

WARD v. WARD¹

Husband and wife—Dispute as to property—Limitations of statutory discretion—Purchase on behalf of both spouses—Rebuttal of presumption that each entitled proportionately to contribution—Married Women's Property Act 1928 section 20; Marriage (Property) Act 1956 section 7

During their marriage the defendant, W., and the plaintiff, his wife, acquired a matrimonial home which was purchased in the husband's name and paid for by instalments over a period of ten years. The plaintiff was the financial manager of the family income which consisted of her own wages, the defendant's wages, and a small sum contributed by the eldest child, and out of this income she paid the living expenses of the family and the instalments on the home. Subsequently the marriage was dissolved and the plaintiff brought this action, seeking against the defendant a declaration that he held, as trustee for her, all, or alternatively some part, of the rights vested in him as the purchaser named in the contract of sale of the home, and an order directing him to assign all or part of such rights to her. The court held that the plaintiff was entitled to a declaration that the defendant held all the rights in the property upon trust for the plaintiff and himself in equal shares, and granted an order directing the defendant to assign to himself and the plaintiff in equal shares all the rights subject to the trust.

The decision was based on the proposition that 'if the ordinary rules of law and equity, when applied to the facts of the present case, locate the ownership in accordance with an actual intention disclosed by the evidence, the result of the action cannot be affected by any statutory discretion that may exist'² and Smith J. was able to discover such an intention. His Honour was satisfied that the defendant, when he entered into the contract, was acting in pursuance of an understanding that he should buy the property for and on behalf of himself and the plaintiff, and so held the rights under the contract on trust for them both. He then referred to the presumption that the parties were entitled to those rights in proportions corresponding with the proportions in which they contributed the purchase money,³ but said that this presumption was rebuttable by proof that a definite intention to the contrary existed at the time of the purchase.⁴ His Honour was able to discover such an intention and, in particular, the fact that the payments for the home were likely to come from a mixed fund contributed to by them both in amounts

¹ [1958] V.R. 68; [1958] Argus L.R. 216. Supreme Court of Victoria; Smith J.

² [1958] V.R. 68, 72.

³ Cf. *Bull v. Bull* [1955] 1 Q.B. 234.

⁴ Cf. *Drever v. Drever* [1936] Argus L.R. 446; *Russell v. Scott* (1936) 55 C.L.R. 440.

and proportions which might vary appreciably from time to time weighed heavily with him.

The actual decision in the case, therefore, rests on the proposition that there is no room for the exercise by the court of the discretion given formerly by the Married Women's Property Act 1928 section 20, but now based on the Marriage (Property) Act 1956 section 7, where the actual intention of the parties can be discovered. The interest of the case lies rather in its discussion of the nature of the statutory discretions conferred in those sections, in particular whether the discretion given by section 7 of the 1956 Act differs from that given by section 20 of the 1928 Act, which the 1956 Act has repealed.

The relevant terms of section 20 of the 1928 Act were as follows: 'In any question between husband and wife as to the title to or possession of property . . . the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit.' In *Wood v. Wood*,⁵ Smith J. held, upon the authority of *Rimmer v. Rimmer*⁶ and *Lee v. Lee*,⁷ that those words conferred a discretion as to questions of title as well as questions of possession, and a discretion as to matters of substance and not merely as to matters of procedure. But in an *obiter dictum* in *Wirth v. Wirth*⁸ on a substantially similar Queensland provision, Dixon C.J. rejected, in effect, the view that provisions such as section 20 of the 1928 Act, in their application to questions of title, confer a discretion as to substance and not merely as to procedure. Smith J. was of the opinion that the view expressed by Dixon C.J. would prevail over that expressed in *Wood v. Wood*.⁹ This will probably prove an accurate prediction in such cases unless the matter is at some time considered in the Privy Council and the more liberal approach is there adopted.

The two conflicting lines of authority seem to rest on differing attitudes to the interpretation of discretions given to courts by statute. On one side stand those who view the uncertainty of a discretion as something to be treated with great suspicion. Preferring to be guided wherever possible by a definite set of rules, they interpret discretions narrowly so as not to trench upon established rules of law and equity. On the other side stand those who, setting less store on strict logic and high precedent, accept readily the responsibility of exercising a discretion, and interpret less narrowly statutes conferring discretions. The line of authority adopting the wider interpretation also seems based on a feeling that problems relating to the ownership of property acquired during marriage by the efforts of both spouses are so dif-

⁵ [1956] V.R. 478.

⁶ [1953] 1 Q.B. 63.

