CASE NOTES

THWAITES v. RYAN[1]

Trusts — Beneficial ownership — Doctrine of part performance — Equitable estoppel — Constructive trust.

Litigation between married or unmarried couples over the beneficial ownership of what may loosely be referred to as the matrimonial home has been common in recent years. Special considerations appear to have developed whereby such beneficial interests may be acquired and in *Thwaites v. Ryan* the Full Court of the Supreme Court of Victoria examined these considerations in detail. It is proposed here to consider this case and the law which now applies in Victoria and to discuss some problems raised by it in relation to the law of trusts and in relation to the equitable doctrine of part performance.

The facts in *Thwaites v. Ryan* were not unusual save for the kind of personal relationship that existed between the relevant parties. These facts are as follows. In 1968 Mr Atkins and Mr Bell acquired property situate at 32 Caroline Street, South Yarra ('the property') as joint tenants. Mr Bell died in 1970 and Mr Atkins became sole proprietor of the property. For some years, Mr Atkins had been friendly with Mr Ryan and in or about Christmas 1970 Mr Ryan commenced residence of the property with Mr Atkins. Up until that time Mr Ryan had lived with his wife and children in North Melbourne. In March 1971 Mr Atkins made a will in favour of Mr Ryan and his wife wherein the property was left to them. In January 1981 Mr Atkins altered his will and left the whole of his estate to a niece. Mr Atkins died in 1981, having by then resided with Mr Ryan at the property for over ten years.

In the event that Mr Ryan did not take the property under Mr Atkins' last will he (together with his wife) issued proceedings against the personal representative of Mr Atkins. In these proceedings Mr and Mrs Ryan claimed the property as their own on two separate bases. In the first place, Mr and Mrs Ryan sought specific performance of an oral contract to leave the property to them by will. In the second place, Mr and Mrs Ryan sought a declaration that Mr Atkins had held the property on trust for himself for his life and thereafter for Mr and Mrs Ryan absolutely. Further or alternatively, Mr and Mrs Ryan sought damages for breach of the agreement or for such other relief as may have been appropriate.

The facts relied upon in support of these two claims were virtually identical. The claim in contract alleged an oral agreement made between Mr Atkins and Mr Ryan whereby, in return for Mr Ryan looking after both the property and Mr Atkins, Mr Ryan would be entitled to live in the property while Mr Atkins was alive and that Mr Atkins would leave the property to Mr and Mrs Ryan. The alternative claim alleged that it was the 'common intention' of all parties that Mr Ryan would be able to live in the property and that, after the death of Mr Atkins, Mr and Mrs Ryan would be entitled to the property absolutely. Thus it was claimed that Mr Atkins held the property on trust for himself for his life and for Mr and Mrs Ryan in remainder. The decision in *Thwaites v. Ryan* is in all material respects for present purposes contained in the judgment of Fullagar J. with whom Young C.J. and Starke J. agreed.

In relation to their claim in contract Mr and Mrs Ryan sought to rely on part performance or an estoppel in order to overcome the absence of a memorandum in writing. The acts that were relied on for part performance of the parol agreement appear to have been the change of residence of Mr Ryan and the occasional performance by him of household tasks. The appropriate tests to be applied for an act of part performance are by no means completely settled in Australia but it is thought that part performance would not have been established here on any view of the appropriate law.

Considerable speculation exists as to whether the High Court will follow the 1974 decision of the House of Lords in *Steadman v. Steadman*[2] on the law of part performance. To a large extent that

[1] [1984] V.R. 65.
[2] [1976] A.C. 536.

decision has relaxed the rigour of what is required for an act of part performance. The High Court is yet to decide whether to follow *Steadman v. Steadman* and in *Thwaites v. Ryan* Fullagar J. stated that the Full Court[3] 'is still bound by the orthodox interpretation of *Maddison v. Alderson*[4] which was adopted by the High Court of Australia in such cases as *McBride v. Sandland*[5] and *Cooney v. Burns*[6], and thus he declined to follow *Steadman v. Steadman*. It is interesting that Fullagar J. criticized[7] one view of the law that was stated in *Steadman v. Steadman*. Of part performance generally, Fullagar J. said:

