IN THE HIGH COURT OF AUSTRALIA

ASKEW

V.

ASKEW AND ANOR.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Friday, 22nd November 1957

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

ASKEW

v.

ASKEW AND ANOR.

ORDER.

Decree of the Supreme Court varied by deleting so much thereof as declares "that the Defendant Ivy Lillian Maude Askew is a trustee for the Plaintiff of the estate in fee simple in the said lands of which she is the registered proprietor as aforesaid as a joint tenant with the Plaintiff". Otherwise appeal dismissed with costs.

ASKEW

v.

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JUDGMENT

DIXON C.J.
KITTO J.
TAYLOR J.

ASKEW

v.

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The appellant and her brother, the first-named respondent (hereinafter referred to as the respondent) are registered under the provisions of the Real Property Act, 1900, as the joint proprietors of a parcel of land at Dee Why near Sydney. The circumstances under which they became so registered are unusual and led Roper J., after hearing the evidence in a suit instituted by the respondent, to conclude that the appellant has no beneficial interest in the property and that her interest was at all material times held by her by way of security only. By the decree which disposed of the suit he so declared and this appeal is brought in an attempt to set the decree aside.

Upon the land is erected a cottage and, originally it was purchased in the joint names of the respondent and his first wife as their matrimonial home. On 22nd October 1948, however, the respondent transferred his interest in the land to his wife. During this year, it appears from the evidence, the respondent suffered a nervous breakdown and, at various times during the year, he received treatment, as an inmate, for his condition in three different institutions in Sydney. He received this treatment prior to 22nd October 1948 and on that day, after executing the instrument by which his interest in the land was transferred to his wife, he left Sydney with the appellant for a sea voyage to Perth. Upon his return he again entered hospital for treatment and he appears to have been in hospital in 1949 during January and February and, again, during April and May. Upon his discharge from hospital in May 1949 he returned home to Dee Why and found the home locked up and his wife missing. The respondent entered the house and since then he has continued to live there. About the time of his discharge from hospital on this occasion the appellant went to live with him and she continued to live in the home at Dee Why until February 1956 when the respondent, being free to do so, remarried.

Shortly after the respondent returned to Dee Why in May 1949 he commenced proceedings against his wife claiming that he was beneficially entitled to a half share in the property. The basis of this claim was that the transfer to her of his interest was executed at a time when he had no proper understanding of what he was doing. The respondent's claim ultimately became the subject of a compromise and, in May 1951, his wife, in pursuance of terms agreed upon, entered into a contract to sell the property to him and the appellant jointly for the sum of £4,800. Subsequently the contract was carried into effect and the respondent and the appellant became registered as joint proprietors as hereinbefore appears.

But it is important to observe that the terms of compromise were agreed upon only after protracted negotiations and the evidence concerning the various discussions which took place throws considerable light upon the intentions and desires of the appellant and the respondent and also of their father and mother who became financially involved in the final settlement.

It should be said at once that the respondent did not finally recover from the effects of his nervous breakdown until some time in 1953, that is to say, some considerable time after his claim had been compromised. In 1951 his condition appears to have been such that he took little, if any, part in the discussions which took place from time to time concerning the offers and counter-offers which were made, or, concerning the financial arrangements which were envisaged as necessary to carry any compromise into effect, though he insisted, at all times, that he was beneficially entitled to a half interest in the property and that negotiations with his wife should be conducted on that basis. The appellant herself said that at this time the respondent "was in no position for discussing anything" and though this may overstate the effect of the respondent's illness there is, no doubt, a good deal of truth in the suggestion that he was quite passive concerning the details of the negotiations and the necessary financial arrangements. In

the main they were left to the appellant and, in a lesser degree to her father.

Negotiations for settlement commenced in 1950 and the first suggestion made by the respondent's wife was that the property should be sold and one-third of the net proceeds paid to the respondent. This was not acceptable and enquiries were made to ascertain whether the respondent's wife was willing to sell the property to the respondent and, if so, for what amount. In reply an offer was made to sell the property to the respondent for £5,000. This offer was made on the basis that the property was worth £7,500 and that the wife should receive two-thirds of this sum. It was, it will be observed, substantially the same as the first offer except that the respondent's wife placed a specified value upon the property. Some discussion took place concerning this offer and as a result of a suggestion made by the solicitor who was then acting for the respondent, the appellant interviewed a Mr. Brown who was the Manager of the Dee Why branch of the Bank of New South Wales. This she did in an attempt to ascertain the extent of the accommodation the bank would be prepared to provide upon the security of the property. Mr. Brown was first approached by the appellant at the beginning of November 1950. He inspected the property and, having valued it at £6,000, intimated that the bank would be agreeable to advance the sum of £2,500. On the strength of Mr. Brown's valuation a counter-offer was made to the respondent's wife to purchase the property for £3,000. In effect this offer was made on the basis that the respondent was entitled beneficially to a half interest in the property and that his wife was entitled to £3,000 for her half interest. This offer was rejected by the respondent's wife and thereafter the negotiations were, for a time discontinued. They were, however, resumed in April or May of 1951 and, ultimately, the plaintiff's claim was compromised on the terms already mentioned. The discussions which led to the making and acceptance of the offer evidenced by these terms indicate that the parties were, finally, prepared to reach a settlement on

the basis that the property was worth £7,500, that the respondent was beneficially entitled to a half interest in the property and that his wife should be paid an appropriate sum for her half interest. The price agreed upon was £4,800 which represented half the agreed value of the property, namely, £3,750 together with the sum of approximately £820 to reimburse the respondent's wife for moneys paid by her to discharge a mortgage on the property and a further small amount for furniture then in the premises and which was claimed by the wife as her property.

