COMMENT

THE CONSTRUCTIVE TRUST AS A REMEDIAL DEVICE — A POSTSCRIPT: *KARDYNAL v. DODEK*

The area of constructive trusts has recently been the subject of considerable judicial creativity by the English Court of Appeal despite the restrictive approach displayed by the House of Lords in two decisions involving matrimonial property: *Pettitt v. Pettitt*[1] and *Gissing v. Gissing*.[2] In an earlier article in this review[3] it was argued that the Court of Appeal was moving towards an acceptance of the American view of the constructive trust as a device imposed by the court in order to achieve fairness between the parties.

In a recent unreported decision in *Kardynal v. Dodek*,[4] Brooking J. of the Supreme Court of Victoria considered the application of the principles relating to constructive trusts to a property dispute between the parties to a de facto relationship.

The facts of *Kardynal v. Dodek* were as follows. In 1949, the plaintiff Kardynal purchased land in Thomastown. Some time during 1968 or 1969 the parties became engaged. In May 1972 the erection of a house on the land was completed, and the defendant Dodek moved into it. At this time the parties were still engaged and the plaintiff spent some nights in the house with the defendant. After the relationship between the parties ended the plaintiff claimed possession of the house and mesne profits. The defendant counter-claimed for an order that she was entitled to an equitable interest in the house by virtue of a constructive trust. The title to the land was in the plaintiff, and he had paid the cost of erecting the house. Some difficulty arose in establishing the facts but Brooking J. found that the defendant had made the following contributions to the establishment of the house and garden.

1. The plaintiff had asked her to bank money for him, and she had done so.
2. When the house was at the planning stage she made minor modifications to its design.
3. On a number of occasions she visited the site of the house while it was being built and made minor improvements to its design.

[1] [1970] A.C. 777.
[2] [1971] A.C. 886.
[3] Neave M. A., 'The Constructive Trust as a Remedial Device' (1978) 11 *M.U.L.R.* 343.
[4] (Unreported Supreme Court of Victoria, 12 December 1977 *per* Brooking J.)

4. She removed a small amount of builder's debris.
5. She lined cupboards.
6. She helped to establish and maintain the garden.
7. She provided various small items of furniture for the house. However, she bought most of this furniture before the house was built, and not specifically for the purpose of furnishing it.

In what circumstances could these acts be relied upon to give rise to a constructive trust in favour of the defendant?

In *Gissing v. Gissing*[5] Lord Diplock analysed the circumstances in which a constructive trust would arise in favour of a person making indirect contributions to the acquisition of property: He said:

> A resulting, implied or constructive trust, and it is unnecessary for present purposes to distinguish between these three classes of trust, is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

In the recent decision in *Ogilvie v. Ryan*[6] Holland J. of the New South Wales Supreme Court accepted Lord Diplock's analysis of the source of the constructive trust. Holland J. extended it to cover the situation where the acts of the *cestui que trust* were not concerned with the acquisition or improvement of the property, but were performed with the expectation that the cestui que trust would thereby obtain a beneficial interest in the property. It is clear from the above analysis that both Lord Diplock in *Gissing v. Gissing*[7] and Holland J. in *Ogilvie v. Ryan*[8] rejected the wide view of the constructive trust as a remedial device which could be imposed whenever it was necessary to achieve fairness between the parties. In *Kardynal v. Dodek*, Brooking J. also accepted the analysis of Lord Diplock. It followed that it was necessary for the defendant Dodek to establish that an agreement existed between herself and Kardynal that she would acquire a beneficial interest in the house, by the contribution of her time and labour. The existence of such an agreement would make it inequitable for Kardynal to induce Dodek to act to her detriment in the belief that she was thereby obtaining a beneficial interest in the land.

How could such an agreement be established? The majority view in *Gissing v. Gissing*[9] was that such an agreement must be either express or implied. It was legitimate for the court to examine the conduct of the parties to establish whether they acted in accordance with an unspoken

[5] [1971] A.C. 886, 904.
[6] [1976] 2 N.S.W.L.R. 504.
[7] [1971] A.C. 886.
[8] [1976] 2 N.S.W.L.R. 504.
[9] [1971] A.C. 886, 898 *per* Lord Morris of Borth-y-gest, 900 *per* Viscount Dilhorne, 902-3 *per* Lord Pearson, 904-5 *per* Lord Diplock. *Cf.* 896 *per* Lord Reid.

understanding. However, in the absence of an express agreement, or one which could be implied from the parties' conduct, the court could not impute an agreement to them upon the basis of what would have been intended by reasonable persons in their position. This unwillingness of the majority of the House of Lords to permit the imputation of the agreement is entirely consistent with Lord Diplock's analysis of the source of the constructive trust.

In contrast, the Court of Appeal[10] has used the fiction of the imputed agreement as a means of circumventing the restrictions inherent in the decision in *Pettitt v. Pettitt*[11] and *Gissing v. Gissing*[12]

Because Brooking J. accepted the view that it was illegitimate for the court to impute an agreement to the parties, he had obvious difficulties in explaining the approach of Lord Denning M.R. in cases such as *Falconer v. Falconer*[13] and *Hazell v. Hazell.*[14] In both these cases, Lord Denning took the view that a constructive trust altering the beneficial interest in the property could be imposed by the court irrespective of any express or implied agreement between the parties. In *Falconer v. Falconer*,[15] for example, Lord Denning spoke of imposing a constructive trust 'not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is *imposed* by law. The law imputes to the husband and wife an intention to create a trust, the one for the other. It does so by way of an inference from their conduct and the surrounding circumstances, even though the parties themselves made no agreement upon it'.