> One must first seek to find such a performance as must imply a contract, and then proceed to ascertain the general nature of such contract as the performance implies, and then to compare that result, if one gets to it, with the general nature of the contract pleaded.[8]

There is little doubt that Fullagar J. did not intend to set out the whole of the law of part performance in such short compass and reference should be made in this respect to what is the most recent decision of the High Court in this area and to leading text-books. In *Regent v. Millett*[9] the High Court decided, first, that it need not be established that the act concerned necessarily implies the existence of the parol agreement concerned; second, that it is enough that the acts were unequivocally and in their own nature referable to some contract of the general nature of that alleged; and, third, that an act of part performance need not be an act in the performance of a contractual obligation and that it appears to be sufficient that the act need only be 'pursuant to the contract'.[10] Thus, the foregoing remarks of Fullager J. are no doubt not intended to set out propositions of law; and it is thought that Fullagar J. meant no more than the method of analysis described, for example, in *Francis v. Francis*[11] by Smith J.

Fullagar J. considered that, apart from part performance, equitable estoppel may have been another way for the plaintiffs to overcome the absence of a memorandum in writing.[12] There are problems associated with establishing an estoppel that may prevent a defendant from relying upon a lack of a memorandum in writing and the better view appears to be that it is preferable to rely upon recognized principles in relation to the kind of behaviour that renders such a reliance unconscionable.[13] This kind of unconscionability sometimes depends in part upon the plaintiff having acted to his prejudice and Fullagar J. considered that Mr Ryan had not acted to his prejudice (detriment) because he had established merely that he had left an unpleasant situation in favour of a congenial residence with an old friend.[14]

The major significance of *Thwaites v. Ryan* lies in the discussion by Fullagar J. of what has often loosely been described as 'constructive trust' cases involving what may also loosely be described as disputes between married or unmarried couples over the matrimonial home. In recent years[15] plaintiffs have succeeded in establishing beneficial interests in such property on the strength of very slight and equivocal discussions regarding the beneficial ownership of such property and financial and other contributions made to the property and in the light of the plaintiff, for example, undergoing some hardship in residing in the property.[16] The foregoing is not intended as a definition of this kind of case, merely a general description of facts commonly involved in cases of this kind. These cases are not

[3] [1984] V.R. 65, 78.
[4] (1883) 8 App. Cas. 467.
[5] (1918) 25 C.L.R. 69.
[6] (1922) 30 C.L.R. 216.
[7] [1984] V.R. 65, 86.
[8] [1984] V.R. 65, 77.
[9] (1976) 133 C.L.R. 679.
[10] *Ibid.* 683.
[11] [1952] V.L.R. 321.
[12] [1984] V.R. 65, 95-6.
[13] See Spry, *Equitable Remedies*, (2nd ed. 1980) 236-9.
[14] [1984] V.R. 65, 96.
[15] *E.g. Hohol v. Hohol* [1981] V.R. 221; *Pettitt v. Pettitt* [1970] A.C. 777; *Gissing v. Gissing* [1971] A.C. 886; *Cooke v. Head* [1972] 2 All E.R. 38; *Last v. Rosenfeld* [1972] 2 N.S.W.L.R. 923; *Binions v. Evans* [1972] Ch. 359; *Hussey v. Palmer* [1972] 1 W.L.R. 1286; *Eves v. Eves* [1975] 1 W.L.R. 1338; *Ogilvie v. Ryan* [1976] 2 N.S.W.L.R. 504; *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685. These and other cases are discussed in Neave, M.A., 'The Constructive Trust as a Remedial Device' (1978) 11 M.U.L.R. 343 and in Neave, M.A., 'The Constructive Trust as a Remedial Device: Kardynal v. Dodek' (1978) 11 M.U.L.R. 580.
[16] *E.g.* in *Hohol v. Hohol* [1981] V.R. 221.

