointed out that the FTT had made no express finding that Ms Harkin's contribution was "of a substantial nature", as section 37 requires. That is a legitimate criticism, but reading the decision as a whole, in particular the sequence of questions in paragraph 25, of which the FTT had reminded itself in paragraph 54, immediately before concluding in the following paragraph that the requirements were met, I am satisfied that the FTT did decide that by assuming a joint liability of £4,400 Ms Harkin was making a contribution of a substantial nature. What amounts to a substantial contribution for this purpose has to be judged relative to the resources of the parties and the value of the property which has been improved. In this case both parties were on modest incomes at the time. They did not agree on the value of the property (after improvement); Mr Hallman considered it was worth around £65,000, while Ms Harkin referred to similar properties in the area having been offered for sale at figures of around £90,000. In either case I have no doubt that Ms Harkin's contribution was capable of being found by the FTT to be a substantial one.

37. The significance of the first ground of the FTT's decision is that it was justified on the basis of facts which are unaffected by the errors and omissions on which Mr Hallman relies in his appeal. It was also free standing from the second ground of the decision.

38. The second basis of the FTT's conclusion was the inference which it drew "on all the evidence" that the parties did have a common intention that Ms Harkin had a beneficial interest. It is apparent from paragraph 56 of the decision that the opening of the joint bank account, and the pooling of resources it represented, including the mistaken assumption that Ms Harkin's salary was now being paid into that account, made an important contribution to that conclusion. The inference of a common intention was a finding of fact. I am satisfied that finding was based on an assessment of the evidence which in some important respects was inaccurate. In other respects (which were significant, at the very least, as part of the background against which the inference of common intention was drawn) the assessment was incomplete. Had the sole basis of the FTT's decision depended on inferences drawn from the facts it would not have been safe to rely on its finding that Ms Harkin has a beneficial interest which she is entitled to protect by a restriction on the register.

39. While I agree with several of the criticisms made by Mr Hallman of the FTT's treatment of the evidence and the limited fact-finding exercise it undertook, I do not consider that those criticisms undermine the first ground of the FTT's decision. The facts concerning the joint loan and expenditure on home improvements are not in dispute and, by themselves, they justify the decision that Ms Harkin has a beneficial interest. The appeal against the finding of a beneficial interest is therefore dismissed and the direction to the Chief Land Registrar to give effect to Ms Harkin's application of 24 June 2016 is undisturbed.

Issue 2: The quantification of the beneficial interest

40. Mr Hallman also challenged the FTT's quantification of the extent of Ms Harkin's beneficial interest at 35%.

41. When it came to quantify Ms Harkin's share the FTT directed itself that it had to "look at all the relevant circumstances to impute what the common intention of the parties would

have been". In its earlier summary of the relevant legal principles (referring to the leading authorities, *Stack v Dowden* [2007] UKHL 17, *Jones v Kernott* [2011] UKSC 53 and *Oxley v Hiscock* [2005] Fam 211) it had explained that, where it could be inferred that the parties intended to share the beneficial interest in property, but it was impossible to infer a common intention as to the size of each of their shares, it was possible to impute such an intention. In such a case each party would be entitled to that share which was considered fair, having regard to the whole course of dealing between the parties in relation to the property.

42. The FTT's direction to itself was entirely orthodox and cannot be faulted. What Mr Hallman points out, however, is that its application of that approach was based on an incorrect assessment of the facts concerning the duration of the couple's relationship and the period of their engagement, and produced an illogical and insupportable result.

43. The FTT said that the parties' relationship while they lived in the house lasted 12½ years from April 2004 until December 2016. In fact, as the FTT had recorded correctly in paragraph 48 of its decision, the relationship ended in December 2015 (although Ms Harkin did not move out until July 2016). The duration of their relationship while they lived together (ignoring the five-month separation in 2009) was therefore a little over 11½ years. Their engagement lasted three years, not four, as the FTT thought. Adopting the arithmetical approach of the FTT, the couple were engaged for 26% of the time they lived together, not for 32% of that time. Adding a little because of the contribution towards improvements, as the FTT did, might push the figure up to 29%, rather than the 35% it found.