⁷ [1952] 2 Q.B. 489.

⁸ (1956) 30 *Australian Law Journal* 586.

⁹ *Supra*, n. 5.

ferent from those arising in other fields that a completely separate set of principles is required to solve them. The problem most commonly arises in cases in which the property has been paid for with small sums contributed from time to time by each spouse, or with moneys saved or acquired as a result of their combined efforts. It is in cases such as these that a decision based on the proportions in which purchase money has been contributed, or upon the presumption of advancement, or upon a disregard of contributions in the form of effort, may produce artificial and unjust results.

But Smith J. felt that section 7 of the 1956 Act could be distinguished from section 20 of the 1928 Act, and be interpreted so as to give the court a discretion as to substance in relation to questions of title, on the following grounds:

1. While section 20 provided only for summary proceedings, the powers which section 7 confers are expressed to be exercisable in either summary proceedings or an ordinary action,¹⁰ and so, it follows, must affect more than the summary remedy.

2. Section 7, sub-section 2, expressly provides, whereas section 20 did not, that the power to make such order as the judge thinks fit extends to the making of orders for the sale of property and the division of the proceeds of sale or for the partition or division of property. This makes it difficult to construe the section, even in its application to questions of title, as conferring no discretion to make orders inconsistent with ownership as ascertained under the ordinary rules.

3. As section 20 stood, the decisions interpreting it as conferring a discretion as to substance in matters of title left the difficulty that ownership could depend on whether proceedings had been brought under the section or independently of it, unless the controversial decision of the Court of Appeal in *Jess B. Woodcock and Son Ltd v. Hobbs*¹¹ that the discretion could be availed of in proceedings brought independently of the section was correct. So section 7, sub-section 7, which allows the discretion to be exercised in proceedings brought independently of the section, was passed to remove this obstacle, and should be construed as a legislative recognition of the wide interpretation of the statutory discretion which seemed to be established at the time it was passed.

These arguments seem very strong, though probably any court which tended to favour rule rather than discretion might not consider them compelling. It would be preferable, therefore, if the legislature resolved any remaining doubt by an express provision on this problem. In many Continental countries some type of community-property system is in force, often going so far as to provide that all

¹⁰ Marriage (Property) Act 1956 s. 7, sub-s. 6.

¹¹ [1955] 1 All E.R. 445.

property owned by a husband or wife is owned by both. A more moderate approach has been adopted in Sweden where each spouse administers his or her own property separately, but when the marriage comes to an end, whether by death or divorce, each is able to claim a half interest in the assets of the other. So it can be seen that problems relating to marriage property have received special attention in that part of the world. If the wider interpretation of sections such as section 7 of the 1956 Act is adopted, and the court, in exercising the discretion, leans in favour of equality in the case of property acquired by joint effort, as the Court of Appeal did in *Rimmer v. Rimmer*,¹² then our courts may well strike a happy medium.

If His Honour had not been able to discover the actual intention of the parties he would have felt unable to apply section 7 of the 1956 Act because it was passed too late to affect this action, but would have considered himself bound by the decision in *Jess B. Woodcock and Son Ltd. v. Hobbs*¹³ to apply section 20 of the 1928 Act though the proceedings here were not brought under that section. His doubts as to whether that decision would be followed by higher courts in this country may well be justified, but section 7, sub-section 7, of the 1956 Act has removed this problem for Victorian courts by its express provision that the discretion is exercisable in proceedings other than proceedings under the section.

J. S. COX

PAPADIMITROPOULOS v. THE QUEEN¹

Criminal Law—Rape—Consent Induced by Fraud—Misrepresentation as to Marriage

The appellant, a Greek, was convicted of rape by a jury before Gavan Duffy J. His appeal to the Full Bench of the Supreme Court of Victoria² being dismissed,³ he appealed to the Full Bench of the High Court. The jury found that he had represented to an immigrant Greek girl, who spoke little or no English, that they were married when in fact they had merely applied to the registry office and given the required statutory notice, and that as a result of his fraudulent misrepresentation the couple had lived together for a short time and had sexual intercourse. P. had then deserted the girl and gone to Sydney, apparently on hearing gossip as to the girl's prior moral reputation, although he seemed originally to have intended to actually marry her.

The appellant contended that there had in fact been consent to

¹² *Supra*, n. 6.

¹³ *Supra*, n. 11.

¹ [1958] *Argus L.R.* 21. High Court of Australia; Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ. ² *Lowe, O'Bryan and Monahan JJ.* ³ Monahan J. dissenting.