examples of plaintiffs providing all or part of the purchase-money of the property nor are they examples of constructive trusts as traditionally understood in the sense of a trust which will be imposed by a court irrespective of the intentions of the parties.[17]

In *Thwaites v. Ryan* the plaintiffs' claim was that it was the 'common intention' of themselves and Mr Atkins that Mr Atkins would hold the property on trust for himself for life and for them in remainder. It is clear from the pleadings in the case that the plaintiffs framed their action in terms of the decision of O'Bryan J. in *Hohol v. Hohol*. In that case, O'Bryan J. set out substantially as follows the elements of a trust that is applicable in these circumstances[18]:

(1) That there be an actual common intention, whether express or inferred, and usually at the date when the property was purchased, that the claimant should have a beneficial interest in it.
(2) That there be some detriment suffered by the plaintiff.
(3) That it would be a fraud on the plaintiff for the defendant to deny him a beneficial interest in the property.

One result of *Thwaites v. Ryan* is that *Hohol v. Hohol* is no longer an accurate statement of the law in this area. A number of problems arise from the conclusions to be drawn from *Thwaites v. Ryan* and these shall be considered here.

Fullagar J. appears to have reached the following conclusions:

(1) That the kind of trust in issue is a form of express trust and not a resulting, constructive or implied trust strictly speaking;[19]
(2) That a trust has been found in the relevant series of cases on an indulgent view of what evidence will satisfy a court as to the creation of an express trust; the requirement of public policy which justifies such a concession or indulgence is the utility of the marriage relationship[20] (*de facto* or *de jure*) and this concession is restricted to male and female *de facto* or *de jure* married couples and 'cannot extend to all cohabitant friends, any more than it can be extended to all Freemasons or all females, or all people generally, who can say that they have some relationship of any kind with another or others';[21]
(3) That this concession will only be made where the facts are that the trustee *acquired* the property on trust for the claimant; that is, that the 'common intention' (which is the vehicle by which the concession operates) as to the beneficial ownership of the relevant property must arise at or before the time of acquisition of the property by the trustee;[22]
(4) An express trust must be evidenced in writing in order to be enforceable (Property Law Act 1958 s. 53) but will be enforced in the absence of writing where, as in the foregoing circumstances, the trustee acquires the property subject to the trust created by parol because (*Organ v. Sandwell*[23]) it is considered unconscionable in such circumstances that the trustee should rely on the lack of writing and claim the property as his own;[24]
(5) That the concept of detriment referred to in *Hohol v. Hohol* is irrelevant to the formation of the trust in issue here;[25]
(6) That 'there must be found a real and factual common intention in both spouses at the time of acquisition, and there must be some statement or at the very least some unequivocal and expressive conduct of each spouse evidencing his/her intention and his/her knowledge that it is a common intention, and the common intention must be that the acquirer now acquires the property for the benefit of the other spouse as well as himself.'[26]

[17] See generally *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685, and in particular the judgment of Glass J.A.
[18] [1981] V.R. 221, 225.
[19] [1984] V.R. 65, 91-4.
[20] [1984] V.R. 65, 93.
[21] [1984] V.R. 65, 93-4.
[22] [1984] V.R. 65, 92.
[23] [1921] V.L.R. 622.
[24] [1984] V.R. 65, 91 citing Spry, *op. cit.* 238.
[25] This is the only conclusion that can be drawn from [1984] V.R. 65, 89-90 and 95-6. It must be that the 'equitable doctrines' referred to by Fullagar J. at 90 are those of acquiescence, estoppel and fraud generally.
[26] [1984] V.R. 65, 92.

