Laird v Laird [1998] ADR.L.R. 11/25

CA before Stuart-Smith LJ, Thorpe LJ, Mummery LJ : 25th November 1998

LORD JUSTICE STUART-SMITH: I will ask Lord Justice Thorpe to give the first judgment.

JUDGMENT : LORD JUSTICE THORPE:

1. Mr Laird, the husband, is in his early 70s. Mrs Laird, the wife, is in her early 60s. She has a twin sister, Mrs Paternoster. In 1966 the husband and Mrs Paternoster married. That marriage failed in 1976 and they both subsequently remarried. The husband's subsequent re-marriage was to the wife and it took place in 1985.

2. Mr Paternoster died in 1991 and that left Mrs Paternoster the sole tenant of a property, 1 Conyers Close, Woodford Green. At that stage she had developed a cancer which was then thought to be terminal and a family arrangement was made whereby the rift between the twin sisters was repaired and both husband and wife moved to share the accommodation at 1 Conyers Close and to care for Mrs Paternoster. In preparation for that move the husband and wife sold their home in Yorkshire and gave up their livelihood as foster parents.

3. Shortly after their arrival an agreement was reached between the three that Mrs Paternoster would exercise her right to buy from the local authority at a price which reflected her previous years as council tenant. The price was £32,500. £26,000 came from the husband and the wife and Mrs Paternoster provided the balance.

4. The purchase could only go forward with Mrs Paternoster as the sole purchaser and accordingly on 3 February 1992 a deed of trust was entered between Mrs Paternoster, the husband and the wife. The terms of the deed are to this effect:

   "1. Mrs Paternoster hereby declares that she will in her capacity as sole registered proprietor of the property and in her capacity as Trustee aforesaid hold the beneficial interest in the property upon trust as to one-third share thereof for herself absolutely and will hold the remaining two-thirds upon trust for Mr and Mrs Laird absolutely who as between themselves will own a one-third share of the said beneficial interest respectively

   2. Mrs Paternoster and Mr and Mrs Laird hereby declare that they will each pay a third share of all costs damages expenses claims and demands in respect of the property and any tenancies which it may from time to time be subject.

   3. Mrs Paternoster shall not by virtue of her position as sole registered proprietor of the property be required to incur any expenditure in respect of the property unless Mr and Mrs Laird shall firstly provide her with two-thirds of the costs thereof in advance."

5. My Lord, Lord Justice Mummery, has pointed out that this constitutes a bare trust and creates a relationship of tenancy in common between the three beneficial owners in shares of strict equality. It is not in itself a trust for sale.

6. In September 1994 old enmity between the sisters resurfaced. There was a fight. The wife left Conyers Close and retreated to Scotland to her daughter's home. There she received a letter from the husband saying that he intended to divorce her. The divorce proceeded rapidly and by May 1995 a decree absolute was pronounced.

7. The wife was living in difficult circumstances with her daughter. There was no bedroom accommodation for her. She was sleeping on a sofa in the living room. Not surprisingly under such circumstances, on 30 November 1995 a notice of application was issued on her behalf seeking all forms of ancillary relief. She filed an affidavit in support of her application. The husband answered and she replied. It is to be noted that no cross- application was filed on the husband's behalf. By her affidavit in support of her application she made it plain that what she sought was to realise the money that she had invested in Conyers Close. The final paragraph of her affidavit reads: *"Orders sought*

   The sale of the matrimonial home and the proceeds to be divided equally between the Petitioner, Mrs Paternoster and myself. I am then prepared to dismiss my claims for a lump sum order and maintenance."

