MAZO.

v.

MAZO

Reasons for Judgment

C.J.

12 September 1949

APPEALS 13 C 18

MAZO v. MAZO

ORDER

APPEAL DISMISSED WITH COSTS.

MAZO v. MAZO

JUDGMENT (ORAL). DIXON J.

I agree.

MAZO v. MAZO

REASONS FOR JUDGMENT (ORAL). LATHAM C.J.

This is an appeal from a decision of the Supreme Court of Western Australia, His Honour Mr. Justice Wolff, in a case in which the plaintiff Morris Mazo claimed as against his wife Zlata Mazo that he was entitled to two pieces of land of which she was the registered proprietor. The plaintiff husband claimed a declaration that the house and land, No. 96 Monash Avenue, Hollywood, and certain other land, No. 35 Fairway, Nedlands, were the property of the plaintiff. The claim succeeded and the learned judge gave judgment for the plaintiff.

There are two grounds of appeal. The first is that the finding of the learned judge that it was intended by the parties when the properties were purchased and placed in the name of the defendant that they should nevertheless belong to the plaintiff was against evidence and the weight of evidence. The property at Hollywood was bought in February 1939 and the property at Nedlands was bought in August 1940. The evidence of the plaintiff is not absolutely clear on all points of detail, but the substance of it was accepted by the learned judge, supported as it was by other evidence of Mr. Routeman and Mr. Southwood, which His Honour accepted as true. The substance of that evidence was that in 1928 the plaintiff husband purchased a property in Perth known as the Bon Marche for £42,000. A considerable amount of the purchase money was left outstanding upon mortgage. At the time when the properties at Hollywood and Nedlands were purchased there were arrears of interest outstanding upon that mortgage. The plaintiff, it was found, and there was evidence to support that finding, provided the money for the purchase of the two properties in question and procured them to be put in his wife's name. The property at Hollywood was a house which be-

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came the residence of the parties, and at Nedlands the property which was bought consisted of a house and an adjoining vacant block of land. The evidence was that the house was to belong to the wife, but the husband's evidence was that the vacant block of land, upon which he subsequently erected flats known as the Oxford Flats, should be the property of the husband. Thus the wife became the registered proprietor both of the house at Hollywood and of the vacant land at Nedlands. The evidence of the husband was that he placed the properties in his wife's name because if the mortgagee of the Bon Marché property, Mrs. McAuliffe, had discovered that he owned other property, she might have required further security for her mortgage, the interest on which, as I have already stated, was in arrear when the properties in question were bought.

The plaintiff gave evidence which was accepted by the learned trial judge that the reason why he put these properties in the name of his wife was the reason stated, namely that he did not desire to have other property in his name over which security might have been sought by the mortgagee of the Bon Marché property. He said, speaking to a witness, Mr. Southwood, "If I had given all my assets as security, I could not build the Oxford Flats; it hampers a man." The learned trial judge accepted the evidence of the plaintiff as to his intention, and also accepted the evidence of the plaintiff that he told his wife what he was doing and why he was doing it. This evidence was supported by the evidence of Mr. Routeman, who gave evidence to the following effect. Mr. Routeman knew both parties, and he speaks of the property at Fairway, Nedlands. He says "They explained [that is the husband and wife] that they had to buy the block as well as the house and Mrs. Mazo was buying the house for herself and Mr. Mazo

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the block for himself". Then he further says that Mrs. Mazo said the flats at Fairway were Mr. Mazo's. "She put the income from the flats in her income tax return, and by doing so she had to pay higher income [tax] and at a higher rate ..... There were always arguments about it and she asked me to try and get Mazo to take the flats in his own name." Similarly, Mr. Southwood, who was an accountant employed by the parties in relation to income tax, says that it would be in 1942 or 1943 that Mrs. Mazo "asked me to ascertain how much should be paid [that is, in income tax] by Mr. Mazo in view of the fact that the Oxford Flats income belonged to him ..... She said the flats had been put in her name and they were not hers ..... On a number of occasions Mrs. Mazo told me 96 Monash Avenue belonged to her husband." Accordingly there certainly was evidence which, if believed, justified the finding of the learned judge that it was the intention of the parties that, though the legal title to these two properties should be in the name of the wife, the husband should have the beneficial interest.