It follows from the conclusion that the trust is express that the declaration of trust must be made for valuable consideration if it is created by parol, for equity will not enforce an express trust in relation to land not evidenced by writing in the absence of the plaintiff having provided valuable consideration.[27]

A number of issues arise from these conclusions in *Thwaites v. Ryan*. First, the vexed question of the characterization of the trust that is enforced in these kinds of cases; second, whether special considerations apply only where the parol common intention arises at the time of the acquisition of property and not thereafter; third, the kinds of relationship that are relevant; fourth, the kind of evidence that is required and, fifth, the relevance of prejudice or detriment.

So far as the characterization of the trust is concerned, the better view is that Fullagar J. conceives of it as an express trust.[28] His judgment should be read bearing two things in mind. On the one hand, an express trust of land, unlike an implied, resulting or constructive trust, requires to be evidenced in writing pursuant to s. 53 of the Property Law Act 1958 and, on the other hand, that an express trust is dependent upon the actual intention of the parties while implied, resulting and constructive trusts are not.[29] This conclusion of Fullagar J. that the trust is an express trust appears mainly from the following passages:

> In the marriage cases the courts have in my opinion extended the area of the fundamental principle which was applied in *Organ v. Sandwell*, that a person who accepts property in a fiduciary capacity cannot set up in himself the legal estate free of the trust, but in my view it did so only by taking a very generous view of the evidence required to establish that one spouse acquired the property on trust for the other spouse as well as for himself. A trust was 'constructed' where the land was, as each spouse knew, acquired for the purposes of the marriage. It is for present purposes unimportant that the trust was 'constructive'. What is important is that equity simply enforced the actual original trust upon which the person accepted the property in the first place; I prefer the view that equity did not here surmount the statute of frauds by relying on any words in it relating to implied or constructive trusts; but that equity held that in the circumstances predicated it was unconscionable conduct of a person to hold the property free of the trust;[30]
>
> It is an implied or constructive trust in the sense that it does not find expression in any of the documents of conveyance and/or acceptance . . . But it is a real and actual trust in the sense that . . . there must be found a real and factual common intention in both spouses at the time of acquisition.[31]

Once Fullagar J. has decided that the trust in issue does not fall outside the statute by reason of it being a resulting[32], implied or constructive trust, that trust must be an express trust and his references to 'implied' or 'constructive' trusts must be references only to the particular process by which express trusts are said to be found in these kinds of cases.

It should be noted that this particular conclusion by Fullagar J. is the same as that which was reached by the majority of the Full Court of the Supreme Court of New South Wales in *Allen v. Snyder*[33]. In this respect it must be said that the English position is extremely confused.[34] There is much to be said for this trust being characterized as an express trust for it is only that kind of trust which depends, as here, solely on the intentions of the parties, equivocally and slightly expressed though those intentions may be.

[27] *Halsbury's Laws of England* (3rd ed.) vol. 38, 813 ff.; *Organ v. Sandwell* [1921] V.L.R. 622, 630; a future property similarly requires consideration.

[28] So far as the trust enforced where a person accepts property on the basis of an otherwise insufficiently evidenced trust is concerned, the Court of Appeal in *Rochefoucauld v. Boustead* [1897] 1 Ch. 196 has also characterized it as an express trust.

[29] See *Snell's Principles of Equity* (27th ed. 1973) 172, 185.

[30] [1984] V.R. 65, 91.

[31] [1984] V.R. 65, 92.

[32] This appears from the approval of Spry, *op. cit.* 238 at [1984] V.R. 65, 92.

[33] [1977] 2 N.S.W.L.R. 685, 689-90, 692-3, 695.

[34] There is no unanimity in England over the characterization of this kind of trust. *E.g.* in *Cowcher v. Cowcher* [1972] 1 W.L.R. 425 Bagnall J. decided that it was a resulting trust; the House of Lords in *Gissing v. Gissing* [1971] A.C. 886, 896, 898, 902, 905 and 906 described it variously as a resulting, implied or constructive trust or as based on a breach of good faith and the Court of Appeal in such cases as *Cooke v. Head* [1972] 2 All E.R. 38 and *Eves v. Eves* [1975] 1 W.L.R. 1338 has described it as a constructive trust.
Nonetheless, the English authorities do not support the proposition that the trust is a form of an express trust in the various cases in issue here.

