

Family Law Reports/1986/Volume 1 /GOODMAN v GALLANT - [1986] 1 FLR 513

[1986] 1 FLR 513

## GOODMAN v GALLANT

### COURT OF APPEAL

SLADE, PURCHAS LJJ AND SIR ROUALEYN CUMMING-BRUCE

8, 9 AND 30 OCTOBER 1985

*Joint tenancy - Parties not married and living together in woman's former matrimonial home - Husband conveying property to parties for valuable consideration - Conveyance containing express declaration of trust for sale - Woman subsequently severing joint tenancy and claiming three-quarters of beneficial interests - Effect of express declaration in conveyance - Importance for draftsmen of conveyances of presence or absence of declaration of trust*

The plaintiff married in 1960 and her husband purchased a house on mortgage in his sole name. The plaintiff's evidence was that it was agreed she should have a 50% beneficial interest. In 1971 the marriage broke down and the husband left the matrimonial home. In 1975 the plaintiff formed an association with the defendant and he moved into the former matrimonial home. The plaintiff and defendant decided to purchase the husband's interest in the matrimonial home which was valued at £17,000 to £18,000. On 23 June 1978 the husband conveyed the fee simple of the property to the parties jointly for a sum of £6,700. The conveyance contained a clause declaring that the plaintiff and the defendant held the property upon trust for sale and to hold the net proceeds of sale upon trust for themselves as joint tenants. On 1 March 1983 by written notice the plaintiff severed the joint tenancy and in it stated 'the said property shall henceforth belong to you and me in equal shares'. The plaintiff issued an originating summons seeking against the defendant an enquiry and declaration as to the respective beneficial interests of the plaintiff and defendant in the property and claiming that she should have three-quarters and the defendant one-quarter of the net proceeds of sale. On 22 November 1984 the registrar ruled that the plaintiff and the defendant held the property on trust for themselves in equal shares. On 28 June 1985 Hollis J upheld the decision of the registrar. Counsel for the plaintiff submitted that if it was accepted that some force must be given to the words in the conveyance 'upon trust for themselves as joint tenants' and 'as beneficial joint tenants', nevertheless, it was still necessary for the court to determine what, on their fair and true construction, those words meant. He submitted that, in their context, they meant no more than that, unless and until the beneficial joint tenancy had been severed, each was to own the whole and on the death of one the survivor was to own the whole. The relevant words on their true construction did not declare what was to become of the beneficial interests once the beneficial joint tenancy had been severed.

**Held** - dismissing the appeal - There was a real and important distinction between a conveyance into joint names which contained a declaration of trust of the beneficial interests and a conveyance which contained no such declaration. Where, as in this case, the conveyance contained an express declaration of trust which comprehensively declared the beneficial interests in the property, there was no room for the application of the doctrine of resulting, implied or constructive trusts unless and until the conveyance was set aside or rectified; until that event the declaration contained in the document spoke for itself.

*Per curiam*: (1) Sections 34 to 36 of the Law of Property Act 1925, while importing a trust for sale in certain cases where it would not otherwise have arisen, were designed merely to simplify the mechanics of conveyancing. They had no effect whatever on the nature and extent of the respective beneficial interests in

the proceeds of sale of the several persons interested. Where there was an imported

[1986] 1 FLR 513 at 514

trust for sale, the way was open for persons claiming a beneficial interest in property to rely on the doctrine of resulting, implied or constructive trusts.

(2) The case well illustrated the importance of the presence or absence of a declaration of trust in a conveyance into joint names and of the form of any such declaration - points which the draftsmen of such conveyances would no doubt carefully bear in mind.

(3) The court with great respect to the majority in the case of *Bedson v Bedson* [1965] 3 All ER 307 felt no hesitation in following *Wilson v Wilson* [1963] 1 WLR 601 in preference to the majority judgments, both as a matter of strict precedent and because the reasoning of the unanimous judgments in *Wilson v Wilson* seemed to the court to represent the more correct approach.