8. The next stage was the issue of an application for leave to intervene by Mrs Paternoster on 13 October. She supported that application with an affidavit to which both the wife and the husband filed affidavits in response. Leave was duly granted. Seemingly then the case was ready for trial. But curiously on 15 October 1996 the wife issued a notice of application under section 30 of the Law of Property Act 1930. By that application she sought first a declaration that she and the two respondents, her husband and her sister, held as joint tenants in trust in equal shares and, second, that the trust be executed and the property sold forthwith. That notice of application was supported by an affidavit which did no more than recite fundamental facts, all of which had been more fully covered in the evidence filed within the suit. So, I have to observe, what on

earth was the purpose of incurring the additional cost of issuing this seemingly superfluous process? The lawyers responsible have much to answer for.

9. The litigation came on for hearing in front of the district judge of the Bow County Court. The judgment of the district judge was given on 3 March 1997. The district judge by her order declared that the parties were entitled beneficially to a third share in the property absolutely, made a direction in relation to some later expenditure which had been solely financed by Mrs Paternoster, and then by paragraph 3 ordered a sale forthwith, Mrs Paternoster's solicitors to have conduct. Paragraph 4 provided for the division of the proceeds of sale. Paragraph 5 dealt with the division of chattels between the husband and wife. Then followed fairly conventional paragraphs with regard to dismissal of claims, liberty to apply as to implementation, and costs.

10. That order was appealed by both the husband and the intervenor and that appeal came before His Honour Judge Goldstein on 25 February 1998. By his order the appeal was allowed and certain paragraphs of the district judge's order were set aside. In substitution therefor it was declared that: *"...the purpose of the trust created by the deed of trust dated 3rd February 1992 is to provide a home for the parties or any of them for so long as any of them shall still be alive and in occupation of the said property."*

11. Subsidiary orders were made and costs were provided for. Against that order the wife sought leave to appeal and in due course leave was granted by the single judge.

12. The issue has been argued before us today largely concentrating on the superfluous application under section 30, just as the parties concentrated on that issue before the circuit judge. But before coming to consider issues within that province, it does seem to me important to establish the inter-relationship of the two jurisdictions invoked by the wife's two applications. It is clear that husband and wife had created between themselves a status of marriage in 1985 which they dissolved in 1995 and upon that dissolution there came into being rights of application giving rise to duties of determination by the court under the provisions of the Matrimonial Causes Act 1973. Of course within that span of a decade, the spouses had chosen to make a property investment on equal terms and shares with another member of the family, namely the wife's twin sister. But in determining the rights of the parties and their obligations the primary statutory task was to apply the criteria contained in section 25 of the Matrimonial Causes Act. Of course as a prelude to that determination it was perfectly legitimate to investigate the nature of the property investment and to determine what rights and duties each had under that deed of trust and to recognise the rights and obligations of Mrs Paternoster under that deed of trust. But that was essentially a prelude to the determination of how those rights and obligations should be varied by the court in the exercise of its statutory function.

13. It seems to me that this litigation went off the rails with the issue of the second notice of application which unfortunately seems to have diverted all legal effort and ingenuity thereafter into arguing and determining rights under that, as though that was the due end of the process and in itself determinative of the respective rights and obligations of the spouses. The district judge was in no doubt at all as to what she was determining for she opened her judgment, which is transcribed and approved, with the sentence, "This is an application for ancillary relief made by the respondent wife in divorce proceedings". However, she went on to consider the basis upon which the issue was presented for determination by the three counsel involved, namely whether or not, applying the classic authorities in the field of section 30 applications, and peculiarly the decision of the court in **Jones v. Challenger** [1960] 1 All ER 75, the primary purpose of trust for sale had been displaced by proof of some collateral purpose. She determined that it had not. She determined that:
"On the basis of the evidence at the time and taking into account all the circumstances, including the sale of Mr and Mrs Laird's former matrimonial home in Yorkshire and Mrs Paternoster's state of health, I do find that the purpose of the trust at the time the Trust Deed was entered into was to provide a home for all of the three beneficiaries, and to enable Mr and Mrs Laird to care for Mrs Paternoster as necessary.
From that it must follow that the purpose of the trust is at an end, in that Mrs Laird has left the property permanently and Mrs Paternoster no longer requires care."