The second ground of appeal is that the transaction consisting in the purchase of the properties and placing them in the name of the wife was tainted by illegality, and the ground of appeal is stated in these words :-

> "That admissions of the Respondent (Plaintiff) disclosed that he had registered the lands in question in the Appellant (Defendants) name for the purpose of defeating delaying or hindering his creditors and in consequence the Learned Trial Judge was wrong in law in holding that the Respondent (Plaintiff) was entitled to the relief claimed."

One must begin the consideration of this part of the case by reference to the law which applies when a husband purchases property or makes an investment in his wife's name. The rule is that a gift to her is presumed in the absence of evi-

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dence of an intention to the contrary. I take the law so stated from the Laws of England, 2nd Edn., Vol 16., p. 663. In this case the husband purchased property and procured it to be placed in his wife's name. There was therefore a presumption of a gift. Therefore in these proceedings the wife begins with that presumption in her favour. The plaintiff husband seeks to rebut that presumption by stating the circumstances in which the properties were placed in her name in order to show that it was the intention of both parties that she should hold the property for him. According to the defendant wife these circumstances show that the object of the transaction was to defeat or delay a creditor, namely, the mortgagee of the Bon Marché property and/or to make a false return of income tax, and possibly to evade the payment of income tax. The question of the relation of this transaction to the law with respect to income tax has been very fully and carefully argued. There is no evidence that any tax in total was evaded. I say "in total", adding the amounts payable by the husband and wife together, - there is no evidence that there was any object of evading payment of income tax so that the parties together would pay a less sum than was justly exigible. There was also in my opinion no evidence that either party had any idea of evading income tax or of deceiving the taxation authorities. One must judge this matter, not merely by looking at the result, but by seeking to ascertain the intention. Here no result beneficial to the parties in relation to income tax was in fact achieved by the transaction, and it is, I think, not shown that either had any intention of deceiving the taxation authorities. By arrangement between the parties the rents from Oxford Flats were returned as the wife's income, but the husband was to repay to her the tax which she paid on

that income. The only concern of the parties with reference to income tax was in my view related to the question of how much the husband should repay to the wife. There was no evidence showing that the act of placing the properties in the name of the wife was animated by any intention to defeat the application of any of the provisions of the income tax legislation. Mr. Southwood's evidence supports that opinion. He went to the income tax authorities and explained on behalf of the parties that though the title to Oxford Flats was in the name of the wife the husband received the income. He was told that in the absence of a document evidencing a trust the income should be returned as the income of the wife. That interview, it is true, took place at a later stage, but there is no reason which can be suggested why it should not be regarded as a true statement of the facts which he was authorised to communicate to the Taxation Department. In my opinion the arrangement between the husband and wife as to income tax was a separable and divisible part of the transaction. The distribution or apportionment of income tax was not one of the objects which the transaction was designed or intended to achieve.

As to the other matter relied upon, namely alleged intention to defeat and delay a creditor, namely the mortgagee of the Bon Marche buildings, the evidence accepted by the learned judge shows that the plaintiff was afraid that if the mortgagee became aware that he had other property the mortgagee would seek to obtain security over that property. It was for this reason, and not for the purpose of evading or delaying payment of either interest or principal, that he put the properties in his wife's name. All the evidence which was given on the subject showed that he expected to be able to pay off the mortgage and in fact he did so. There

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was no evidence that the intention of the plaintiff was to avoid or delay paying either the arrears of interest or future interest or the principal. Accordingly, in my opinion the learned judge rightly held that the illegal intention alleged or suggested was not shown to exist. In this view it is unnecessary to discuss the principle stated in PAYNE v. McDONALD, 6 C.L.R. 208 and PERPETUAL EXECUTORS & TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. WRIGHT, 23 C.L.R. 185; and see DONALDSON v. FREESON, 51 C.L.R. 598; DREVER v. DREVER, 1942 A.L.R. 446 in this Court. It would be necessary to consider the principle laid down in those cases only if it were held that the alleged illegal intention actually existed. In my opinion the appeal should be dismissed with the natural consequence as to costs.

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