INFORMAL ARRANGEMENTS AFFECTING LAND:

CARMODY v. *DELEHUNT*[1]

This case follows a series of decisions in both England and Australia dealing with the legal consequences of informal arrangements affecting land. In recent years increasing attention has been focussed on this branch of the law due to the growth of these types of arrangements, and hence the necessity of ensuring that the strict rules of established property law are not unduly severe in their application to such circumstances. The novel feature of *Carmody* v. *Delehunt* is the manner in which it raises possibilities in relation to the nature of the beneficial interest accruing to co-owners when acquiring property by way of equal contribution.

History

In 1935 Carmody married the plaintiff and they separated in 1939 living independently thereafter. Also in 1935 the Delehunt family commenced a tenancy in a residential property[2] located in the inner city of Sydney. Carmody met and became acquainted with Delehunt, the defendant, and their relationship led eventually to cohabitation at the property in which Delehunt was a tenant. This domestic arrangement subsisted from 1949 onward, having assumed the external features of a family unit, and, in time, Delehunt came to be known as "Mrs. Carmody".

Early in 1956 Carmody entered a contract for the purchase of their house, the consideration being an initial deposit combined with a series of subsequent instalments. Although the matter was disputed initially the case proceeded on the view that Delehunt at all stages made equal contributions to the purchase consideration. In 1962 the final instalment was tendered and a duly executed memorandum of transfer caused the title to be indefeasibly registered in the name of Carmody in 1963. Further, it was found that it was the intention of the parties to be equal co-owners pursuant to an express oral agreement that the property eventually be registered in both names, although this never occurred.

In 1980 Carmody died intestate and was survived by Delehunt, and his widow. The latter, by virtue of her status as next of kin, acting through the administrator of his estate, sought possession of the property from Delehunt. She responded by lodging a caveat claiming the existence of

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[1] New South Wales Court of Appeal: [1984] 1 N.S.W.L.R. 667; High Court: (1986) 61 A.L.J.R. 54.
[2] Registered under the provisions of the Real Property Act, 1900 (N.S.W.).

an equitable trust in her favour. It was in this state that the matter came before Wootton, J. in the Equity Division of the New South Wales Supreme Court. Mrs. Carmody, as plaintiff, sought an order for removal of the caveat, while by way of cross claim Delehunt sought a declaration that Mrs. Carmody held the property upon trust for her use absolutely and, consequently, a vesting order.[3] His Honour found for the defendant, and on appeal to the New South Wales Court of Appeal[4] this decision was reversed, and having granted special leave[5] to appeal the High Court[6] upheld the decision of the Court of Appeal.

Rights Under a Contract

Initially Wootton, J. found that Carmody, as legal owner, held the property on an express trust for the defendant and himself in equal shares due to the existence of an express oral agreement to the effect that they hold as co-owners. This then led his Honour to consider that whether the equitable co-ownership was in the form of joint tenants or tenants in common was to be determined by reference either to implication or if necessary a presumption. In relation to the former, by considering the position of the parties at the time when the property was conveyed to the name of Carmody he concluded that it was possible to imply a contractual term to the effect that the equitable co-ownership was to be by way of a joint tenancy.[7] The Court of Appeal averred that it was essential to the discovery of an enforceable[8] contract relating to co-ownership that there be an express or implied term dealing with the question of survivorship. The court had little hesitation in overruling Wootton, J.'s finding on the basis that the correct time for testing the implication of a contractual term is when the contract is alleged to be entered (1956) rather than at the time of its completion (1963).[9] Further, the court also invoked the broader ground that at neither point in time was the implication of such a term so obvious as "to go without saying".[10] Although this aspect of the case was not argued before it, the High Court indicated[11] that the absence of

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[3] In accordance with the rule in *Saunders* v. *Vautier* (1841) 4 Beav. 115.

[4] Before Priestley, J.A. who delivered the leading judgment, with the agreement of Hutley and Glass, JJ.A.

