

Seminar with Professor Alastair Hudson

Introduction

This seminar will focus on the following passages from three judgments relating to the question: on what basis does the claimant acquire a property right in the home? There are some questions after each case and after the extracts from the judgments. After these extracts are some further extracts from a famous legal text from 1765 which tells us alarming things about the historical attitude to the rights of wives, from a memoir by Lord Denning, and from a case in Australia which takes a very different approach.

You should read all of these in advance of the seminar. This is less than you would be required to read in advance of a normal seminar. If you wanted you could read Chapter 15 of Professor Hudson's book *Equity & Trusts* (5th edition, Routledge-Cavendish, 2007) on this topic, or the shorter book *Understanding Equity & Trusts* (2nd edition, Cavendish Publishing, 2004).

Note: the most senior court in England is the House of Lords (i.e. Lord Bridge); then the next tier is the Court of Appeal (i.e. Chadwick LJ) and then the next tier down is the High Court (i.e. Waite J). The doctrine of precedent requires that lower cases must follow earlier decisions and the decisions of senior courts or equivalent courts; whereas senior courts may overrule junior courts; and the House of Lords may overrule itself.

First extract

LLOYDS BANK PLC. v ROSSET

[1991] 1 A.C. 107

[HOUSE OF LORDS]

Lord Bridge:

[Page 131] ...

The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her

position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do. ...

Question 1

Does this test seem to promote certainty in the law to you?

Question 2

Consider the following set of facts:

Tariq and Dipali bought a house together in February 2005 for £400,000. They had two children: aged 1 and 3. Tariq worked as a trainee solicitor. It was agreed between them that Tariq would take out a mortgage for £380,000 to buy the house, and that Tariq would also contribute £20,000 in cash from his savings.

Tariq's monthly income was £2,000, from which he paid the monthly mortgage repayments of £1,500.

Their younger child had a complicated medical complaint which could only be treated by private healthcare costing £1,000 per month. Dipali earned £1,500 per month as a freelance graphic designer working from home. She paid for the whole of the healthcare costs.

The couple separated in February 2008.

- (a) What rights in the home does each party have?
- (b) Do you consider this outcome to be fair?

Second extract

MIDLAND BANK v COOKE

[1995] 2 FLR 915

COURT OF APPEAL

Waite LJ

[p.926]

... When the court is proceeding, in cases like the present where the partner without legal title has successfully asserted an equitable interest through direct contribution, to determine (in the absence of express evidence of intention) what proportions the parties must be assumed to have intended for their beneficial ownership, the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that 'equality is equity'.

Question 3

What would be the effect of applying this test to the facts of the case involving Tariq and Dipali?

Third extract

Hammond v Mitchell

[1992] 2 All ER 109

WAITE J.

In the summer of 1977 Mr Tom Hammond, a married man of 40 separated from his wife, was setting off for a ride in Epping Forest when he had a chance encounter with Miss Vicky Mitchell, a 21-year-old girl who had stopped her car to ask the way. Their conversation led to further meetings and within a very short time they were living together. He was a trader, dealing in those days principally in secondhand cars. She was a Bunny Girl employed at a high salary by the Playboy Club in Mayfair as one of their croupiers. They both shared a zest for what each described in evidence as 'the good life', a concept which for them meant luxury cars rapidly changed, comfortable holidays spent abroad, dining out in restaurants, gaming in casinos and raising and racing greyhounds. They also shared a love of the marketplace in the sense of an attachment to dealing for dealing's sake and a mutual delight in bargain hunting. They were, and still are, both highly-charged people emotionally, a quality which accounts

both for the strength of the relationship which endured for 11 years and produced two children, and also for the intensity of feeling which marked its end. The net value of the assets they were enjoying together at the time of parting and now in dispute between them approaches £450,000. Mr Hammond says that virtually all of it is his; Miss Mitchell claims that a substantial part at least of it is hers.

Had they been married, the issue of ownership would scarcely have been relevant, because the law these days when dealing with the financial consequences of divorce adopts a forward-looking perspective in which questions of ownership yield to the higher demands of relating the means of both to the needs of each, the first consideration being given to the welfare of children. Since the couple did not marry, none of that flexibility is available to them, except a limited power to direct capital provision for their children. In general, their financial rights have to be worked out according to their strict entitlements in equity, a process which is anything but forward-looking and involves, on the contrary, a painfully detailed retrospect.

...

