Neutral Citation Number: [1978] EWCA Civ 2

Case No.: 7601259

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (Civil Division)
(On appeal from Mr. I.S. McKintosh
sitting as a Deputy Circuit Judge
at Camborne and Redruth County Court)

Royal Courts of Justice
1st December 1978

B e f o r e :

LORD JUSTICE ORE,
LORD JUSTICE LAWTON
and LORD JUSTICE CUMMING-BRUCE

SAMUEL OSWALD PASCOE — **Plaintiff (Appellant)**

- v -

PEARL TURNER — **Defendant (Respondent)**

(Transcript of the Shorthand Notes of
The Association of Official Shorthandwriters, Ltd., Room 392,
Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, WC2)

MR. HOWARD APLIN (instructed by Messrs. G.C. Davies & Partners, Redruth: London Agents, Messrs. Gregory Rowcliffe & Co.) appeared on behalf of the Plaintiff (Appellant).
MR. M.E. BRABIN (instructed by Messrs. Trott & Battell, Camborne: London Agents, Messrs. Robbins, Olivey & Lake) appeared on behalf of the Defendant (Respondent).

HTML VERSION OF JUDGMENT

LORD JUSTICE ORR: I will ask Lord Justice Cumming-Bruce to deliver the judgment of the Court.

LORD JUSTICE CUMMING-BRUCE: This is an appeal from the orders made on the 21st April 1973 by Mr. McKintosh, sitting as a deputy circuit judge in the Camborne and Redruth County Court, whereby he dismissed the plaintiff's claim for possession of a house at 2 Tolgarrick Road, Tuckingmill, Camborne in Cornwall, and granted the defendant declarations upon her counterclaim that the plaintiff held the house on trust for the defendant her heirs and assigns absolutely and that the contents of the house belonged to her. The appellant asks for an order of possession, and that the counterclaim be dismissed. The Issues:

The appeal raises three issues about the house:

(a) Did the defendant prove the trust found by the judge?
(b) Did she prove such facts as prevented the plaintiff by estoppel from asserting his legal title?
(c) If the answer to that question is yes, what is the equitable relief to which she is entitled?

In respect of the contents of the house, did the defendant prove that they were given to her by the plaintiff's voluntary gift? The Facts:

The plaintiff was a business man in a relatively small way and at all material times was and had been building up some capital assets which he invested in purchases of private and commercial property. In 1961 or 1962 he met the defendant, a widow recovering from the distressing circumstances of her husband's death. She had invested about £4,500 capital and had some income from this and from an invalidity pension. They made friends. She was happy to help him in small ways in business activities. The relationship deepened and she took the plaintiff's young son under her wing, and helped to guide him through his problems. In 1963 she moved into the plaintiff's home, at first as his housekeeper. In 1964 the boy went away to his own mother, and shortly afterwards the plaintiff and the defendant began to share a bedroom and live in every sense as man and wife. The plaintiff's business was expanding, and she worked in the business as well as doing the housekeeping. She did all that a wife would have done. He offered marriage, but she declined. In 1965 they moved. He took her to see 2 Tolgarrick Road, asked her if she liked it. He bought it. They moved in and continued living there as man and wife. He paid for the house and contents. He gave her £3 a week housekeeping. She used her own money to buy her clothes. She only bought small things for the house. Then she began to collect some rents for him and was allowed to keep part of them, bringing her housekeeping allowance up to £6 per week. He bought a place in Spain which they visited on holidays. At some stage there was some mention of the position with regard to the plaintiff's property, including the house, and the defendant. There was what the judge describes as a sort of will on which there was mention of the defendant having the house if anything happened to the plaintiff. In 1973 Cupid aimed his arrow. It struck the plaintiff, who began an affair with a Mrs. Pritchard. All unknowing, the defendant went for a few days with her daughter to Capri. In her absence the plaintiff moved in for two days to the house with Mrs. Pritchard, but they removed themselves before her return. Immediately the defendant got back, he visited her. There was a conflict of evidence on what was then said. His version was that all he told her was that he would never see her without a roof over her head. The account given by the defendant and the witnesses called on her behalf was that he declared to her and later to them that she had nothing to worry about as the house was hers and everything in it. The judge rejected the plaintiff's evidence and accepted the evidence of the defendant and her witnesses. The plaintiff declared to the defendant not once but on a number of occasions after he had left her "The house is yours and everything in it". He told a Mrs. Smejhal and a Mrs. Green the same thing. To Mrs. Smejhal he said that he'd put it in a solicitor's hands. Mrs. Green asked him at the end of 1973 if he'd given the defendant the deeds, and he replied that he hadn't yet but was going to see to it. In fact he never did. There was no deed of conveyance, nothing in writing at all. The defendant stayed on in the house. She thought it was hers and everything in it. In reliance upon the plaintiff's declarations that he had given her the house and its contents she spent money and herself did work on re-decoration, improvements and repairs. The judge found that the plaintiff as donor stood by knowingly while she improved the property thinking it was hers. In 1973 when he left and told her that the house was hers she had about £1,000 of her own capital left. She spent some £230 on repairs and improvements and re-decoration to the house, and also paid a man an unspecified sum in cash for working on the house. She bought carpets for the lounge, stairs and hall and fitted carpets to the bedrooms. She bought curtains. Though the house was full of furniture, she got rid of a good deal and replaced it by purchases made out of savings. The work which she carried out in 1974 and 1975 was pleaded in a list given in further particulars of defence and counterclaim as follows:

1. Partly replumbing house, providing hot water from immersion system to kitchen and installing new sink unit and other fitments. Installing gas into the kitchen.
2. Joining outside toilet to rear door of premises by blockwork covered way.
3. Installing gas conduits and installing a gas fire into the lounge.
4. Repairing and retiling the roof where necessary and repairing lead valleys.
5. Repairing and redecorating interior. So she stayed on. He lived nearby and sometimes visited her. She continued to collect some rents for him. Then there was a quarrel. He decided to throw her out of the house if he could. On 9th April 1976 his solicitors wrote to her

giving her two months notice "to determine her licence to occupy", and demanded possession on 10th June 1976. She refused to go.

On 25th August he filed his plaint in the county court, claiming possession and mesne profits at £10 per week from 10th June 1976 until possession. On 14th February 1977 she filed her defence and counterclaim. She pleaded his declarations that the house and contents were hers and that in reliance on his statements she carried out extensive works on the house with the plaintiff's full knowledge and encouragement. By her counterclaim she sought a declaration that the house and its contents were hers, and that the plaintiff held the realty on trust for her, her heirs and assigns. Alternatively she sought a declaration that the plaintiff had given her a licence to occupy the house for her lifetime. She claimed that the plaintiff was estopped from denying the trust or the licence. By his reply and defence to counterclaim the plaintiff joined issue on the extent of the works alleged to have been done since 1973, denied that they had been done in reliance upon his promises, or that they were of sufficient substance to give rise to the estoppel alleged. The judge decided the issue of estoppel against him. It is implicit in his conclusion that he accepted the defendant's evidence about what was done to the house after 1973, and how the plaintiff knew all about it and advised and encouraged her.

The judge found that the plaintiff had made a gift to her of the contents of the house. I have no doubt that he was right about that. She was already in possession of them as a bailee when he declared the gift. Counsel for the appellant submitted that there was no gift because it was uncertain what he was giving her. He pointed to a safe and to the defendant's evidence that she had sent round an orange bedroom suite to the plaintiff so that he should have a bed to sleep on. The answer is that he gave her everything in the house, but later, recognising his need, she gave back some bits and pieces to him. So much for the contents.

Her rights in the realty are not quite so simply disposed of because of section 53 and section 54 of the Law of Property Act 1925. There was nothing in writing. The judge considered the plaintiff's declarations, and decided that they were not enough to found an express trust. We agree. But he went on to hold that the beneficial interest in the house had passed under a constructive trust inferred from words and conduct of the parties. He relied on the passage in which, at page 185 of 27th Edition of Snell's Equity, the learned editors suggest a possible definition of a constructive trust. But there are difficulties in the way. The long and short of events in 1973 is that the plaintiff made an imperfect gift of the house. There is nothing in the facts from which an inference of a constructive trust can be drawn. If it had not been for section 53 of the Law of Property Act 1925 the gift of the house would have been a perfect gift, just as the gift of the contents was a perfect gift. In the event it remained an imperfect gift and, as Lord Justice Turner said in Milroy v. Lord (1862 4 De G. F. & J. 264 at p.274) "there is no equity in this court to perfect an imperfect gift". So matters stood in 1973s and if the facts had stopped there the defendant would have remained a licensee at will of the plaintiff.

But the facts did not stop there. On the judge's findings the defendant, having been told that the house was hers, set about improving it within and without. Outside she did not do such: a little work on the roof and an improvement which covered the way from the outside toilet to the rest of the house, putting in a new door there, and Snowcem to protect the toilet. Inside she did a good deal more. She installed gas in the kitchen with a cooker, improved the plumbing in the kitchen and put in a new sink. She got new gas fires, putting a gas fire in the lounge. She redecorated four rooms. The fitted carpets she put in the bedrooms, the stair carpeting, and the curtains and the furniture that she bought are not part of the realty, and it is not clear how much she spent on those items. But they are part of the whole circumstances. There she was, on her own after he left her in 1973. She had £1,000 left of her capital, and a pension of some kind. Having as she thought been given the house, she set about it as described. On the repairs and improvement to the realty and its fixtures she spent about £230. She had £300 of her capital left by the date of the trial, but she did not establish in evidence how much had been expended on refurbishing the house with carpets, curtains and furniture. We would describe the work done in and about the house as substantial in the sense that that adjective is used in the context of estoppel. All the while the plaintiff not only stood by and watched but encouraged and advised, without a word to suggest that she was putting her money and her personal labour into his house. What is the effect in equity? The cases relied upon by the appellant are relevant for the purpose of showing that the judge fell into error in deciding that on the facts a constructive trust could be inferred. They are the cases which deal with the intention of the parties when a house is acquired. But of those cases only Inwards v. Baker (1965 2 Q.B. 29) is in