### **Statutory provision considered**

Law of Property Act 1925, s. 36

### **Cases referred to in judgment**

*Bedson v Bedson* [1965] 2 QB 666; [1965] 3 WLR 891; [1965] 3 All ER 307

*Bernard v Josephs* (1983) 4 FLR 178; [1982] Ch 391; [1982] 2 WLR 1052; [1982] 3 All ER 162

*Crisp v Mullings* (1976) 239 EG 119

*Gissing v Gissing* [1971] AC 886

*Hine v Hine* [1962] 1 WLR 1124; [1962] 3 All ER 345

*Leake v Bruzzi* [1974] 1 WLR 1528; [1974] 2 All ER 1196

*Pettitt v Pettitt* [1970] AC 777

*Pink v Lawrence* (1978) 36 PCR 98

*Wilson v Wilson* [1963] 1 WLR 601; [1963] 2 All ER 447

*Wilson v Wilson* [1969] 3 All ER 945

APPEAL from an order dated 28 June 1985 by Hollis J dismissing an appeal from an order of Mr Registrar Turner dated 22 November 1984.

*Timothy J.W. Scott for the appellant (plaintiff);*

*Bernard J. Devlin for the respondent (defendant).*

*Cur. adv. vult.*

## **SLADE LJ**

This is the judgment of the court. This is an appeal by the plaintiff, Mrs Goodman, from an order of Hollis J made on 28 June 1985, whereby he dismissed her appeal from an order of Mr Registrar Turner dated 22 November 1984. The registrar had before him an originating summons by which the plaintiff sought against the defendant, Mr Gallant, an enquiry and declaration as to their respective beneficial interests in a house known as 127 Daws Heath Road, Rayleigh, Essex. His decision, subsequently upheld by the judge, was that the plaintiff and the defendant held the property on trust for themselves in equal shares.

Since the question which arises for decision on this appeal is solely one of law, the salient facts can be briefly stated. The plaintiff in 1960 married a Mr Goodman. He purchased the house on mortgage. Though it was conveyed into his sole name, the plaintiff's evidence is that it was never in doubt between the two of them that she had a 50% beneficial interest in it. There were three children of the marriage. In 1971 Mr Goodman left. In about 1975 or 1976 the plaintiff began to associate with the defendant and in due course they started to live together.

During the course of 1978 negotiations took place with a view to the

*[1986] 1 FLR 513 at 515*

purchase by the plaintiff and the defendant from Mr Goodman of the house or his interest in it. The judge was told that in 1978 the property was worth some £17,000 to £18,000, though there is no evidence that any valuation of it had been obtained. The negotiations culminated in a conveyance dated 23 June 1978 ('the conveyance') whereby Mr Goodman conveyed the fee simple in the property to the plaintiff and the defendant, who were together referred to as 'the purchasers'. The conveyance recited that Mr Goodman had agreed with the purchasers for the sale to them of the freehold interest in the property for the price of £6,700. By clause 1 it was provided that, in pursuance of the said agreement and in consideration of the sum of £6,700 paid by the purchasers to Mr Goodman (of which he acknowledged the receipt), he conveyed to the purchasers the property 'to hold the same unto the purchasers in fee simple as beneficial joint tenants'. Clause 2 began as follows:

'The purchasers hereby declare as follows:

(a) the purchasers shall hold the property upon trust to sell the same with power to postpone the sale thereof and shall hold the net proceeds of sale and net rents and profits thereof until sale upon trust for themselves as joint tenants.'

In early 1983 the plaintiff served on the defendant a written notice dated 1 March 1983, which described the property in a schedule and stated:

'I hereby give you notice of my desire to sever as from this day the joint tenancy and equity of and in the property described in the schedule hereto now held by you and me as joint tenants both at law and in equity so that the said property shall henceforth belong to you and me in equal shares.'

Mr Scott, who appeared for the plaintiff, told us that it is in fact possible that any beneficial joint tenancy had been severed by earlier correspondence. Nevertheless, the apparent intention of this particular notice of severance, which was no doubt drafted by the plaintiff's legal advisers at that time, was clear enough, namely that she and the defendant should thenceforth hold the property in equal shares.