By the spring of 1988 relations between Mr Hammond and Miss Mitchell had become strained. They were still together when they returned to England, and the bungalow, in May 1988; although shortly before that return Miss Mitchell had started what was to prove in the end to be only a short-lived affair with a young Spaniard in Valencia. The bungalow to which they returned was, as always, stuffed throughout with furniture, ornaments and fittings which they had accumulated during their years of dealing. Much of it had sentimental value, but they were neither of them the kind of person in whom sentiment was ever strong enough to outweigh commercial advantage. Their dealers' instincts saw to it that every object in their home, however dearly cherished, had a potential buyer in their mind's eye, if only the price was right.

Early in June 1988 Mr Hammond bought for £12,500 a Mercedes car. Shortly afterwards, Mr Hammond went to Spain for a brief visit and in his temporary absence Miss Mitchell made arrangements to leave him. With the help of her parents and friends she loaded a substantial quantity of furniture and effects from the bungalow into vans, which were then driven away. She herself removed the Mercedes and then made arrangements to fly to Spain to resume her affair with the young Spaniard. Mr Hammond, whose son by his former marriage had discovered what was going on and warned his father in Spain by telephone, made arrangements to return secretly to England and confront Miss Mitchell. He gave that confrontation the maximum dramatic effect by getting a seat (unknown to her) on the same flight to Spain as that on which Miss Mitchell was booked. Just as the aircraft was about to take off he emerged and denounced her in a way that led to a blazing row and a violent scuffle, requiring the intervention of the cabin staff to separate them and in the end to allow Miss Mitchell at her own request to disembark.

Question 4

If people live their lives in this fashion, is it appropriate to have tests like that in *Lloyds Bank v Rosset*?

Fourth extract

Oxley v Hiscock

[2004] 3 All ER 703

Chadwick LJ [para 66]

...

Once it is recognised that what the court is doing, in cases of this nature, is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was, in fact, no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition) is shown to be fair ...

Question 5

Is there a logical problem with a court “supplying” a common intention?

SOME LITERATURE ON THE RIGHTS OF HUSBANDS AND WIVES

There now follows an extract from the memoir of Lord Denning explaining his approach to the rights of husbands and wives, from *The Due Process of Law* (Butterworths, 1980, at p.194), his lordship lets us in on his personal vision of the war between the sexes:

‘No matter how you may dispute and argue, you cannot alter the fact that women are different from men. The principal task in life of women [sic] is to bear and rear children: and it is a task which occupies the best years of their lives. The man’s part in bringing up the children is no doubt as important as hers, but of necessity he cannot devote so much time to it. He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. ...’

It goes on in this vein for some little while.

One of the most respected theorists in feminist literature is Simone Weil. Consider this next passage, and then read the approach of William Blackstone in 1765 which is quoted after it:

‘“You do not interest me.” No man can say these words to another without committing a cruelty and offending against justice.’

- Simone Weil, 1943,
‘Human Personality’, trans. Rees,
collected in *Simone Weil: An Anthology*, ed Miles,

(Virago Press, 1986), p.70.

This is the ultimate expression of Kant's categorical imperative. It is the ultimate recognition of the fact that we cannot ignore the individual importance and significance of each individual person. The following statement from Blackstone set out the rights of women on marriage in the 18th century (which persisted until the late 19th century):

‘... the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband...’

- Blackstone, *Commentaries on the Laws of England*, 1765,
(reprinted by University of Chicago Press, 1979), p.430.

Thus, all of the wife's property became her husband's property, so that he could, for example, spend all of her money without needing her permission because it had become his money.

The Australian case law has taken a different approach. Consider this statement of the principles from Kirby P (in which the Australian courts had decided to award rights in the property to anyone whom they felt had been unconscionably denied any such rights) in the case of *Bryson v Bryant* (1992) 29 NSWLR 188:

“It is important that the ‘brave new world of unconscionability’ should not lead the court back to family property law of twenty years ago by the back door of a pre-occupation with contributions, particularly financial contributions ... Nor should those who have provided ‘women's work’ over their adult lifetime ... be told condescendingly, by a mostly male judiciary, that their services must be regarded as ‘freely given labour’ only or, catalogued as attributable solely to a rather one-way and quaintly described ‘love and affection’, when property interests come to be distributed.”

Question 6

Which of these approaches do you consider to be preferable, and why?

NB: A normal seminar would include more reading than this clearly, but these are the sorts of questions we would consider. You can access the full course materials for our second year undergraduates for this material at the following web-site:

<http://www.alastairhudson.com/trustslaw/Prop2CourseDocs07-08.pdf>

Look at pages 50 - 54 of that document and you will see the reading list for this topic for our undergraduate students.

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