She continued on the next page: *"Here I do accept that the purpose of the trust is at an end, and therefore the only order that can be made is one for the sale of the property forthwith."*

She then considered two matters which she described as small and made determinations in relation to those, one a loan account and the other two frozen bank accounts, broadly in favour of the applicant wife, and she went on to say that this should be a clean break order.

14. It is manifest from that that she never considered whether, having determined the respective rights and obligations of the beneficiaries under the deed of trust, some adjustment was required in the exercise of her discretion under the Matrimonial Causes Act. However, in fairness to the district judge it is to be noted that the conclusion under section 30 was precisely the conclusion that the applicant wife contended for under the Matrimonial Causes Act, and the respondent husband had not himself within the Matrimonial Causes Act issued any cross-notice of application seeking any relief or argued for any particular conclusion under the Matrimonial Causes Act at variance from the conclusion at which the district judge had arrived.

15. The case before the circuit judge, according to his judgment, proceeded only on the basis of an appeal within the bounds of the wife's application under section 30 of the Law of Property Act. He says at the outset of his judgment: *"This is an appeal under Ord. 37, r. 6 from a decision of District Judge Langley given at Ilford on 3rd March 1997. ... This appeal is limited to her decision under an application under s.30 of the Law of Property Act 1925..."*

16. In the concluding paragraph of his judgment he said, *"The net result of this judgment is that this appeal is allowed. The order as far as s.30 is concerned is set aside and the matter of the ancillary relief can and should proceed on that basis."*

17. It seemed to me, from a reading of the judgment alone, that the judge had overlooked the fact that the determination he had made was of very little value to the parties since it in no way determined the litigation and left the all important question of what should be the court's discretionary conclusion under the Matrimonial Causes Act completely unaddressed.

18. But Miss Langridge for the husband says that this was a result of some sort of concession made by counsel for the wife, who specifically said that he did not pursue any appeal under the Matrimonial Causes Act - he appealed only under the section 30 application - and that at the end of the case he conceded that the issue under the Matrimonial Causes Act had effectively been either determined or put out of effective pursuit by the judge's adverse conclusion. If there was such a sweeping concession it was most unwise and it certainly is unrecorded in the judge's judgment.

19. Before coming to consider the judge's criticisms of the district judge I would like to record that it was agreed before the court below that the application originally issued under section 30 had effectively become an application under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, which provides by section 14(4) that: *"The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this Act."*

20. It was also agreed between counsel in the court below that the range of section 14 extended to a bare trust and conferred upon the court a power to make any order that it deemed appropriate under section 14(2) including an order for sale.

21. Turning to the judgment below, it is plain from the judge's record of Miss Langridge's submissions that she did make some attack on the district judge's factual summary. As the judge recorded the submission, she said that the summary of the evidence of the parties did not accurately reflect the evidence that they had given and that the district judge did not say what evidence she had accepted, what she had rejected and, if she did reject any, upon what basis. The judge was passingly critical of the district judge's factual investigation when he said later that her assessment of the evidence given by the parties had been "skimpy and sketchy in all the circumstances".

22. But Miss Langridge, in supporting his judgment in this court, said that his essential conclusion was that the district judge had failed to carry out a profound analysis of the relevant facts and circumstances in order to allow her to arrive at a legitimate weighing of the balance under sections 14 and 15 of the statute. Further, Miss Langridge said that, if she fails in that submission, the district judge was manifestly wrong to have said, as she did at the conclusion of her judgment, that a finding that the purpose of the trust was at an end led to only one conclusion, namely immediate sale. Plainly authority shows that, even if it is established that the purpose of the trust is at an end, still the court must exercise a discretion as to what order is appropriate in that circumstance.