point here. For this is a case of estoppel arising from the encouragement and acquiescence of the plaintiff between 1973 and 1976 when, in reliance upon his declaration that he was giving and, later, that he had given the house to her, she spent a substantial part of her small capital upon repairs and improvements to the house. The relevant principle is expounded in the 27th Edition of Snell's Equity in the passage beginning at page 565 under the heading "Proprietary Estoppel", and is elaborated in the 3rd Edition of Spencer Bower on Estoppel in chapter 12 entitled "Encouragement and Acquiescence".

The cases in point illustrating that principle in relation to real property are Dillwyn v. Llewelyn (1862 4 De G. F. & J. 517), Ramsden v. Dyson (1866 1 E. and I. App. Cases 129), Plimmer v. City of Wellington((1884) 9 A.C. 699). One distinction between this class of case and the doctrine which has come to be known as "promissory estoppel" is that where estoppel by encouragement or acquiescence is found on the facts, those facts give rise to a cause of action. They may be relied upon as a sword, not merely as a shield. In Ramsden v. Dyson (supra) the plaintiff failed on the facts, and the dissent of Lord Kingsdown was upon the inferences to be drawn from the facts. On the principle, however, the House was agreed, and it is stated by Lord Cranworth L.C, and by Lord Wensleydale as well as by Lord Kingsdown. Likewise in Plimmer's case (supra) the plaintiff was granted a declaration that he had a perpetual right of occupation.

The final question that arises is: To what relief is the defendant entitled upon her counterclaim? In Dillwyn v. Llewelyn (supra) there was an imperfect gift of land by a father who encouraged his son to build a house on it for £14,000. Lord Westbury L.C. at page 521 said:

> "About the rules of the Court there can be no controversy. A voluntary agreement will not be completed or assisted by a Court of Equity, in cases of mere gift. If anything be wanting to complete the title of the donee, a Court of Equity will not assist him in obtaining it; for a mere donee can have no right to claim more than he has received. But the subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift. Thus, if A gives a house to B, but makes no formal conveyance, and the house is afterwards, on the marriage of B, included, with the knowledge of A, in the marriage settlement of B, A would be bound to complete the title of the parties claiming under that settlement. So if A puts B in possession of a piece of land, and tells him 'I give it to you that you may build a house on it', and B on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made".

In Plimmer's case (supra) the Privy Council pose the question, how should the equity be satisfied? (See pp. 713, 714). And the Board declare that on the facts a licence revocable at will became irrevocable as a consequence of the subsequent transactions. So in Thomas v. Thomas (1956 N.Z.L.R.) the Supreme Court of New Zealand ordered the defendant to execute a proper transfer of the property.

In Crabb v. Arun District Council (1976 Ch. 179) this court had to consider the principles upon which the court should give effect to the equity: See the Master of the Rolls (Lord Denning) at page 189. Lords Justices Lawton and Scarman (as he then was) agreed with the remedy proposed by the Master of the Rolls. On the facts of that case Lord Justice Scarman expressed himself thus: "I turn now to the other two questions - the extent of the equity and the relief needed to satisfy it. There being no grant, no enforceable contract, no licence, I would analyse the minimum equity to do justice to the plaintiff as a right either to an easement or to a licence upon terms to be agreed. I do not think it is necessary to go further than that. Of course, going that far would support the equitable remedy of injunction which is sought in this action. If there is no agreement as to terms, if agreement fails to be obtained, the court can, in my judgment, and must, determine in these proceedings upon what terms the plaintiff should be put to enable him to have the benefit of the equitable right which he is held to have. It is interesting that there has been some doubt amongst distinguished lawyers in the past as to whether the court can so proceed. Lord Kingsdown refers in fact to those doubts in a passage, which I need not quote, in Ramsden v. Dyson.

Lord Thurlow clearly thought that the court did have this power. Other lawyers of that time did not. But there can be no doubt that since Ramsden v. Dyson the courts have acted upon the basis that

they have to determine not only the extent of the equity, but also the conditions necessary to satisfy it, and they have done so in a great number and variety of cases. I need refer only to the interesting collection of cases enumerated in Snell's Principles of Equity, 27th Ed. (1973), at pp. 567-568, para. 2(b). In the present case the court does have to consider what is necessary now in order to satisfy the plaintiff's equity."