[5] Special leave to appeal was granted on the narrow ground "that the Court of Appeal erred in holding that s. 26 of the Conveyancing Act 1919, as amended (N.S.W.) displaced the equitable presumption that where two persons advance equally the purchase moneys for a property they hold as equitable joint tenants".

[6] Gibbs, C.J.; Wilson, Brennan, Deane and Dawson, JJ. Gibbs, C.J. delivered the judgment of the court.

[7] *Supra* n. 1 at 672.

[8] *Balfour* v. *Balfour* [1919] 2 K.B. 571 establishes a presumption against contractual intention (*animus contrahendi*) with domestic arrangements, but that case "stretched the doctrine to its limits" (*Pettitt* v. *Pettitt* [1970] A.C. 806, 816) and it is hardly an issue on the present facts. Additionally, the domestic arrangements in question mostly have concerned spouses. See generally G. H. Treitel, *The Law of Contract* (6th ed., 1983) at 126 (as to sexual immorality at 334).

[9] *Supra* n. 1 at 671.

[10] The court relied on *Codelfa Constructions Pty. Ltd.* v. *State Rail Authority of New South Wales* (1982) 56 A.L.J.R. 459, 461 for this point.

[11] *Supra* n. 1 at 55.

an implied term dealing with the question of survivorship, of itself, would not be fatal to the discovery of an enforceable contract.

It is worthwhile to consider what the position would be if this avenue had been explored more fully. This is partly because there has been a recent tendency to dim the distinction between contractual and proprietary rights. Under the present facts the finding of a contract may relate to equal ownership as was discussed, or failing that, alternatively, to the enforcement of a licence to occupy. As to the former the case seems to reaffirm that the approach which is budding in England has yet to germinate in Australia. In relation to the English position it is said that:

> If the courts wish to proceed on the contract basis, they will have to impose solutions. The English Court of Appeal seems recently to have reconciled itself to doing just this, implying or imposing terms that then justify the degree and duration of protection to be awarded . . .[12]

Presumably, if the New South Wales Court of Appeal had been willing to yield to this lead they would have encountered little difficulty in finding sufficient circumstances to justify a construction of the contract which "implies or imposes" a term that the nature of the beneficial co-ownership be by way of joint tenancy despite a presumption to the contrary, in the absence of alternative indications, raised by s. 26 of the Conveyancing Act, 1919 (N.S.W.).

The second possibility is contractual rights conferring a licence to occupy. Although the case of *National Provincial Bank* v. *Ainsworth*[13] witnessed the rejection of any notion of a "deserted wife's equity" as suggested in a series of cases by Lord Denning, it has been pointed out[14] that Lord Upjohn expressly left open the question whether

> . . . the right (undoubted contractually against the owner of the property) of . . . [the defendant] to remain in exclusive occupation of his cottage rent free for the rest of his life will by judicial decision one day be held to create an equitable estate or interest binding all except purchasers for value without notice . . .[15]

While this speech may be criticised for its tendency to elevate contractual rights "as if by magic into property rights"[16] it does offer Delehunt's counsel the possibility of an alternative ground upon which he might justify the presence of a caveat[17] over the property.

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[12] J. D. Davies, "Constructive Trusts, Contract and Estoppels: Proprietary and Non Proprietary Remedies for Informal Arrangements Affecting Land" (1980) 7 *Adel. L.R.* 200, 216.

[13] [1965] A.C. 1175.

[14] J. D. Davies, "Informal Arrangements Affecting Land" (1979) 8 *Syd.L.R.* 578, 583.

[15] *Supra* n. 13 at 1239.

[16] *Supra* n. 14 at 583.

[17] As to limitations on a caveatable interest in this context see s. 74 of the Real Property Act, 1900 (N.S.W.) (which will become s. 74H when the Real Property (Caveats) Amendment Act, 1986 (N.S.W.) comes into effect) and the views of Windeyer, J. in *Tierney* v. *Loxton* (1891) 12 L.R. (N.S.W.) 308, 314. For further discussion see *Baalman, The Torrens System in New South Wales* (2nd ed. by R. A. Woodman and P. J. Grimes, 1974) at 72.