44. Mr Hallman also pointed out that it surely could not be right for the period of the couple's engagement to be taken to have altered the beneficial interest entirely in Ms Harkin's favour, rather than requiring an adjustment to their shares, at most, on an equal basis. The 26% engagement period should be divided between them, so that Ms Harkin's share should be 13%, not 26%. I certainly see the force of that point, but it assumes the arithmetical exercise on which the FTT embarked, and its focus on the duration of the relationship before and after the couples' engagement, was a legitimate approach to quantification of the beneficial interest acquired during that engagement.

45. The FTT did not explain why it considered a comparison between the duration of the relationship and the duration of the engagement was helpful in quantifying Ms Harkin's beneficial interest. I find it difficult to see why the mere passage of time was relevant at all, but at the very least it cannot possibly have merited the decisive weight given to it by the FTT in what was supposed to be an assessment of what was fair in all the relevant circumstances, having regard to the whole course of dealing between the parties in relation to the property.

46. It is also relevant that the FTT reached its conclusion on the intention to be imputed to the parties without resolving the conflict of evidence about the contributions made by Ms Harkin to the family finances between 2004 and 2012. An assessment of what reasonable people would consider appropriate in the circumstances (which is what the imputation of an intention is all about) required a determination of what those circumstances were.

47. The need for an inclusive assessment of the parties' true financial arrangements is apparent from Chadwick LJ's summary of the relevant principles in *Oxley v Hiscock* (a case in which a home had been purchased in the sole name of one party in a co-habiting couple without any express declaration of trust, each having made some financial contribution to the purchase). Where there is no evidence of any discussion of the share which each was to have:

> " … the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

48. If, as Mr Hallman contends (and as he says Ms Harkin acknowledged in her letter to the County Court and at the hearing before the FTT), she made no significant financial contribution to joint expenditure for the first eight years of their relationship, that was a matter which would have to be taken into account in determining the extent of her beneficial interest.

49. Be that as it may, by themselves the errors which the FTT made in computing the length of the parties' relationship, which Ms Harkin does not dispute, require that I set aside its determination of the extent of her interest as 35%. I therefore allow the appeal on that issue.

50. What should this Tribunal do next? That raises the issue which I identified at the start of this decision, but which it has not yet been necessary to address. On an appeal, this Tribunal has the same powers as the FTT and, having allowed an appeal, it can substitute a decision of its own if it has the material required to do so. But, like the FTT, this Tribunal can only determine matters over which it has been given jurisdiction by statute. The important question raised by this appeal, which the FTT did not address, is whether the FTT has any jurisdiction to determine the extent of a beneficial interest at all. If it does not, that would provide a further and more fundamental reason for setting aside its decision that Ms Harkin's share in 19 Durham Avenue is 35%.

Jurisdiction

51. In paragraph 7 of its decision the FTT said that its task was to determine whether Ms Harkin had any interest in the house. If she did, she would be entitled to the entry of a restriction on the register. The learned Judge then added this:

> "The parties have also invited me to determine, if the applicant does have an interest in the house, what the amount of her share is. I have no jurisdiction to order a sale of the house."

52. At the hearing of the appeal both parties informed me that the Judge had told them that his decision on the extent of any beneficial interest would not be binding on them. No statement to that effect appears in the decision. The Judge's views on the extent of his

jurisdiction can only be guessed at from the two sentences I have quoted. He acknowledged that he could not order a sale, but it is not possible to tell from the decision what status the Judge intended that the parties, or others, should attribute to his statement in paragraph 58 that "I determine the applicant's interest as 35%".