However, on 22 April 1983 she issued an originating summons seeking an inquiry and declaration as to their respective interests and supported it by an affidavit in which, in the light of the facts and for the reasons there deposed to, she stated her belief that the effect of the purchase from Mr Goodman was to leave her owning three-quarters of the house and the defendant owning one-quarter. This affidavit was answered by an affidavit sworn by the defendant in which in substance he asserted that his own intention was that the property should be held by the two of them as beneficial joint tenants. Affidavits in reply to the defendant's evidence were sworn by the plaintiff and by Mr Goodman, who stated that he had always regarded the plaintiff as having a one half beneficial interest in the property and that it was his understanding and intention that the conveyance should merely transfer to the plaintiff and the defendant his one half beneficial interest in the property.

[1986] 1 FLR 513 at 516

However, neither the registrar nor Hollis J were invited to go into the evidence. They were invited to deal with a preliminary point of law, raised on behalf of the defendant, which can be simply summarized in two propositions said to be based on a line of previous decisions of this court, namely that:

- (1) The declaration contained in the conveyance stating that the plaintiff and the defendant hold the property in trust for themselves as 'joint tenants' is conclusive as to the nature of their respective beneficial interests.
- (2) The inevitable effect of the severance of this beneficial joint tenancy was to leave them entitled to the property or its proceeds of sale in equal shares.

These in effect were the propositions upheld by the registrar and subsequently by the judge who said:

'However much I may in a sense dislike it, I think that I am clearly bound by the decisions of the Court of Appeal in *Wilson v Wilson*, in *Leake v Bruzzi* and in *Pink v Lawrence*, which were all unanimous decisions on the meaning of similar declarations as to beneficial interests as is found in this case.'

Before turning to these and other relevant decided cases, we should refer to the relevant provisions of the Law of Property Act 1925 and make a few observations as to their effect. Section 36(1) provides:

'Where a legal estate . . . is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity.'

The purpose of the parenthesis 'in like manner . . .' is, in our judgment, simply to refer back to ss. 34(2) and 35, which provide in effect that where the legal estate in land is expressed to be conveyed to *sui juris* persons as tenants in common, the conveyance operates as if the legal estate had been conveyed to them as joint tenants upon trust for sale and to hold the net proceeds of sale upon such trusts as may be requisite for giving effect to the rights of the persons interested in the land.

In the present case, therefore, even if the conveyance of the fee simple in the property to the plaintiff and the defendant jointly had contained no express trust for sale and no declaration as to the beneficial interests, a trust for sale would still have arisen through the combined effect of ss. 34 to 36 of the Law of Property Act 1925.

However, ss. 34 to 36, while importing a trust for sale in certain cases where it would not otherwise have arisen, are designed merely to simplify the mechanics of conveyancing. They have no effect whatever on the nature and extent of the respective beneficial interests in the proceeds of sale of the several persons interested. Accordingly, in our judgment, the provisions of clause 2(a) of the conveyance, by which *express trusts* are declared concerning the beneficial interests in the property or its proceeds

[1986] 1 FLR 513 at 517

of sale, cannot be regarded as otiose. The position is quite the contrary.

In a case where the legal estate in property is conveyed to two or more persons as joint tenants, but neither the conveyance nor any other written document contains any express declaration of trust concerning the beneficial interests in the property (as would be required for an express declaration of this nature by virtue of s. 53(1)(b) of the Law of Property Act 1925), the way is open for persons claiming a beneficial interest in it or its proceeds of sale to rely on the doctrine of 'resulting, implied or constructive trusts' (see s. 53(2) of the Law of Property Act 1925). In particular, in a case such as that, a person who claims to have contributed to the purchase price of property which stands in the name of himself and another can rely on the well-known presumption of equity that a person who has contributed a share of the purchase price of property is entitled to a corresponding proportionate beneficial interest in the property by way of implied or resulting trust (see, for example, *Pettitt v Pettitt* [1970] AC 777 at pp. 813-14, *per* Lord Upjohn). If, however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself.

