

Land law cases analysis



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Kingsnorth Finance v Tizard [1986] 1 WLR 783

Mr and Mrs Tizard owned a matrimonial home on unregistered land. Mrs Tizard had contributed to it although it was in Mr Tizard's name. Due to the breakdown of the matrimony Mrs Tizard spent time away from the home but returning daily to care for their children and to prepare herself for work and so often spending nights there to care for the children and leaving clothes at the property. Mr Tizard obtained a loan to which it was thought that the property was solely occupied by him and his children. Mr Tizard informing the surveyor that he and his wife were separated and that she was living outside of the property with someone else. The loan was consequently granted and Mr Tizard defaulted. The lenders sought to enforce the charge and the question was whether his wife's equitable interest was defeated. This depended on whether the lender had actual or constructive notice of her rights. It was held that the plaintiff lender did have constructive notice of the wife's rights. Their agent, the surveyor had been aware that a wife existed even though having been told the applicant was single and should have informed the lender of these contradictory facts. Given the wife's confirmed existence further investigations should have been carried out by the plaintiffs. The occupation of the children in the house should have further alerted the surveyor as to possible occupation by their mother; Mr Tizard's wife. Since the plaintiffs should have carried out further investigations as to the matters, they had constructive notice of the wife's rights. Further, the fact that the inspection had been prearranged did not, in these circumstances, amount to a reasonable inspection.

Counce v Counce [1969]1 WLR 286

A and B, intended to buy a property as a matrimonial home. It was agreed that a mortgage would be acquired in B's name and that the property would be conveyed into their joint names. B contributed £479.00 towards the cost of the property. But in breach of the agreement A obtained a conveyance of the property into his sole name. Without B's knowledge A effect legal charges in favour of the bank to secure the amount lent to him. A became bankrupt and B commenced proceedings claiming that she had an equitable interest in the property and so that she was entitled to such interest free from the claims both of A's trustee in bankruptcy and of the bank. The bank as mortgagee issued a summons seeking possession of the property. B claimed that A had held the house on trust for herself and the banks, also that the banks' mortgages were charged only against the husband's beneficial interest and that her interest had prior over that of the banks. She further claimed that the bankers had had constructive notice of her equitable interest in her property as she had held an account with them.

It was held that the bank took free charge of her interest unless they had constructive notice of it. An enquiry into the wife's account was not an enquiry the bank ought reasonably to have made and so there were no special facts which should have brought her interest to their attention. Mortgages were not affected with equitable interest of people residing in their property where that residence was not inconsistent with the title offered as security. They were not fixed with contrastive notice by failure to enquire. The mere fact of it being a matrimonial home did not raise a need to enquire; therefore, B's interest was not free from the legal charge.

In older cases the problem had mainly been that the occupier, usually a wife with a beneficial interest in the family home, had been living with the registered proprietor in circumstances which are not indicative of any hostile claim. But in cases of unregistered land Stamp J in *Caunce* held that there would not be constructive notice of such a wife's interests. In *Williams & Glyn Bank v Boland* [1], the House of Lords faced similar facts in registered land. Lord Wilberforce was explicit in rejecting the relevance of the doctrine of notice. He was derisive as to the suggestion that a spouse may be subject to special rules and rejected the suggestions that actual occupation excludes occupation that is consistent with the mortgagor's title. This test would be difficult to apply in modern circumstances as wives and other occupiers are likely to have proprietary interests.

But two things must be distinguished; the first is in regards to a person who is living on land in circumstances illustrated in *Caunce* and *Boland*. That person cannot be denied to be in actual occupation in accordance with the interpretation of Stamp J: *"If there is actual occupation, and the occupier had rights, the purchaser takes subject to them..... no further element is material."* Stamp J holding favour of the bank, also based his decision on the fact that it was quite unreasonable to expect a bank to make enquiries beyond the legal owner of the property, taking the view that; [2] *"it is not in the public interest that the bank mortgages should be snoopers and busybodies in wholly normal transactions of mortgage."* [3]

The courts have already concluded that where there is doubt as to whether there was actual occupation then it is looked to the question of whether the occupation would have been obvious to a purchaser.[4]Turning to *Tizard* ,

Judge Finaly QC was clear that there was actual occupation as the *Boland* test was applied even though the facts concerned unregistered land. Although the Mrs Tizard was no longer living there, her daily activities must be regarded sufficient to justify the result.