53. The respect which a statutory tribunal is required to show to the limits of its jurisdiction, and the inability of the parties to enlarge those limits, are illustrated clearly by the decision of the House of Lords in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808, which concerned the powers of the Lands Tribunal, conferred by the Town and Country Planning Act 1959, to determine disputes over the purchase by a local authority of land affected by certain planning proposals. The Tribunal was empowered by the relevant statutory provision to "consider the matters set out in the notice served by the claimant and the grounds of objection specified in the counternotice" served by a local authority. An objection to a purchase notice served by a land owner on an authority had been determined by the Tribunal and by the Court of Appeal, and had reached the House of Lords, despite the objection not having featured in the authority's counter-notice. Lord Reid, (with whom the other judges agreed) said, at p.816, that the Lands Tribunal "had no jurisdiction to do anything more in this case than to determine whether the objection in the appellants' counternotice should or should not be upheld." It did not matter that the land owner had failed to raise the jurisdictional point at an earlier stage because, as Lord Reid explained:

> " … it is a fundamental principal that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction."
>
> "If the High Court, having general jurisdiction, proceeds in an unauthorised manner by consent there may well be estoppel. And an arbitrator, or any other tribunal deriving its jurisdiction from the consent of parties, may well have his jurisdiction extended by consent of parties. But there is no analogy between such cases and the present case. The tribunal in the present case had no power to state a case except with regard to some matter arising out of the exercise of its limited statutory jurisdiction, and this stated case does not deal with any such matter. I am, therefore, of opinion that the stated case was not properly before the Court of Appeal and is not properly before your Lordships. Accordingly this House ought to refuse to answer the question set out in the case stated…"

54. The jurisdiction of the FTT has been determined by Parliament and is defined, in this instance, by the Land Registration Act 2002 ("LRA 2002").

55. Ms Harkin's application to the Registrar of 24 June 2016 was for the entry of a restriction in the register of title for 19 Durham Avenue under section 42(1), LRA 2002 which provides that:

> "The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of –
>
> (a) …

(b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or

(c) protecting a right or claim in relation to a registered estate or charge".

56. The effect of a restriction is explained in section 41, LRA 2002: no entry in respect of a disposition to which the restriction applies may be made in the register except in accordance with the terms of the restriction. A restriction in Form A, such as the restriction applied for by Ms Harkin, provides that "No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court" (Land Registration Rules 2003, Schedule 4). As an interest under a trust of land cannot be protected by the entry of a notice on the register (LRA 2002, s.33(a)) the entry of a restriction provides the only means of ensuring that such interests are overreached on a disposition of the land subject to the trust (as contemplated by section 42(1)(b), LRA 2002). In practice, however, restriction are used to protect a claim to a right in relation to a registered estate (section 42(1)(c)) by preventing a sale until the claim is dealt with. Whether this was appreciated when the LRA 2002 was enacted is unclear.

57. Subject to exceptions which are not relevant in this case, section 73(1), LRA 2002 permits anyone to object to an application to the Registrar to enter a restriction. Where an objection is received which the Registrar is not satisfied is groundless, and which it is not possible to dispose of by agreement after notice has been given to the applicant, section 73(7), LRA 2002 provides that "the registrar must refer the matter to the First-tier Tribunal".

58. Section 73(8) provides that rules may make provision about references under section 73(7). The Land Registration (Referral to the Adjudicator to HM Land Registry) Rules 2003 lay down the procedure to be followed. The Registrar is required by rule 3 to prepare a case summary containing details of the disputed application and of the objection to it. The case summary must then be sent to the FTT together with a written notice "stating that the matter is referred to the First-tier Tribunal under section 73(7) of the Act" and the parties must be so informed (rule 5(2)).

59. Part 11, LRA 2002 is concerned with adjudication. The functions to be performed by the FTT are identified by section 108(1) which provides that:

> "The First-tier Tribunal has the following functions –
>
> (a) determining matters referred to it under section 73(7), and
>
> (b) determining appeals under paragraph 4 of Schedule 5."

60. The limit of the FTT's relevant jurisdiction is defined by these functions and is therefore confined to determining the "matters" referred to it by the Registrar. Power to rectify or set aside certain documents is also given to the FTT by section 108(2).