The view of Fullagar J. that cases such as *Hohol v. Hohol* really depend upon a new attitude towards the evidence of the plaintiff is not a view which is found in any of the previous cases although there are attractions from a theoretical standpoint in denying that a new form of constructive trust has evolved. Fullagar J. ascribes this concession to plaintiffs in this way:

> It seems that this was in part because property is often acquired for the purposes of the relationship itself, and perhaps also because, not only are children the spoilt darlings of the law, but the law will exert itself to favour and foster familial and protective surroundings in which they can spend their tender years, and thus the marriage relationship itself. Thus a statement by a husband, or even a fiance who is later married, that 'I am acquiring the land for both of us', though meaning at the time perhaps no more than 'I am acquiring this land for a matrimonial home', could be treated with very little more evidence as importing that the land was acquired for the purposes of the matrimonial relationship in which both the parties were bound.[35]

There is force in the argument of Fullagar J. that the courts have been indulgent towards plaintiffs' evidence in these cases. Yet it may be appropriate to rest this indulgence upon the close nature of the relationship between the parties so that, for example, comments that might otherwise be insufficient to constitute a declaration of trust may be sufficient in view of the fact that considerations of tact and a close personal relationship and other such matters may require greater significance to be given to particular words or conduct than might otherwise be the case. Parties in a close personal relationship may very well intend to create a relationship of trust by using language that, for example, businessmen would regard as too vague or slight. An unfortunate consequence of confining this indulgence to male and female *de facto* or *de jure* married couples is that it excludes people in other close personal relationships who may well intend the same results to follow from equally vague language.

Similar criticism may be made of Fullagar J. confining this indulgence or concession to cases where the common intention or parol agreement of the parties arises at the time of the acquisition of the property.[36] By 'acquisition' Fullagar J. presumably means acquisition in some formal sense but it will remain to be seen whether, for example, property is 'acquired' for these purposes when a defendant signs a sale note or the like or when he is registered in the Titles Office as the proprietor in the case of land under the Transfer of Land Act 1958. If it is because of public policy that this indulgence is granted it is difficult to understand why the time at which the common intention is expressed should be relevant. It should further be noted that no such restriction was made by the Full Court of the Supreme Court of New South Wales in *Allen v. Snyder*. The majority in that case decided that the common intention of the parties may arise after the acquisition of the property concerned[37] and expressly stated that these rules 'ought to apply indifferently to all property relationships arising out of cohabitation in a home legally owned by one member of the household, whether that cohabitation be heterosexual, homosexual, dual or multiple in nature.'[38] Questions as to the timing of the common intention do not appear to date to have been clearly decided in England although remarks were made in *Gissing v. Gissing*[39] to the effect that the common intention may arise after the property has been acquired; similarly it is difficult to say whether the English authorities confine themselves to male and female married or unmarried couples.[40]

Concerning the kind of evidence that is required in order to find a relationship of trust, Fullagar J. stated that 'there must be some statement or at the very least some unequivocal and expressive conduct of each spouse evidencing his/her intention and his/her knowledge that is a common intention'[41]. This is consistent with the view adopted in *Allen v. Snyder* that the court was 'unable to accept the proposition that a trust of the matrimonial home may be based upon a common intention, which does

[35] [1984] V.R. 65, 93.
[36] [1984] V.R. 65, 92.
[37] [1977] 2 N.S.W.L.R. 685, 691.
[38] [1977] 2 N.S.W.L.R. 685, 689. Compare Meagher R.P., Gummow W.M.C. *Jacobs' Law of Trusts in Australia* (4th ed. 1977) 227.
[39] [1971] A.C. 886, 901 and 908. The remarks at 908 were made by Lord Diplock and may be compared with his forceful and contradictory remarks at 905.
[40] In *Cooke v. Head* [1972] 2 All E.R. 38 and *Eves v. Eves* [1975] 1W.L.R. 1338, the Court of Appeal said that this kind of trust is not confined to husband and wife and applies to other relationships. See generally Meagher, Gummow *op. cit.* 225-7.
[41] [1984] V.R. 65, 92.