Rather than dismiss this comment as incorrect, Brooking J. attempted to explain the words 'even though the parties themselves made no agreement upon it' as relating only to the absence of an express common intention but not to the absence of an implied common intention. This valiant effort to reconcile Lord Denning's approach with that of the House of Lords ignores Lord Denning's explicit reference to the non-existence of an implied agreement, in the passage quoted above. Similarly, in *Hazell v. Hazell* Lord Denning M.R. said that a wife might get an interest in the matrimonial home by reason of her indirect contributions 'even though there is no agreement, express or implied'.[16] With reference to this passage Brooking J. suggested that Lord Denning was simply drawing a distinction between an agreement and a common intention. Presumably Brooking J. was referring to the fact that an agreement in the strict sense, necessarily involves an intention to enter into legal relations. It may be difficult to prove such an intention where the parties to the agreement are married or are living together. However, even where such a contract does not exist,

[10] See the detailed discussion in Neave *op. cit.*, 11.
[11] [1970] A.C. 777.
[12] [1971] A.C. 886.
[13] [1970] 3 All E.R. 449.
[14] [1972] 1 All E.R. 923.
[15] [1970] 3 All E.R. 449, 452.
[16] [1972] 1 All E.R. 923, 925.

a common intention between the parties may, when acted upon by one party, be sufficient to give rise to a constructive trust. While this analysis is convincing it seems unlikely in the extreme that Lord Denning M.R. was concerned to draw this distinction in the Court of Appeal decisions discussed above. Rather, Lord Denning adopted the approach of imputing an agreement to the parties in order to achieve a fair distribution in a case where the parties had clearly not directed their minds to the disposition of the beneficial interests in the property.

Brooking J. also mentioned the reference by Holland J. in *Ogilvie v. Ryan*[17] to a common understanding or intention 'express, implied or imputed'. He did not accept the view that this could be a reference to an imputed common intention in the sense rejected by the House of Lords in *Gissing v. Gissing*.[18] He said that the statement of Holland J. 'must be a reference to the rule that in inferring intention from conduct the court will treat as the intention of a party the intention that was reasonably understood by the other party to be manifested by that party's words or conduct, notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate to the other part'.[19]

Generally the expression 'an imputed agreement' is used to describe the case where the court imposes an agreement upon the parties even though they themselves have not made an express agreement, and the existence of an agreement cannot be deduced from their conduct. A court which 'imputes' an agreement ascribes an agreement to the parties, despite their clear absence of intention, on the basis that reasonable persons in their position would have reached such an agreement. The 'imputed agreement' approach serves to achieve a fair distribution of property between the parties despite the absence of any consensus. It is clear that the majority of the House of Lords in *Gissing v. Gissing*,[20] rejected the imputed agreement approach.

In contrast, in *Gissing v. Gissing* it was regarded as legitimate for the court to deduce the existence of an unspoken agreement between the parties. Such an 'implied agreement' could be inferred from the conduct of the parties if their activities were such as to enable the court to deduce that an agreement existed, even though such an agreement was not expressly articulated. In the passage quoted above Brooking J. is concerned to refine the concept of the implied agreement to cover the case where the conduct of the parties is objectively sufficient to enable the court to deduce the existence of an agreement, but where one party seeks to rely upon his secret subjective intention in order to overcome the effect of his conduct. Consistently with the approach which exists in the field of contract law,

[17] [1976] 2 N.S.W.L.R. 504, 517.
[18] [1971] A.C. 886.
[19] Transcript, p. 19.
[20] [1971] A.C. 886.

such a secret intention would not overcome the effect of the conduct of one party upon the mind of the other, and in such circumstances the court would be justified in holding that an implied agreement existed.

While the distinction drawn by Brooking J. between an imputed and an implied agreement is logically supportable it must be pointed out that it is almost impossible to apply. Both concepts are, in reality, legal fiction, the difference being only one of degree.

Courts have had a great deal of difficulty dealing with the distinction between imputed and implied agreements,[21] without having to deal with a further refinement of the concept of the implied agreement. Precisely how is a court to distinguish between a situation where the parties did not intend an agreement, although reasonable persons in their position would have intended an agreement (an imputed agreement) and a situation where one party says he did not intend to enter into an agreement, although his conduct suggests to the objective bystander that he did intend such an agreement. It may be that both fictions will ultimately have to be abandoned. One is reminded of the comment of Lord Hodson in *Pettitt v. Pettitt*[22] that 'the conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque'.

Brooking J. held that the acts of the defendant did not permit the implication of any common intention that she would acquire a beneficial interest. It was not open to the court to impute an intention to the parties. Even if this approach had been open to the court, Brooking J. would not have imputed an intention on the facts of the case. The absence of any common intention made it unnecessary for the court to consider the question whether the defendant had suffered any detriment, bringing the case within the principle expressed in *Ogilvie v. Ryan*.[23]

In view of the very trivial contributions made by the defendant the decision is clearly correct. The main significance of the case is in its unqualified acceptance of the analysis of Lord Diplock in *Gissing v. Gissing*[24] as to the origin of the constructive trust. A reluctance to accept the more innovative approach of the Court of Appeal in cases such as *Falconer v. Falconer*[25] and *Hazell v. Hazell*[26] is obvious.

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[21] See *e.g. Doohan v. Nelson* [1973] 2 N.S.W.L.R. 320, and the unrepentant stance of Mahoney J.A. in *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685.
[22] [1970] A.C. 777, 810.
[23] [1976] 2 N.S.W.L.R. 504.
[24] [1971] A.C. 886, 904.
[25] [1970] 1 W.L.R. 1333.
[26] [1972] 1 W.L.R. 301.

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