61. By section 110(1), LRA 2002 the FTT may, instead of deciding a matter referred to it by the Registrar, direct a party to commence proceedings in the court for the purpose of obtaining the court's decision on the matter. Tribunal Procedure Rules made under a power conferred by section 110(3) may make provision about matters including the adjournment of the proceedings before the FTT pending the outcome of those before the court.

62. The proper limits of the jurisdiction of the FTT have been the subject of a number of decisions of this Tribunal, most recently in *Avon Ground Rents v Child* [2018] UKUT 0204 (LC) which concerned a residential property dispute referred to the FTT by the County Court under section 176A of the Commonhold and Leasehold Reform Act 2002. At [46] the Tribunal (Sir David Holgate, President, and HHJ Hodge QC) confirmed that "the jurisdiction of the FTT in a case transferred to it from the County Court is confined to the question transferred and all issues comprehended within that question". The Tribunal elaborated on the relationship between the jurisdiction of the transferring court and the jurisdiction of the FTT, at [47]:

> "… the FTT has no power (even with the consent of the parties) to extend its jurisdiction, or to arrogate to itself a jurisdiction to determine questions which the County Court had no power to transfer to the FTT for determination. In the context of a transfer under s.176A of the 2002 Act, only questions which the FTT would have had the jurisdiction to determine under any of the enactments specified in s.176A (2) may properly be transferred from the County Court to the FTT."

63. The functions conferred on the Registrar and on the FTT by Part 11, LRA 2002 logically require that the same two limitations apply to the FTT's jurisdiction in land registration proceedings: it may only determine matters referred to it by the Registrar under section 73(7), LRA 2002, and it may not determine questions which the Registrar had no power to refer. It may not, as the Tribunal put it, "arrogate to itself" any wider jurisdiction whether at the request of the parties or otherwise.

64. Guidance on the scope of "the matter" referred to the FTT by the Registrar for decision pursuant to section 73(7) and which defines its function under section 108(1)(a) is provided by a number of decisions the High Court and the Court of Appeal.

65. In *Jayasinghe v Liyanage* [2010] 1 WLR 2106 the applicant applied for the entry of a restriction against the registered title of the property, pursuant to section 42(1), LRA 2002 claiming to be the sole beneficiary under a resulting trust of a residential property arising from her payment of the purchase price and mortgage instalment. The respondent registered proprietor objected to the restriction on the ground that the applicant had no interest in the property. The Registrar referred the matter to the adjudicator (the statutory predecessor of the FTT in this jurisdiction) under section 73(7), who directed cancellation of the application, having concluded that the applicant's evidence was wholly unreliable and that she had made no financial contribution to the acquisition of the property. The applicant appealed on the ground that the adjudicator had no jurisdiction to determine whether the applicant had a beneficial interest in the property, his function being simply to ascertain whether the applicant had demonstrated an arguable claim.

66. Briggs J dismissed the appeal and held that the adjudicator was entitled to determine the question whether the applicant had a beneficial interest in the property and was not limited to deciding whether she had an arguable claim which should be referred to a competent court. Having reviewed the structure of Part 11, LRA 2002 and the procedural rules made under it, he explained at [16]-[18]:

> "16. It follows in my judgment that what has to be referred to the adjudicator under section 73(7) , where an objection which is not obviously groundless cannot be disposed of by agreement, is not merely the question whether the applicant has a relevant right or claim, but the additional question whether the entry of a restriction is necessary or desirable for the purpose of protecting that right or claim. Both of those questions fall within what is described in section 73(7) as "the matter" to be referred to the adjudicator.
>
> 17. It is also apparent from section 73(5) to (7) that determination of the application for the restriction, where there has been an objection, requires the objection to be "disposed of". The disposal of the objection is therefore an integral part of the matter referred to the adjudicator under section 73(7).
>
> 18. It follows from that analysis that the precise nature of the adjudicator's function on any particular reference under section 73(7) will be significantly affected by an examination of the precise restriction sought, the nature of the claim or right thereby sought to be protected, and the basis of the objection which has led to the reference. It is plain from section 110(1) that the adjudicator is given a broad discretion, on a reference under section 73(7) , whether to decide "a matter" himself, or to require it to be decided in a competent court, and it is equally plain from the panoply of procedural powers given to the adjudicator under the Practice and Procedure Rules that a decision to decide a matter himself may properly involve a trial, rather than merely a summary review directed merely to the question whether an asserted claim is reasonably arguable."