Concluding

The case law involving both unregistered and registered land before the 2002 Act suggests that proper enquiries were considered necessary. The leading authority in respect of unregistered land was *Counce* where it was thought that notice of the presence of the wife did not of itself give the bank notice of her interest in the property. But in *Tizard* it was decided that the mortgagee may be fixed with notice of the co-owner's interest by her actual occupation. In *Tizard* it was held that the bank did have constructive knowledge because the inspection took place on a Sunday in dubious circumstances. So far as registered land is concerned it will be a rare case where the beneficiary will both be in actual occupation and unaware of the bank's charge. However, there may still be cases where the lender is ignorant of the beneficiary's interest. The Law Commission recommended^[5] that occupation of the beneficiary claiming a beneficial interest should have been apparent on reasonably careful inspection and this recommendation has now been incorporated in Schedule 3 of the Land Registration Act 2002 in respect of registered dispositions. As emphasised by the Law Commission it was knowledge of the occupation that was important not knowledge of the interest claimed. In conclusion, the law as enacted in the 2002 Act combined with the cases since *Boland*^[6] gives the lender a high degree of protection. Banks are likely to make standard enquiries and any

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failure to disclose will enable them to take free of the beneficiary's interest where, for example, a wife knows that her husband is charging the property. There may still be exceptional cases where the wife neither knew nor ought to have known of the husband's charge over the property or where the wife is in occupation through an agent[7] whose relationship to her is not obvious to an outsider. However, those cases are likely to remain rare.

Considering the facts of these cases from a modern perspective; the problem here is the matter of presumption as well as occupation. The operation of presumptions in English law is problematic. There are situations established by case law in which it is presumed that the transfer of property manifests an intention to create a gift of that property. The two most usual cases are the transfer of property from father to child and from husband to wife. So the use of presumption in society today is questionable. There is no logic behind the reasoning that a presumption may exist behind the transfer between father and child if the transfer may not necessarily exist between mother and child. In the times when presumptions were created it would be thought natural for the court to assume that a man would be obliged to provide for his wife and children. So it was presumed that a transfer of property to a wife or child was thought to be part of his obligation to maintain them. Yet this presumption did not exist between a wife and her husband as it was thought that women did not usually have a property of their own. At this time husbands and wives were thought to be one person[8] as the wife was merely "*the shadow of her husband*". [9]

Caunce very much reflects an era where women were considered to rarely own property of their own and were not often thought of as earning incomes

and so were reliant on either their husbands or fathers. The presumption of advancement between husband and wife belonged to an era where men were expected to look after women for the above reasons. It was only with *Caunce*, in 1969, that wives were finally accepted by English law as not being solely shadows of their husbands. This meant that for the first time women were entitled to have separate rights to property outside of the rights of their husbands. In 1970 with the influence of Lord Reid in his enlightened approach to rights of spouses in the matrimonial home, *Pettitt v Pettitt* [10] considered for the first time all the circumstances in recognising the existence of rights in the home, even at a time when women were not considered to have rights independent of their husbands.

The matter of the juxtaposition of a woman's role in society and so her influence upon mortgage transactions due to her possible proprietary rights in property is not the sole principle to be considered in the light of these two cases. Due to the benchmark decision of *Boland* it was accepted that the restrictive approach taken in *Caunce* was no longer applicable and the ambit of reasonable enquiries extended to making enquiries of all occupiers of the property, despite the vendor also being in occupation.[11] The full extent of the purchaser's task, considered in *Tizard* meant that the idea of investigations into all occupants of the household was now embraced. This meant that recognition was given to those living within a household living with the legal owner of the house may have rights deserving of protection when the property is mortgaged without their consent.

Reference list

Journals

- Hanbury, W., *Overriding Interests under the Land Registration Act, 2002 – the Lender’s Perspective*, 2005. 3 EMIS Property Service.
- Shea, T., *Overriding Interests in Unregistered Land*. Journal of International Banking Law. 1 (2), 125 – 127
- Thompson, M. P., *The Purchaser as Private Detective*, 1986. Conveyancer and Property Lawyer, July – August 283 – 28

Bibliography

- Hudson, A., *Equity and Trusts*, 2004. Third Edition. Cavendish Publishing, London.
- Pearce, R & Stevens, J., *The Law of Trusts and Equitable Obligations*, 2002, Third Edition. Butterworths, London.
- Smith, R. J., *Property Law*, 2003, Fourth Edition. Longman, London.
- Thompson, M. p., *Modern Land Law*, 2003. Second Edition. Oxford University Press

Footnotes

[1] (1981) AC 487; (1979) Ch 312

[2] Thompson, M. p., *Modern Land Law* at page 53

[3] *Counce v Counce* [1969]1 WLR 286 at 294

[4] Analysis of Mustill LJ in *Lloyds Bank v Rosset* (1989) Ch 350

[5] In “ *Land Registration for the 21st Century*” (Law Com 254).

[6] Ibid 1

[7] Per Lord Oliver in Abbey National BS v Cann (1991) 1 AC 56

[8] Hudson, A., Equity and Trusts at page 318

[9] Ibid 3

[10] (1970) AC 777

[11] Midland Bank Ltd v Farmpride Hatcheries Ltd (1981) 2 EGLR 147