With this brief history of the matter in mind it is convenient to come to the evidence of the discussions concerning the manner in which the title to the property should be taken. There is, it may be said, some confusion among the witnesses on this point. The respondent's solicitor says that the matter was discussed late in November 1950 when the property was under offer to the respondent for £5,000. He said that at that time he intimated that if the proposal "went ahead" it would be necessary for him to know in whose name the property should be purchased. According to him the appellant said "It should be in Dad's name" but her father said that he was too old and that it should be in her name. She, it is said, refused to have the property in her name and then said "If Dad won't have it in his name it will have to be in the name of Jack and myself". The solicitor further deposed that he had a recollection that the father had said that it was not worth while "putting the property in Jack's name because of his state of health".

It was not suggested that the respondent, who was present, took any active part in this discussion although it is apparent that up to this time what was contemplated was that the respondent should acquire the property for himself. This is abundantly clear from a letter written by the solicitor on 10th November 1950 by which he informed the respondent of the progress of the negotiations and of the instructions which

he had received, apparently on behalf of the respondent, directly from the applicant. After referring to the earlier offer of the respondent's wife to submit the property to auction and to pay one-third of the net proceeds to the respondent the letter proceeded "The writer was then instructed to ascertain if Mrs Askew was prepared to sell the property to you and to inquire the price at which a sale could be effected". The letter also dealt with the later developments and informed the respondent that Miss Askew had "instructed the writer to offer Mrs Askew a total sum of £3,000 for the property". Again it is clear from the appellant's evidence that when she first interviewed Mr Brown on 6th November 1950 she did so on behalf of her brother. No doubt, after this interview, it was hoped that it would be possible to acquire the property for an outlay of £3,000 and if this could have been done only a small sum would have been required to supplement the amount which the bank was prepared to provide. Indeed the appellant, on her brother's behalf, endeavoured to obtain accommodation to the extent of £3,000 and if she had been successful in this endeavour no other assistance would have been required by the respondent to purchase the property at this figure. According to the appellant, however, Mr Brown was reluctant to commit the bank to make an advance to the respondent alone and she appears to have made it clear to him that there would be no difficulty in making arrangements acceptable to the bank. Indeed she told Mr Brown that if it was considered inadvisable to place the title in the respondent's name "the family would secure the home in some other member's name with her". This of course may have been the real reason why at this stage, or very shortly afterwards, a decision was made that if the property could be acquired the title would be taken by the appellant and the respondent as joint tenants. But, at the best it was a decision which was made for, and not by, the respondent. That much is beyond doubt. [There can be no doubt that some discussion on this topic must have taken place in November or early in December, 1950 for the written proposals

for settlement were prepared which incorporated the offer of the respondent's wife to sell the property for £5,000 and these terms contemplated a sale to the respondent and appellant jointly. But it is equally clear that there must have been other discussions in which both the appellant and her father took part. Indeed, each of them says that there were though it is possible that there is some confusion in their minds between the initial discussion and discussions which took place at a much later date. When it was known that the sum of £4,800 would be required to carry the compromise into effect there must have been, and it is alleged that there were, other discussions within the family circle with a view to deciding what could be done to help the respondent. Thereafter, it is said by the respondent and both by the appellant and her father that a further discussion took place in the solicitor's office. This was after it was known that the appellant and her father and mother would be financially involved in the settlement to a substantial extent. The evidence of these witnesses concerning the conversation which is said to have taken place on this occasion is, except as to one matter, substantially the same. The initial suggestion, said to have been made by the solicitor, was that because of the respondent's state of health and because his first marriage was still subsisting, the property should be put in the father's name. But the father was not willing for this to be done and suggested that the appellant's name should be used. She in turn, according to her evidence, refused to take the title in her name alone and so it was decided that both her name and the respondent's should be used. Both the respondent and his father maintained that it was expressly said that this arrangement was to provide security for the money to be advanced by the members of the family. This, however, is strenuously denied by the appellant.

There was a further conflict between the appellant on the one hand and her brother and father and mother on the other. The evidence of the respondent and of his father and mother, if believed, establishes that the contributions made to

enable the compromise to be carried into effect were made by way of loan. This, the appellant again denies. But there was a number of discussions in the family circle concerning what should be done to help the respondent and there is little room for doubt, as the learned trial judge found, that the contributions were made by way of loan to assist the respondent. This conclusion is supported by a number of considerations appearing in the evidence.