We have prefaced any consideration of the decided cases with these observations because in the light of certain judicial observations we seek to make two points clear. First, in our judgment, ss. 34 to 36 of the Law of Property Act 1925 do not enable or assist a person to establish a beneficial interest in land or its proceeds of sale greater than or different in nature from the interest which he would have enjoyed if those sections had not been enacted; beyond transferring the beneficial interests of tenants in common and joint tenants from the land to its proceeds of sale, they have no effect on the nature or extent of such interests. Secondly, the many decisions which deal with the situation where the legal estate in land has been conveyed to persons as joint tenants without any declaration of the beneficial interest are, in our opinion, clearly distinguishable from cases where an express declaration of the beneficial interests has been made.

One of such decisions was the decision of this court in *Hine v Hine* [1962] 3 All ER 345 on an application under s. 17 of the Married Women's Property Act 1882. The property in that case had been conveyed into the joint names of husband and wife, but the actual conveyance was not before the court at all; the court was therefore not considering the case of an express trust by which the beneficial interests had been formally declared, at the time of the purchase, by the husband and wife (see the observations on *Hine v Hine* by Russell LJ in *Wilson v Wilson* [1963] 1 WLR 601 at p. 610). For present purposes we need only cite one passage from the judgment of Pearson LJ in *Hine v Hine* (at p. 350E of the report):

'In my judgment, however, the fact that the husband and wife took the property in joint tenancy does not necessarily mean that the husband should have a half interest in the proceeds of the sale now in contemplation. The parties agreed, expressly or by implication from the creation of the joint tenancy, that the house should be the matrimonial home and should belong to both of them (technically to each of them in

[1986] 1 FLR 513 at 518

its entirety) and that, on the death of one it would belong to the other by right of survivorship. They did not, however, make any agreement, or have any common intention, what should happen in the event of the marriage breaking up and the property then being sold. That event was outside the contemplation of the parties. The proper division of the proceeds of sale in that event is left to be decided by the court in this application under s. 17.'

In contrast, in *Wilson v Wilson* (above) this court had to consider the case where a matrimonial home had been conveyed into the joint names of husband and wife and the conveyance contained an express declaration stating that they held the property upon trust for sale and that they would hold the net proceeds of sale and other capital moneys upon trust for themselves as joint tenants. On an application under s. 17 of the Married Women's Property Act 1882 to have the rights of the parties in the proceeds of sale in the house determined, the husband claimed the entirety of such proceeds. The wife, however, contended that the effect of the conveyance was to entitle her to one half of the proceeds of sale in any event. This court unanimously upheld this contention. Donovan LJ (at p. 607) said this:

'By the conveyance the husband and wife, who were the purchasers thereunder, were to hold the property upon trust to sell the same with power to postpone the sale thereof and to hold the net proceeds of sale and other money applicable as capital and the net rents and profits thereof until sale upon trust for themselves as joint tenants. Thus the entire beneficial interest in the property was declared at the outset. While it was the matrimonial home the spouses owned it as joint tenants. If it should be sold, they were to hold the net proceeds of sale as joint tenants, which I construe as meaning that on a division of these proceeds the division was to be in equal shares.'

It should be observed that Donovan LJ specifically said that this result ensued as a matter of construction of the declaration of trust contained in the conveyance. Russell LJ (at p. 609) said this:

'Suppose in those circumstances that the beneficial trust expressly declared of the proceeds of sale had been for the husband and wife in equal undivided shares, there would, in my judgment, have been no jurisdiction under the section to make an order in a different sense, any more than there would have been such jurisdiction in an ordinary action by the wife claiming half the net proceeds of sale. . . . Can the position be different if the declared beneficial trusts are for a joint tenancy? In my judgment, no.'