Rights Under an Express Trust

Consistent with his finding that Carmody and Delehunt had reached an express oral agreement to own the property in equal shares, Wootton, J. concluded that an express trust had arisen. The Court of Appeal, in dealing with this aspect of the judgment, first affirmed that in the present circumstances it was possible that such a trust could arise despite the absence of writing.[18] Secondly, the requirement of certainty of intention indicated that it would still be essential to identify the terms of the trust. Hence, in the absence of an express term dealing with the issue of survivorship, the question before the court was whether the term could be implied. To determine this the court derived from a speech of Lord Diplock in *Pettitt* v. *Pettitt*[19] a test which required the court to consider whether it could impute to Carmody and Delehunt "a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses." Although this test was contemplated as being more diffuse than that relevant to the implication of contractual terms the Court of Appeal considered it was not satisfied under the present facts, and hence rejected the possibility of finding an express trust.[20] The High Court indicated[21] although this aspect of the case was not argued before it that the absence of a term in an express trust dealing with the nature of the equitable co-ownership would not be decisive, and in these circumstances the correct course would be to adopt the same approach as with a resulting trust.

It may be doubted whether the Court of Appeal adopted the correct means to determine whether a term may be implied hence completing an express trust. It is conceded that Lord Diplock's test in *Pettitt* v. *Pettitt* is not vitiated by the fact that his Lordship was dealing with spouses rather than de factos,[22] or that it appears to be more concerned with an alleged resulting trust than an express trust. The perplexity is that the court proceeded to apply the Lord Diplock test under the conviction that he "first distinguished the technique of implication in ordinary contractual situations then dealt with what he considered to be a different situation, namely transactions between husband and wife in relation to family assets."[23] A more accurate description, with respect, is that rather than finding a distinction "his Lordship treats as *ejusdem generis* the processes used by the courts in deciding whether a contractual term is to be implied

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[18] In relation to the requirements of s. 23C of the Conveyancing Act 1919 (N.S.W.) the case of *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685 was cited (approved in *Thwaites* v. *Ryan* [1984] V.R. 65) and the judgment, casting doubt on English views, of Glass, J.A. at 692-3 is especially in point.

[19] [1970] A.C. 777, 822.

[20] *Supra* n. 1 at 673.

[21] *Supra* n. 1 at 55.

[22] Glass, J.A. in *Allen* v. *Snyder* at 689 held that "the law does not countenance, in this respect, different rules for the married and unmarried. Nor should it be overlooked that the rules, however they came to be formulated, ought to apply indifferently to all property relationships arising out of cohabitation in a house legally owned by one member of the household, whether that cohabitation be heterosexual, homosexual, dual or multiple in nature."

[23] *Supra* n. 1 at 673.

and the 'imputation of a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses' ".[24] Hence the court's assertion that the test they are applying is "somewhat more relaxed than the one applicable to the implication of contractual terms"[25] appears to be based on an incorrect interpretation of Lord Diplock's comments in *Pettitt* v. *Pettitt*, and it is not surprising therefore that the court, in fact, reached the same result as with their endeavours to imply a contractual term. Consequently it is open to speculation whether a term dealing with survivorship might have been implied if a more congenial test had been found by the Court of Appeal. Finally, although Lord Diplock's views were in the minority, and have been severely criticised[26] it is suggested that in the proper context a discovery of a beneficial interest based on what "reasonable spouses" would have intended had they directed their minds to the issue has been banished too readily in England and Australia.

Rights Under a Resulting Trust

Both the Court of Appeal and the High Court based their judgments largely on the view that a resulting trust arose on the facts. This is in accordance with the classic statement of Eyre, L.C.B. in *Dyer* v. *Dyer*:[27]

> The clear result of all the cases, without a single exception, is that the trust of a legal estate . . . whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser, whether in one name or several . . . results to the man who advances the purchase money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor.