It will be seen that the dispute between the parties is essentially one of fact. And, it may be added, the case presents features which make it one in which the opportunity of seeing and hearing the witnesses conferred a distinct advantage upon the learned trial judge. With this advantage he preferred the evidence of the respondent and his father and mother to that of the appellant on vital matters. A review of the facts and consideration of the arguments advanced on behalf of the appellant discloses no reason why we should reach a different conclusion particularly since, as will be seen, the view that the appellant did not become the beneficial owner of the interest standing in her name is the only view reasonably consistent with a number of other features which presented themselves.

The main criticism advanced on behalf of the appellant was that the learned trial judge did not give sufficient weight to the fact that the appellant was the legal owner of an interest in the property. Parol evidence that a transfer which is absolute in form is a mortgage only must, it was said, be regarded with suspicion. There is of course no doubt that cogent evidence is required in such cases. But there is nothing in his Honour's reasons to suggest that he thought otherwise; on the contrary he approached the case on the basis that the respondent could not succeed in his suit unless he was able to satisfy the court that, despite the form of the documents, the transfer to the appellant was by way of security only and it is clear that he thought that the evidence

supporting the respondent's case was, in spite of some deficiencies, both credible and cogent. In addition there was, he thought, a number of other matters which tended to support the respondent's case and to some of these we propose to make a brief reference.

In the first place it is apparent that by May 1951 the respondent's wife was prepared to admit that the respondent was entitled, beneficially, to an equal share in the property and the amount agreed upon as the purchase price of the property was arrived at on this basis. What was then done by the members of his family was done, according to all of the evidence, to assist the respondent. But if the respondent's evidence and that of his father and mother is to be rejected the settlement left the respondent, beneficially, in a worse position than he was before. Acceptance of the appellant's case would mean that all that was achieved by the settlement so far as the respondent was concerned was that, whilst acquiring a legal title to his half interest, he incurred a joint obligation to repay a substantial sum of money to the bank.

Secondly, there can be no doubt that whatever decision was made as to the manner in which the title to the property should be taken, it was not a decision made by the respondent or in which he took any active part. He was, even on the appellant's evidence, not in a fit condition to make such a decision for himself and, as already appears, she was the person who consistently gave instructions to the solicitor acting for him and who made the necessary inquiries of the bank with respect to finance. Now it was at all times the respondent's assertion that he was beneficially interested in the property and his desire was to acquire his wife's outstanding interest. In all the circumstances it would seem that if the intention was that an arrangement should be made whereby his sister would acquire this outstanding interest beneficially and he, in turn, would be saddled with a liability to the bank, the occasion was one upon

which it would have been, at the very least, desirable that the effect of the arrangement should have been made perfectly clear to him and his agreement explicitly obtained. Both the solicitor acting for him and the appellant knew of his condition and, it seems to us, such an elementary precaution would not have been overlooked if this was the real arrangement.

Thirdly, the respondent at all times after taking up residence again acted as the sole owner of the property. Among other things, in 1952, he raised money upon the security of his life assurance policy for the purpose of erecting a flat on part of the land and he collected the rents of the flat, apparently, without question until some time in 1953. It is true that the appellant made some repayments to the bank but these were made during the latter part of 1951 and the early months of 1952 when the respondent was, again, undergoing treatment in hospital and she said that she was "only carrying on until he could take over the payments".

Finally, it was not until 1953, when differences arose between the appellant and the respondent out of matters unconnected with the property, that the appellant asserted a right to a beneficial interest in it. On 26th May 1953 she caused a firm of solicitors to write to the respondent demanding a statement of all moneys received by him by way of rent since 1st January of that year and a statement of all moneys expended by the respondent "in and about the premises". A demand was also made that all future rent be paid directly into the joint account of the appellant and the respondent at the Dee Why branch of the Bank of New South Wales and that, in future, proper books of account should be maintained and be available for inspection by the appellant at any time. In answer to this letter the respondent furnished particulars of the rents received and amounts paid by him and indicated the manner in which he proposed progressively to reduce the amounts "loaned to me by my mother, father and sister". The letter is an intelligent letter and among other things proceeds to say that "The property

was placed in our joint names as security mainly for the interests of both Mum and Dad and as protection for the monies contributed by them both and also for the amount contributed by Ivy" (the appellant). The letter is, we think, of the greatest significance, and is completely inconsistent with the case now made by the appellant. Further, although the respondent and the appellant were still living in the same house, they were at this stage at arm's length and after this letter had been written and received no further steps were taken by the appellant to assert a right to a beneficial interest in the property until after the respondent had remarried in 1956 when, as already appears, she left the premises.

In all the circumstances of the case we think that the learned trial judge correctly decided the issue of fact between the parties and that, subject to a minor alteration in the form of the decree, the appeal should be dismissed.