

## THE ARMSTRONG V. ONYEARU DECISION.

1. A property is jointly owned by A and B. B charges his share to pay a debt owed solely by A, and B in fact pays off that debt. On those facts, as between A (the principal debtor) and B (his surety), B may be entitled to have his share of the property exonerated (released) by A from the charge B has created.
2. In Armstrong v Onyearu [2017] EWCA Civ 268 the Court of Appeal has, for the first time since 1898, considered the principles applying to the 'equity of exoneration'. It is best understood as part of the relief granted to sureties against the principal debtor, and it arises from the (actual or presumed) intention of the parties. On the central point of the appeal, the fact that B has received an *indirect* benefit from A's secured debt is not itself sufficient to deny B's right of exoneration (at [60],[82]).

## 3PB'S ANALYSIS.

3. **The Proceedings.** The question arose on an application by Mr Onyearu's trustee in bankruptcy (the Appellant), for an order for sale of the matrimonial home. Mrs Onyearu (the Respondent) argued that she was entitled to a charge over her husband's interest in the property, by virtue of an equity of exoneration, which exhausted his beneficial interest. The District Judge had agreed with Mrs Onyearu and consequently dismissed the trustee's application. His decision was upheld on a first appeal.
4. **The facts.** In 2000, Mr Onyearu purchased a property via an interest-only mortgage as the matrimonial home. Mr Onyearu was the sole registered proprietor but the court declared (and the trustee did not dispute) that the couple held the property beneficially in equal shares.
5. Mr Onyearu was a solicitor whilst his wife was a lecturer. Both had separate bank accounts. Until 2010, Mr Onyearu paid the mortgage, simply because the mortgage was in his name, and Mrs Onyearu paid all other household expenses.
6. In 2005, Mr Onyearu obtained a business loan, secured by a charge over the property, to pay the debts of his

struggling solicitor's practice. The firm closed in 2010 and in 2011, Mr Onyearu was declared bankrupt.

7. **Analysis.** Two important points are worth recalling at the outset. Whether the equity of exoneration arises is quite different from the question of the parties' beneficial interests (see at [59]). The equity can only arise once it is established that A and B have some beneficial interest, and is concerned with how—as between A and B—the charge over B's share is to be treated.
8. Secondly, the availability of the equity depends on the intention of the parties. If the parties have *actually* considered the matter, that is decisive. Only where they have not will the court need to consider, in light of all the circumstances, what intention is to be *inferred* (at [3]). The appeal in Armstrong centred on when it is appropriate to draw that inference.
9. There have been several recent judgments regarding the equity of exoneration. The novel point in Armstrong was the trustee's core argument that, as Mrs Onyearu had received an *indirect* benefit from the business loan (in that it enabled Mr Onyearu to continue to make the mortgage payments), the judges below had erred in law in *inferring* the necessary joint intention that the burden of Mr Onyearu's loan should fall primarily on his share of the property (at [18]).
10. Following an analysis of previous cases, David Richards LJ summarised the law as follows (at [43])<sup>1</sup>:
  - 10.1. Where jointly-owned property is charged to secure the indebtedness of one joint owner, an evidential presumption arises that the parties intended that liability should fall on the debtor's share of the property. This intention will be presumed from the nature of the transaction and is akin to a surety relationship.
  - 10.2. The parties' intention is to be discerned at the time that the charge was granted, but subsequent events may shed light as to what the intention was.

<sup>1</sup> Following the two leading judgments Paget v. Paget [1898] 1 Ch 470 and Re Pittortou [1985] 1 WLR 58. These principles do not appear to be disputed by the parties.

- 10.3. Circumstances may arise on the facts of a particular case making it inappropriate to presume that intention *e.g.* where the debtor gives consideration for the other co-owner's share to be charged, or where the property is charged to secure debts that are jointly owed.
- 10.4. The presumed intention can be rebutted by evidence of another intention. For example, evidence that the debt is incurred for the benefit of the surety tends to rebut the presumption.
- 10.5. While previously it was assumed that household expenses were the responsibility of a husband, this is no longer the case and one co-owner is borrowing to fund household expenses may indicate that the debt is for the benefit of both.
- 10.6. The equity will apply where the debtor borrows to fund his or her business, even though the surety may derive some indirect benefit from the business.
- 10.7. The particular facts need careful consideration to determine whether the equity applies.
11. Richards LJ considered a number of authorities in which the presumption had been considered, and concluded that none supported the trustee's submission that the surety's receipt of an indirect benefit prevented the equity from arising as a matter of law. They turned on their particular facts, and the inference had been inappropriate where the surety had derived benefit from the debtor's loan (Re Chadwa [2014] BPIR 49; Cadlock v. Dunn [2015] BPIR 739; Graham-York v. York [2015] EWCA Civ 72).
12. The trustee relied heavily upon the New Zealand judgment, Re Berry [1978] 2 NZLR 373. That illustrated only that there can be no entitlement to exoneration where *A* and *B* are *jointly* liable for the debt (at [63]-[65]), because the essence of a surety situation is lacking. But that had no bearing on the instant case.
13. Dismissing the appeal, the Court of Appeal applied the Australian case of Parsons v. McBain [2001] FCA 376, relied upon by Mrs Onyearu. Although the equity may be defeated if (or to the extent that) the surety receives a benefit from the loan, the suggested benefit cannot be too remote or intangible. Here, as at the date of the charge, the possibility that Mrs Onyearu might benefit from the loan if Mr Onyearu's solicitors' practice flourished, was too remote to provide a basis for inferring

or presuming that her intention was to bear the burden of the loan equally with her husband (at [85]).

#### IMPACT OF THE DECISION

14. Despite what seems to be a well-fought battle by the trustee, the law remains unchanged and the original principles under Page and Re Pittortou continue to apply to the equity of exoneration. However, and importantly, each case turns on its own circumstances. At a time where subjects such as the gender pay gap are topical, it is expected that the decision will be welcomed by women and co-owners alike.
15. The Court of Appeal rejected the trustee's invitation to change the law by treating co-habiting couples differently. The suggestion was that, where a couple "*operates as a family unit*", the co-owner will invariably receive a benefit from the loan, and so the equity should not apply. The Court of Appeal rejected that. Such a change would be tantamount to the court interfering with a couple's financial arrangements and suggesting a particular way in which couples ought to act. It was inconsistent with the law's development towards "*provid[ing] financial emancipation to women and to enable[ing] couples to keep their property and financial affairs separate to such extent as they desire*".

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