A little later (at p. 609) Russell LJ said:

'The beneficial joint tenancy conferred upon the wife an equitable right or title in respect of the property and the proceeds of sale whenever sold, under which she was entitled to the whole together with the husband until severance *inter vivos* by either, and to the whole alone on survival

[1986] 1 FLR 513 at 519

before such severance, and was further entitled at any time by unilateral act to sever the joint tenancy and confer upon herself and upon him a right to an undivided one half share. The conferring of the beneficial joint tenancy necessarily and clearly involved these beneficial rights and interests.'

All the members of the court in *Wilson v Wilson* considered that the court had no power under s. 17 of the Married Women's Property Act 1882 to override the clearly defined and formally declared beneficial title of the parties as set out in the conveyance. (Of course, since the decision in *Wilson v Wilson* each spouse now has available the remedy of an application for a property adjustment order: s. 24 of the Matrimonial Causes Act 1973.)

The facts of *Wilson v Wilson* are, so far as we can see, in all material respects indistinguishable from those of the present case. If that decision had stood alone we doubt whether the plaintiff's present claim would ever have been put forward. However, not long after that decision there came before this court *Bedson v Bedson* [1965] 3 All ER 307. Since it is the sheet anchor of the plaintiff's claim in the present case, it requires careful examination. Its facts were, so far as we can see, in all material respects indistinguishable from those of *Wilson v Wilson*. The eventual unanimous decision of the court was that the wife was entitled to a half share in the property. However, the routes by which its members reached this decision were very different. We will refer to their judgments in the reverse order. The third member of the court, Russell LJ, in effect simply followed the decision in *Wilson v Wilson*. He considered that the court had no jurisdiction under s. 17 of the 1882 Act to find that the wife had any beneficial interest other than one equal to that of the husband. He reiterated his own reasoning in that earlier case, saying (at p. 318G):

'If a freehold is conveyed to A and B on trust for themselves as joint tenants, each has the same beneficial interest in the nature of that property as the other. That is inherent in the nature of the beneficial interest created, as is the right to the whole on survivorship before severance. It is also inherent in the nature of the beneficial interest created that either may sever at any time *inter vivos*, and on severance the beneficial joint tenancy becomes a beneficial tenancy in common in undivided shares and right by survivorship no longer obtains. If there be two beneficial joint tenants, severance produces a beneficial tenancy in common in two equal shares.'

However, Davies LJ, the second member of the court, said (at p. 316E) that he could see no distinction in principle between a declaration of trust of the nature under discussion and a mere conveyance into joint names. He continued:

'From the many and sometimes conflicting authorities the principle, in my judgment, emerges that, in proceedings under s. 17 of the Act of 1882 between husband and wife, the form of a transaction is not conclusive. In enquiring into the title to property the court must investigate the reality of the situation and, having done so and having

[1986] 1 FLR 513 at 520

ascertained the facts, must make such order as it thinks fit. So that, whatever the documents may appear to say on their face, the court may reach the conclusion that, in reality, by express or implied agreement the true position was something different from that appearing on the face of the documents. Unless, however, the court is satisfied on evidence that the parties expressly or by conduct did agree to a state of affairs other than that indicated by the documents, then the documents must prevail. It may be that it is more difficult to go behind a declaration of trust than a conveyance. It may be that practical difficulties may arise in any given case; but I do not think that there is any authority for the proposition that, in no circumstances as between husband and wife where no third party interest is concerned, can the court look behind the form of the documents.'

Nevertheless, the conclusion which he reached (at pp. 316H-317A) was that since there was no evidence of any agreement between the parties that the property should be owned otherwise than in equal shares, the wife was entitled to a half interest in the property.

We have two observations to make on the judgment of Davies LJ. First, with great respect to him, for the reasons already stated, we think there is a real and important distinction between a conveyance into joint names which contains a declaration of trust of the beneficial interests and a conveyance which contains no such declaration. Secondly, as Lord Upjohn significantly pointed out in *Pettitt v Pettitt* (above) (at p. 813F), the observations of Davies LJ in *Bedson v Bedson* (above) were plainly made upon the assumption that s. 17 gave the court power to vary the existing proprietary rights of parties as ascertained according to the well-established principles of law and equity. The decision of the House of Lords in *Pettitt v Pettitt* established that that assumption was erroneous. We therefore think that the reasoning of Davies LJ in this case can no longer be regarded as authoritative.

