BURDEN OF PROOF WHERE THE COURT ISNT IMPRESSED WITH THE EVIDENCE?

CIVIL WATCH – PRACTICE NOTE

As part of Goldsmith Chambers' Civil Watch series, Stuart Whitehouse a Civil and Family practitioner, provides a useful insight into the issues arising where the Judge is not persuaded by the parties evidence and falls back on the burden of proof.

INTRODUCTION

1. We are all well aware that claimants have to prove their case and the absolute necessity of presenting sufficient credible evidence to the court in order to do so. The situation becomes more complicated where the Judge may not be persuaded by either parties' evidence with respect to where the truth, on the balance of probability, lies on a fact in issue.

THE LAW

2. Lord Brandon of Oakbrook said in Rhesa Shipping Co. SA v. Edmunds [1985] 1WLR 948 *"[It is] of great importance that the judge is not bound always to make a finding one way or the other with regard to facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on the burden of proof if he can legitimately avoid having to doing so. There are cases, however, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take*"

3. More recently in Constandas v Lysandrou & Ors [2018] EWCA Civ 613 (an interesting case to read for many reasons), where a claim was brought by the Claimant, Mr Constandas, against the First Respondent, his sister Mrs Lysandrou, the Second Respondent his brother-in-law, Mr Lysandrou and the Third Respondent his nephew Michael Lysandrou. The claim concerned the beneficial ownership of the house in Mackeson Road, London NW3 in which all the parties lived for many years. Since 2007 the legal title to the house has been vested in Mr and Mrs Lysandrou. Mr Constandas claimed that he was entitled to a half share in the house on the grounds that when it was bought in 1959 he paid a deposit of £100 and a further £500 as a down payment. That comprised half the purchase price of £1,200, the other half being funded by a mortgage taken out in the sole name of Mrs Lysandrou. The claim was brought under the Trusts of Land and

Appointment of Trustees Act 1996 for a declaration regarding Mr Constandas' right of ownership of and occupation at the property and for an injunction and damages for unlawful eviction and trespass. It was common ground at the trial that the claim was based on a resulting trust said to arise in accordance with the principles established by the House of Lords in Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432. It was agreed that there was a presumption that the beneficial ownership of a property was the same as the legal ownership.

4. The case turned on whether Mr Constandas could show that he had contributed the down payment of £600 in June 1959 when the house was bought. The Respondents denied that Mr Constandas had made any such contribution to the purchase price or that he was entitled for any other reason to an interest in the house.

5. The Court of Appeal was therefore concerned with an appeal against the decision of HHJ Faber who had concluded that on the evidence available to her she could not arrive at any findings as to who had paid the £600 down payment in 1959. She therefore held that Mr Constandas had not discharged the burden of proof that lay upon him as the claimant in the proceedings. She therefore dismissed the claim, other than awarding Mr Constandas a small amount of money in respect of damage caused to his property by the Respondents.

6. The Judge had concluded at [21]: *"21. The Claimant has not shown himself to be sufficiently reliable as a witness to establish on the balance of probabilities that he did pay that money from his Bank of Cyprus account to buy 28 Mackeson Road. The Defendants are not reliable witnesses either so I cannot make any findings as to who paid the down payment. It might have been the first Defendant from her earnings and she may have been assisted by money sent from Cyprus by relatives."*

7. The Court of Appeal considered Stephens v Cannon [2005] EWCA Civ 222, [2005] C.P. Rep. 31. and cited the following passage "*After referring to the relevant authorities, Wilson J, with whom Arden and Auld LJJ agreed, set out the following propositions ([46]):*

   "(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.
   (b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.
   (c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.
   (d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can

understand the reasons why it has concluded that it cannot do so. ***The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost****. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.*

(e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in [a] judgment will be necessary."

8. The Court of Appeal also cited Verlander v Devon Waste Management & Anr [2007] EWCA Civ 835 (unreported) Auld LJ reduced the analysis to two main propositions:

"*19. …First, a judge should only resort to the burden of proof where he is unable to resolve an issue of fact or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence. Secondly, the Court of Appeal should only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort.*

24. When this court in Stephens v Cannon used the word "exceptional" as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice -- and a respectable and useful part at that -- where a tribunal cannot on the state of the evidence before it rationally decide one way or the other. In this case the Recorder has shown, in my view, in his general observations on the unsatisfactory nature of the important parts of the evidence on each side going to the central issue, particularly that of Mr Verlander, that he had considered carefully whether there was evidence on which he could rationally decide one way or the other."

9. As to the point about the Judge's failure to alert counsel to the possibility that she would be unable to arrive at a conclusion on the facts, the court accepted that it was unfortunate that she did not do so and give counsel the opportunity to make submissions, however, on appeal counsel was not able to point to any specific additional evidence or submission that she would have been able to make that might have led to a different outcome.

CONCLUSION

10. So, although it may be tempting for a court to throw it's hands up and fall back on the burden of proof in a situation where it is concerned about the quality of the evidence of the parties on a fact in issue it should only do so where it cannot reasonably make a finding in relation to the disputed issue and this should be exceptional.

11. The court should where possible alert the advocates to the possibility of such an eventuality so that they can deal with it by submissions/further evidence.

12. Clearly the rational is that the parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost (and so must the appeal court!).

13. Equally one should remind oneself of the dicta in In Re B (Children), Re [2008] UKHL 35, Lord Hoffman explained the burden of proof in these terms:

> *If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened*.

When understanding the importance of the court making findings where possible to the parties and generally.

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