67. The parties' statements of case in *Jayasinghe* showed that it was the applicant's case that she was either solely entitled to the beneficial interest in the property or was entitled to a substantial share which she intended to have quantified by the court if necessary. It was not suggested by anyone that the exercise of determining the amount of her share should be undertaken by the adjudicator. At [29] Briggs J identified issues which might have justified a direction by the adjudicator under section 110(1) requiring the applicant to commence proceedings in court; these included "issues as to the precise quantification of the applicant's alleged beneficial interest and, by implication, issues as to whether the property should be sold or transferred to the applicant". It has been suggested by the learned authors of Megarry & Wade, The Law of Real Property, 9th ed., at para 6-130, fn 897 that this passage creates uncertainty as to the existence of jurisdiction in the FTT to determine the quantum of an interest arising under a constructive trust. I do not read it in that way, and it appears to me that Briggs J was simply identifying factors which, in that case, would have justified a direction under section 110(1); he was not suggesting that an alternative course would have been for all the same issues to have been determined by the FTT. Although the precise scope of the adjudicator's function would vary with the nature of the application and the objection, and although it was a discretionary case management matter whether all issues ought to be determined by the court at a single hearing, it was not suggested that the discretion extended to the adjudicator quantifying the alleged beneficial interest or ordering the disposal of the property.

68. In *Silkstone v Tatnall* [2012] 1 WLR 400 the Court of Appeal reiterated that the reference of a matter to an adjudicator under section 73(7), LRA 2002 required the adjudicator in an appropriate case to decide "the underlying substance of the objection on its merits" and the adjudicator was not limited to deciding whether there was an arguable claim which should be protected until it was resolved by the court. The application to which the objection was made in that case was for the cancelation of a unilateral notice entered in the charges register to protect a disputed right of way. The determination of the merits of the claim would be binding on the parties as to the disputed claim to an easement and would provide the answer as to whether the objection was or was not well founded (Rimer LJ, at [37]).

In *Inhenagwa v Onyeneho* [2018] 1 P & CR 10 an objection was made to an application to cancel a unilateral notice entered on the register to protect the right of the respondent to seek rectification of the register to restore her as joint proprietor of a property which had been the subject of a forged transfer to the appellant alone. The application was dismissed by the adjudicator who was satisfied that the transfer had been forged, and made findings of fact about arrangements when the property was first acquired in 1991 in which it had been suggested that the parties would each be entitled to a half share. The respondent subsequently commenced proceedings in the county court seeking an order for sale and a declaration that she was beneficially entitled to a half share in the property on the basis of the adjudicator's findings, which she claimed had created an issue estoppel in her favour. The judge in the county court held that an issue estoppel rendered the adjudicator's findings of fact binding on the parties. The appellant appealed to the High Court.

69. Morgan J held, at [39], that an issue estoppel could, in principle, arise from a final decision of an adjudicator on a matter within his or her jurisdiction. It was implicit in both *Jayasinghe* and *Silkstone* that the decision of the adjudicator on "the matter" referred under section 73(7) was binding on the parties, both in relation to the state of the register and more generally as to the outcome of the underlying dispute which was the subject of the reference. However, as Morgan J explained at [47]-[49], (referring the judgment of Diplock LJ in *Thoday v Thoday* [1964] P 181 at 198, and the judgment of Dixon J in *Blair v Curran* (1939) 62 C.L.R. 464 at 531-533) not every finding made in the earlier proceedings will create an estoppel binding in later proceedings:

> "Before the result of earlier proceedings before a judicial tribunal can give rise to an issue estoppel, there obviously must be "a decision" on the point that is later in issue. Further, the matter which was decided on the earlier occasion must be the identical issue to that which is involved in the subsequent litigation. Yet further, the decision on a point in the earlier proceedings must have been necessary to the result of the first proceedings before it will give rise to an issue estoppel."