not actually exist, but which is ascribed to the parties by operation of law'[42]. The English position is again very difficult.[43]

Previous authorities in this area seemed to require that (as in *Hohol v. Hohol*) the plaintiff incur some detriment or prejudice, such as making financial or other contributions to the property or leaving one pleasant place for a less pleasant place in order to establish a constructive trust. Once however, it is decided that the trust is a form of express trust, detriment or prejudice strictly speaking is irrelevant. In other circumstances where it is sought to overcome the Statute of Frauds, in the case of unconscionable conduct for example, there may be cases where such detriment or prejudice is relevant.[44] Nonetheless, in the case of an express trust which is enforceable in the absence of writing by virtue of the principle applied in *Organ v. Sandwell*, the facts which may have given rise to 'detriment' may support a finding that valuable consideration, which is necessary, may have flowed from the plaintiff to the defendant.

Several general comments may finally be made in respect of *Thwaites v. Ryan*. In the first place, there is no doubt that the decision is surprising in many respects and that the law in this area of the law of trusts in Australia may now be regarded as very confused, bearing in mind the substantial conflicts that now exist between the Full Courts of the Supreme Courts of Victoria and New South Wales and the various differences that further exist between their decisions and recent English decisions. Matters are so confused that probably only the High Court may resolve them. In the second place, there is little doubt that the decided cases in this area are very difficult to reconcile with equitable principles and it is desirable that some limitation be placed on the application of these cases. This is particularly so in regard to the English decisions and it is hence understandable that Fullagar J. should seek to confine them, as it were, to their own facts and in this sense the decision in *Thwaites v. Ryan* is perhaps to be justified on grounds of general policy.

D.M. MACLEAN*

CHURCH OF THE NEW FAITH v. COMMISSIONER FOR PAY-ROLL TAX[1]

Pay-roll Tax (Vic.) — Scientology, whether exempt — Meaning of religion.

In spite of the findings made by Crockett J. in the first instance and on appeal by the Full Court of the Supreme Court of Victoria (the subject of an earlier case note by the author)[2], the Church of the New Faith made an application to the High Court of Australia for special leave to appeal against the lower courts' decision. The resultant unanimous decision by the High Court both to grant special leave and to exempt the scientologists from the pay-roll tax assessment earlier made by the Commissioner for Pay-roll Tax has provided most liberal guidelines as to what will constitute a religious organization in this country. The factual situation allowed the High Court to address itself to an area in which there were very few pre-existing major Australian decisions. The purpose of this case note is to examine the three approaches adopted by the various judges under circumstances where their Honours had considerable room to exercise judicial creativity in shaping the law in this area.

1. *MASON A.C.J. AND BRENNAN J.*

Their Honours commenced with a brief recapitulation of the facts and by acknowledging that the question before them amounted simply to whether Scientology was a religion. Although they proceeded to consider this question, they made the valid observation that a determination of this question one way or the other would not necessarily furnish an answer to the question as to whether the applicant

[42] [1977] 2 N.S.W.L.R. 685, 694.

[43] See the discussion of the various authorities in *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685, at 693-5, 699-701. From a practical point of view it will be difficult to distinguish between cases where an intention is evidenced by 'expressive conduct' and where it is 'imputed' or 'ascribed' to the parties by operation of law.

[44] See Spry, *loc. cit.* 236-9.

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[1] (1984) 57 A.L.J.R. 785 (before Mason A.C.J., Murphy, Wilson, Brennan and Deane JJ.)

[2] (1983) 14 M.U.L.R. 318-25. The facts are set out in some detail in this earlier note.