While this statement may be taken as representative of the position in Australia, it appears that possibly more progressive influences in England are leading to a less exacting approach. In *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing*[28] Lords Reid and Diplock appear to dilute the conventional requirements for the ascertainment of a beneficial interest held on resulting trust. Their Lordships broaden the concept of a common intention beyond that which may be deduced merely by examining the source of the purchase price. From this Lord Denning, in a series of subsequent cases, mis-

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[24] *Jacobs' Law of Trusts in Australia* (5th ed. by R. P. Meagher and W. M. C. Gummow, 1986) at 279. The editors add that "a beneficial interest revealed by the exploration encouraged by Lord Diplock cannot be . . . an express trust for it is of the essence of Lord Diplock's system that there be no express intention".

[25] *Supra* n. 1 at 673.

[26] *Supra* n. 24 at 279.

[27] (1788) 2 Cox. 92, 93. The position was reaffirmed in the leading High Court case of *Calverley* v. *Green* (1985) 59 A.L.J.R. 111.

[28] [1971] A.C. 886.

chievously extracted a "resulting trust which resulted from all the circumstances of the case"[29] but ultimately baptized it as "a constructive trust of a new model. Lord Diplock brought it into the world and we have nourished it".[30] Despite this, it appears that the less venturesome stance of Australian courts seems to have calcified sufficiently to resist this erosive influence.[31]

Hence, without the benefit of some of the modern English influences the New South Wales Court of Appeal cited the views of Maitland[32] as establishing the general proposition that if two individuals join in the acquisition of property they are joint owners of the beneficial interest in equity. The High Court repeated this point and more modern texts which were cited support the proposition to the extent of confirming that in circumstances where there are multiple contributors to the purchase price the

> . . . presumed trust is one under which the titleholder holds on trust for the contributors as equitable tenants in common, in proportion to the amounts each contributed except that where they contributed equally the contributors would be equitable joint tenants. This would seem to follow from the case where the contributors take the title in all their names as joint tenants.[33]

However the litigants in the matter sought clarification concerning the extent to which statutory intervention modified this position. Section 26 of the Conveyancing Act, 1919 (N.S.W.) in effect provides that, in the construction of any instrument, a disposition of the beneficial interest in any property whether with or without the legal estate to two or more purchasers together beneficially shall be deemed to be made to or for them as tenants in common rather than joint tenants in the absence of a contrary indication. This adopted the view of equity which regarded the capriciousness of the right of survivorship with aversion.[34] Under the present facts no instrument was involved, however, it was successfully contended that once the common law policy in relation to the construction of written instruments is abrogated the foundation for the law as stated by Maitland (and his successors) is no longer present.[35] Similar reasoning found favour in the High Court where it was held that "if equity follows

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[29] *Heseltine* v. *Heseltine* [1971] 1 All E.R. 952, 955.

[30] *Eves* v. *Eves* [1975] 3 All E.R. 765, 771. D. Oliver, in her article "The Mistress in Law" (1978) 31 *Current Legal Problems* 81, 85 endorses this approach as one that "produces fair results".

[31] For example *Allen* v. *Snyder* at 694. Davis, *supra* n. 10 at 210 typifies the opposition: "The criticism of recent extensions in England of the techniques of inferring or imposing resulting trusts is indeed that the finding of fact that a proprietary interest was intended is based on inadequate evidence of an understanding to that effect . . . To transmute informal arrangements too readily to proprietary rights could prejudice the need to protect genuine proprietary interests created informally."

[32] *Supra* n. 1 at 674.

[33] A. J. Ford and W. A. Lee, *Principles of the Law of Trusts* (1983) at 966. A similar statement is found in *Hanbury and Maudsley, Modern Equity* (12th ed., by J. E. Martin, 1985) at 254.

[34] G. L. Certoma, C. M. Sappideen, R. T. J. Stein and P. J. Butt, *Cases and Materials on Real Property* (2nd ed., 1985) at 52; P. J. Butt, *Introduction to Land Law* (1980) at 171.