70. Morgan J was satisfied that the adjudicator had deliberately refrained from making a finding that the property was owned in equal shares, recognising that such a finding was not necessary for her decision as to whether the forged transfer was a nullity and whether the respondent was entitled to apply to rectify the register (which was the matter referred by the Registrar). As a result, no issue estoppel arose from the adjudicator's determination of the background facts and the decision of the county court that the parties were bound by those findings was wrong. Morgan J concluded with some

observations on the jurisdiction of the adjudicator (which by then had been acquired by the FTT), at [62] as follows:

> "The jurisdiction of the adjudicator (and now the First-tier Tribunal) is to determine the issues which go to the merits of the dispute in relation to the matter referred for determination. Prima facie, therefore, the adjudicator or the tribunal should not determine the merits of other disputes between the same parties, even disputes relating to the same registered title, if those disputes are different from the dispute in relation to the matter referred for determination. However, I would qualify that statement as follows. The adjudicator or tribunal may consider that it would be helpful to make findings on certain points where such findings would throw light on the findings which are necessary to determine the dispute in relation to the matter referred for determination. The present case is a good example of that. The adjudicator found it helpful to make findings about the arrangement in 1991 to assist with her findings as to the 2002 transfer. I consider that the adjudicator was acting within her jurisdiction when making those findings as to the 1991 arrangement. However, because her findings as to the 1991 arrangement were evidentiary findings and not ultimate findings, they do not give rise to an issue estoppel and the parties are not bound by them in any subsequent litigation."

71. The decision of Morgan J in *Inhenagwa* was relied on by the FTT (Judge Dray) in *Whitehouse v Jervis* [2017] UKFTT 805 (PC) in a dispute over a restriction entered on the register to protect a claimed beneficial interest. In response to an invitation by both parties to determine the shares in which the property was held between them in the event that he was satisfied that it was held on trust for them both Judge Dray declined to do so. Having determined that a trust existed and directed the Registrar to give effect to the application to enter a restriction to protect it, he concluded that his function was completed. In particular it was not necessary to determine the extent of the parties' beneficial shares in order to decide whether a trust existed, and to do so would not bind the parties.

72. I respectfully consider the FTT in *Whitehouse v Jervis* was right to refuse the parties' request that it determine the extent of the parties' beneficial interests, and the FTT in the case under appeal was wrong to embark on that exercise even subject to the disclaimer that the decision would not be binding.

73. On receipt of Ms Harkin's application of 24 June 2016 to enter a restriction, the question for the Registrar under section 42(1) was whether it was necessary or desirable to do so for any of the identified purposes, including securing that an interest capable of being overreached was overreached on a disposition, or protecting a right or claim in relation to the registered estate. That obviously required consideration of the question whether any such interest existed, but the Registrar had no need to consider the extent of the parties' interests under the claimed common intention constructive trust in order to reach a view on that question. Nor did he have jurisdiction to do so. The function of the Registrar is to deal with "the business of registration" under the LRA 2002 (section 99), but no part of that business is concerned with the quantification of beneficial interests. No notice of an interest under a trust of land may be entered on the register, and none of the forms of

restriction in Schedule 4 of the Land Registration Rules 2003 makes provision for information about the extent of any such interest.

74. Where an objection to a restriction cannot be disposed of by agreement section 73(7), LRA 2002 requires that the registrar must refer the matter to the FTT. The issue for the FTT is the same as for the Registrar, namely whether in light of the objection it is necessary or desirable to enter the restriction for any of the purposes mentioned in section 42(1). Again, no question of quantification necessarily arises in the determination of that question.