So the principle to be applied is that the court should consider all the circumstances, and the counter-claimant having at law no perfected gift or licence other than a licence revocable at will, the court must decide what is the minimum equity to do justice to her having regard to the way in which she changed her position for the worse by reason of the acquiescence and encouragement of the legal owner. The respondent to this appeal submits that the only appropriate way in which the equity can here be satisfied is by perfecting the imperfect gift as was done in Dillwyn v. Llewelyn (supra).

Counsel for the appellant on instructions has throughout submitted that the appellant is entitled to possession. The only concession that he made was that the period of notice given in the letter of 9th April 1976 was too short. He made no submission upon the way the equity, if there was an equity, should be satisfied save to submit that the court should not in any view grant a remedy more beneficial to the respondent than a licence to occupy the house for her lifetime.

We are satisfied that the problem of remedy on the facts resolves itself into a choice between two alternatives: Should the equity be satisfied by a licence to the respondent to occupy the house for her lifetime, or should there be a transfer to her of the fee simple?

The main consideration pointing to a licence for her lifetime is that she did not by her case at the hearing seek to establish that she had spent more money or done more work on the house than she would have done had she believed that she had only a licence to live there for her lifetime. But the court must be cautious about drawing any inference from what she did not give in evidence as the hypothesis put is one that manifestly never occurred to her. Then it may reasonably be held that her expenditure and effort can hardly be regarded as comparable to the change of position of those who have constructed buildings on land over which they had no legal rights.

This court appreciates that the moneys laid out by the defendant were much less than in some of the cases in the books. But the court has to look at all the circumstances. When the plaintiff left her she was, we were told, a widow in her middle fifties. During the period that she lived with the plaintiff her capital was reduced from £4,500 to £1,000. Save for her invalidity pension that was all that she had in the world. In reliance upon the plaintiff's declaration of gift, encouragement and acquiescence she arranged her affairs on the basis that the house and contents belonged to her. So relying, she devoted a quarter of her remaining capital and her personal effort upon the house and its fixtures. In addition she bought carpets, curtains and furniture for it, with the result that by the date of the trial she had only £300 left. Compared to her, on the evidence the plaintiff is a rich man. He might not regard an expenditure of a few hundred pounds as a very grave loss. But the court has to regard her change of position over the years 1973 to 1976.

We take the view that the equity cannot here be satisfied without granting a remedy which assures to the respondent security of tenure, quiet enjoyment, and freedom of action in respect of repairs and improvements without interference from the appellant. The history of the conduct of the appellant since 9th April 1976 in relation to these proceedings leads to an irresistible inference that he is determined to pursue his purpose of evicting her from the house by any legal means at his disposal with a ruthless disregard of the obligations binding upon conscience. The court must grant a remedy effective to protect her against the future manifestations of his ruthlessness. It was conceded that if she is granted a licence, such a licence cannot be registered as a land charge, so that she may find herself ousted by a purchaser for value without notice. If she has in the future to do further and more expensive repairs she may only be able to finance them by a loan, but as a licensee she cannot charge the house. The appellant as legal owner may well find excuses for entry in order to do what he may plausibly represent as necessary works and so contrive to derogate from her enjoyment of the licence in ways that make it difficult or impossible for the court to give her effective protection.

Weighing such considerations this court concludes that the equity to which the facts in this case give rise can only be satisfied by compelling the appellant to give effect to his promise and her expectations. He has so acted that he must now perfect the gift.

The order of the court is: The appeal is dismissed, save that the order of the learned judge is varied as follows: His second declaration is revoked. In its place there will be a declaration that the estate in fee simple in the property known as 2 Tolgarrick Road, Tuckingmill, Camborne in Cornwall, is vested in the defendant. The plaintiff is ordered to execute a conveyance forthwith at his expense transferring the said estate to the defendant. I think that the court wishes to hear counsel on what further order should be made to deal with the procedure to be followed in default of execution and delivery of the said deed.

(Appeal dismissed, save that the order of the court below be varied as follows: The second declaration is revoked. In its place a declaration that the estate in fee simple in the property known as 2 Tolgarrick Road, Tuckingmill, Camborne in Cornwall is vested in the defendant.

The plaintiff ordered to execute a conveyance within 28 days at his expense transferring the said estate to the defendant.

In default of such conveyance, the conveyance to be settled by the defendant's solicitors and executed on behalf of the plaintiff by the Registrar of the county court, the cost thereof to be paid by the plaintiff.

Order that the plaintiff do pay the defendant's costs of the appeal.

Leave to appeal to the House of Lords refused)