23. The judgment of the circuit judge is lengthy, extending to 38 pages, mainly because it contains very extensive citations from a number of authorities. At the end of those citations the judge said at page 33 - and this seems to me to be the very heart of his judgment: *"It is right, even looking at it from the district judge's judgment, that each party did say different things at different times... One thing is absolutely plain, during the course of their evidence each one of them said words to the effect, or words [that] the learned district judge could and should have inferred, that each of them when they entered into that deed thought they were entering into it for life. ...*
Looked at it in that way and not the rather glib way, I have to say, that the learned district judge did, it is absolutely plain that any judge could see what the underlying or collateral purpose of this deed of trust was. It was that the property should be a home for each of them until the last survivor dies or voluntarily gives up possession of the property. In my judgment, any view to the contrary flies in the face of the clear evidence in this case."

That is an extraordinarily strong conclusion to express. How is it justified? The judge had recorded at pages 31 and 32 the factors which he regarded as relevant to the discretionary conclusion. He referred particularly to the ages of the parties. He referred to Mrs Paternoster's health. He referred to the fact that the husband and wife had sold their property and given up their livelihood in order to invest in Conyers Close and he referred to the fact that Mrs Paternoster had herself given up a secure council tenancy. However, those very features seem, not surprisingly, to have weighed also with the district judge who in her judgment had referred to the oral evidence of the three parties and had concluded that they did not discuss the events, that they did not turn their minds at all to what would happen in the circumstances which had arisen. She then referred to Mrs Paternoster's health and recovery. She referred to the ages of the parties. She referred to the security that Mrs Paternoster might have been concerned to lose and similarly the security that the husband and wife had lost. She then arrived at precisely the opposite conclusion to the circuit judge.

24. I do not myself see that the more extensive review of authority carried out by the circuit judge justified a view different from that assumed by the district judge in her briefer review of authority. In relation to any formulation of a discretionary conclusion, it is obvious that it was the district judge who saw and heard the three parties and who was best placed to evaluate intention and purpose. Certainly the summary made by the circuit judge at page 33 as to the evidence of the parties and the basis on which they entered into the deed seems to be erroneous.

25. For my part I am not persuaded that the criticisms that the circuit judge expressed of the district judge are well-founded and certainly I would not support the strong language in which they are expressed. However, it is hard to resist Miss Langridge's submission that the district judge was wrong to have concluded that she had nothing to consider once she accepted that the purpose of the trust was at an end. But in the circumstances it does not seem to me that that consideration is of much relevance, for what manifestly must be completed in this case is a proper review of the section 25 criteria to determine how matters should stand between these two spouses, particularly in relation to the wife's frozen capital investment.

26. I am clear in my mind that the order made by the circuit judge is indefensible and must be set aside. I am equally clearly that, unless the parties can arrive at some compromise, there must be a remission to a district judge to determine the wife's application for ancillary relief which has never been properly or fully determined. In my opinion the lawyers' fault in filing the wife's second application has led to a waste of costs which, although it has not been quantified for us, is probably by now at a level that threatens the investment of all three of these parties. Before any further costs are incurred, I would urge the parties to consider submitting the remaining issues for mediation within the ADR scheme of this court. There are a number of highly qualified family law mediators who are available on a pro bono basis to help the parties and the costs of the ADR process itself are covered by existing legal aid certificates.

27. So I would urge that course on the parties. But for my part I would allow the appeal, set aside the order of the circuit judge and remit the notice of application for ancillary relief for final determination.

LORD JUSTICE MUMMERY: I agree : **LORD JUSTICE STUART-SMITH**: I also agree.

Order: Appeal allowed as per judgment; costs of appeal be for appellant; costs before HHJ Goldstein be for respondent and intervenor; costs before DJ Langley reserved to final determination of the s.25 application.

MR GEOFFREY AMES (instructed by Messrs Richard Sandler & Co, London E8 1HA) appeared on behalf of the Appellant (Respondent).
MISS NIKI LANGRIDGE (instructed by Messrs Coldham Shield & Mace, London E17 3AT) appeared on behalf of the First Respondent (Petitioner) and (instructed by Messrs Rayner Hudson Bennett & Co, London E4 9PT) appeared on behalf of the Second Respondent (Intervenor).