75. The narrowness of the FTT's jurisdiction is confirmed by the Tribunal Procedure Rules made under the power in section 110(3). In the present context, the procedural rules which govern the procedure of the FTT on a reference under section 73(7) are the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. So far as material rule 40 of these Rules provides:

> "40.— Requirements directed to the registrar
>
> (1) The Tribunal must send written notice to the registrar of any direction which requires the registrar to take action.
>
> (2) Where the Tribunal has made a decision, that decision may include a direction to the registrar to—
>
> (a) give effect to the original application in whole or in part as if the objection to that original application had not been made; or
> (b) cancel the original application in whole or in part."

The outcome of a reference under section 73(7) provided for by the LRA 2002 and the Rules made under it is a direction to the Registrar to take action either to give effect to the application for a restriction or to cancel it. The FTT has no power to make declarations concerning the beneficial interests under a trust of land and the Rules make no provision for effect to be given to such a determination by the Registrar.

76. For the reasons explained by Morgan J in *Inhenagwa* the resolution of issues which are not necessary to the performance by the FTT of its function of determining the specific matter referred to it by the Registrar will not bind the parties before it. The determination of the extent of Ms Harkin's interest in this case was not required to enable the FTT to direct that the Registrar give effect to her application for a restriction, and it therefore had no effect on the rights of the parties. All that has been achieved by it is the creation of expectations and concerns in the minds of the two parties which may or may not prove to be justified on proper consideration of all the relevant circumstances.

77. Quite apart from the absence of any jurisdiction to make binding determinations of the extent of interest under trusts of land, there are other powerful reasons why, having found such a trust to exist, the FTT should refrain from expressing a view of any sort on the relative interests of the parties entitled under it. The FTT has no power to make an order for sale of property subject to a trust. To quantify the parties' beneficial interests, even on an informal basis, before a constructive trust is dissolved risks prematurity. In this case, there are separate proceedings between the parties over their respective contributions to

the repayment of the loan used for home improvement. When considering the whole course of conduct between the parties in order to quantify their interests it may be relevant to consider how they have behaved in relation to the property since the breakdown of their relationship and the extent to which they have in fact assumed responsibility for the cost of the improvements on which the existence of the trust is predicated.

78. It is not the function of courts or tribunals to express non-binding opinions, and parties who would be assisted by an informed view may utilise one of the forms of alternative dispute resolution available to them. The expression of an opinion on a non-binding basis by a tribunal judge is likely nevertheless to carry weight because of the judge's perceived expertise especially where, as in this case, there is no indication in the decision itself that the view expressed is not intended to resolve the issue. Yet, in the absence of jurisdiction, an expression of opinion cannot be subject to an effective appeal, with the risk that errors will go uncorrected.

79. For all these reasons I agree with Morgan J that "the tribunal should not determine the merits of other disputes" except where it is necessary to do so as part of the resolution of the dispute which has been referred to it. Tribunals should therefore refuse to express non-binding views on the quantum of beneficial interests if requested to do so, and should refrain from volunteering them where they have not been requested. If on receipt of a reference under section 73(7) the material before the FTT demonstrates that there is or is likely to be a dispute over quantification of interests, the better course is likely to be for the FTT to make a direction under section 110(1), LRA 2002 that one party commence proceedings in court. Taking that course will be especially important in cases involving the property of unmarried couples where other issues will often arise, including in relation to children, financial remedies or the sale of the property. By that route a binding decision by a judge with all the necessary powers and experience may then be obtained in a single forum not only on the matter referred by the Registrar but on all connected questions.

Disposal

80. For these reasons I dismiss Mr Hallman's appeal and confirm the FTT's direction to the Registrar to give effect to Ms Harkin's application of 24 June 2016 to register the restriction against Title Number MS254289. The FTT's quantification of Ms Harkin's interest did not form part of its order and I have no power to excise its assessment from the statement of its reasons for confirming the restriction. I make it clear, however, that the FTT's "determination" of that interest as 35% in paragraph 58 of its decision, and the findings of fact which supported it, are not binding on the parties and have no effect on their rights and obligations.

Martin Rodger QC,