[35] *Supra* n. 1 at 675.

the law, it will follow the rules of law in their current state . . . although s. 26 of the Conveyancing Act has no direct application to the present case, its indirect effect is to require it to be held that there was a resulting trust . . . as tenants in common."[36]

Proprietary Estoppel

This doctrine prevents a person from denying the truth of some statement formerly made by him, or the existence of facts which he has by his words or conduct led others to believe in to their detriment. Hence proprietary estoppel takes the form of an exception to the general rule that money expended on the property of another will not bestow a proprietary interest. It was unnecessary to resort to this issue in the Court of Appeal and it was excluded from the grounds of appeal to the High Court. Certainly the facts before the two courts established a sufficient passive acquiescence, and a substantial detriment on the part of the defendant. Proprietary estoppel is a rapidly expanding[37] ground for relief which is still underused despite its advantages to the litigant.[38] It entirely disposes of the Court of Appeal's attempts to isolate a common intention at the time of purchase as it is not stultified by the formality necessary for a common law remedy in contract. Further, the remedies potentially available to the possible plaintiff are wide ranging[39] and may even include a conveyance of the property.[40] The modern formulation, which merges estoppel by acquiescence and estoppel by encouragement, is that of Scarman, L.J. in *Crabb* v. *Arun District Council.*[41] It appears that his Lordship might have asked first whether Delehunt had established an equity; secondly, if an equity is established what is its extent; and thirdly what is the relief appropriate for an equity thus established. Counsel for Delehunt relegated this as an argument in the alternative, presumably on the basis that the granting of relief for the least equity to do justice may be less favourable than Delehunt's view that the property was held on trust absolutely for her use.

It appears that the law in relation to proprietary estoppel, as discussed in *Crabb*, not only "marks the attainment of maturity by the modern doctrine, and the beginning of attempts to amalgamate it with . . . other forms of estoppel"[42] but also the beginning of attempts to amalgamate it with other branches of equitable doctrine, namely trust. In one recent formulation[43] it has been suggested that

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[36] *Supra* n. 1 at 57.

[37] The limits of the doctrine were recently explored in *Riches* v. *Hogben* [1986] 1 Qd.R. 315.

[38] *Supra* n. 14 at 586. For a more sanguine view see A. A. S. Zuckerman, "Formality and the Family—Reform and the Status Quo" (1980) 96 *L.Q.R.* 248, 259.

[39] See generally J. D. Heydon, W. M. C. Gummow and R. P. Austin, *Cases and Materials on Equity and Trusts* (2nd ed., 1982) at 311.

[40] *Pascoe* v. *Turner* (1979) 2 All E.R. 945.

[41] [1976] Ch. 179, 192.

[42] *Supra* n. 39 at 301.

[43] *Holol* v. *Holol* [1981] V.R. 221, 225 per O'Bryan, J.

> . . . the essential elements of the trust are, first, that the parties formed a common intention as to the ownership of the beneficial interest. This will usually be found at the time of the transaction and may be inferred as a matter of fact from the words or conduct of the parties. Secondly, that the party claiming a beneficial interest must show that he, or she, has acted to his, or her, detriment. Thirdly, that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property . . .

Such a formulation would clearly defeat Mrs. Carmody's attempt to gain an order for removal of the caveat over the property. The creator indicates that "it is really unnecessary to confer a name" upon this Protean trust which has shades of the same judicial technique in this area pursued against opposition by Lord Denning in the English Court of Appeal.

In summary, the New South Wales Court of Appeal recognized that the ground (upheld in the High Court) upon which they decided the matter, namely that the enactment of s. 26 of the Conveyancing Act, 1919 (N.S.W.) altered the manner in which a beneficial interest under a resulting trust is presumed to be held, prevented the application of an alternative solution "which would fit the merits of the case better."[44] It is submitted that a range of alternatives is available with facts not greatly divergent from those in *Carmody* v. *Delehunt*. Further, it seems that these types of matters will arise with greater frequency as relationships not subject to statutory regulation of property rights[45] continue to grow with a corresponding increase in the need to appropriately deal with informal arrangements affecting land.

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[44] *Supra* n. 1 at 678.

[45] Ss. 78 and 79, Family Law Act 1975 (Cth.); s. 20 De Facto Relationships Act, 1984 (N.S.W.).