Lord Denning MR, who delivered the leading judgment in *Bedson v Bedson* (above), took a strong line of his own. In a passage under the heading 'What is the wife's share', he said this (at p. 314C):

'Although the court refused a sale, we are asked to determine what is the wife's share in the property. I do not think that the fact that they were joint tenants means that, on a sale, she necessarily takes a half share. That is decisively shown by the decision of this court in *Hine v Hine* [1962] 3 All ER 345. I would refer particularly to the wise observations of Pearson LJ at p. 350. That decision was distinguished by Russell LJ, in *Wilson v Wilson* [1963] 2 All ER 447 at p. 452, on the ground that the conveyance in *Hine v Hine* did not contain an express declaration of trust for the two jointly; but I for myself assumed that it did, because a declaration of trust is common from: see *Smith v Smith* [1945] 1 All ER 584 and *Brown v Brown* [1959] 2 All ER 266 and s. 36(1) of the Law of Property Act 1925. The mere insertion of a declaration of trust (which would be imported anyway) cannot make any difference. Notwithstanding the criticisms that have been made of *Hine v Hine*, it is, I think, still good law. In that very case, Pearson LJ pointed out at p. 350 that a half-and-half division would not have

[1986] 1 FLR 513 at 521

produced a fair and just result, whereas decisions of this court did achieve a reasonable result. I would, myself, hesitate

long before I overthrew a case which did justice; but suffice it to say that it is binding on this court and none of us can overthrow it. In this situation, I have had great doubt whether we should interfere with the decision of the judge who relied on *Hine v Hine*, but my brethren think that we should, and I concur on the ground that there is solid ground for believing that the parties did intend that, come what may, the proceeds of the sale of the property (when it should happen) should be shared equally. I say this because of the form of the latest accounts which were agreed by the husband with the accountants after the disputes had arisen. They showed the property as belonging half-and-half to each.'

We accept that in the case of a conveyance of the legal estate in land to persons jointly, a *trust for sale* would be imported anyway because of ss. 34 to 36 of the Law of Property Act 1925. However, with great respect to Lord Denning, we do not agree that a declaration of trust defining the parties' respective beneficial interests in the proceeds of sale would in any event have been imported. As we have already indicated, these sections, in our judgment, have no effect whatever on the nature and extent of the respective beneficial interests in the proceeds of sale. The suggestion in the judgment of Lord Denning MR in *Bedson v Bedson* (above) that the effect of s. 36 of the Law of Property Act 1925 was to make the inclusion or omission of an express declaration of trust irrelevant is not, in our respectful view, a tenable one. Unless and until the contrary has been established the court has to assume that it has been inserted deliberately and for its apparent purpose, namely to define the parties' respective beneficial interests. As to Lord Denning's reference to *Hine v Hine* (above), we think it very doubtful whether that decision can now be regarded as good authority, even for what it decided, having regard to the subsequent decision of the House of Lords in *Pettitt v Pettitt* (above) concerning the scope and effect of s. 17 of the 1882 Act. However, whether or not *Hine v Hine* is good authority for what it decided in relation to a case where an express declaration of trust does not feature, it could not, in our judgment, have compelled this court to reach the decision which it did in *Bedson v Bedson*. On the contrary, in our judgment, the Court of Appeal in *Bedson v Bedson* was both entitled and bound to follow its previous decision in *Wilson v Wilson*, the facts of which were in all material respects indistinguishable.

For these reasons, even if the authorities had ended with *Bedson v Bedson*, we would with great respect to the majority in that case, have felt no hesitation in following *Wilson v Wilson* in preference to the majority judgments, both as a matter of strict precedent and because the reasoning of the unanimous judgment in *Wilson v Wilson* seems to us to represent the more correct approach. The authorities, however, do not stop there.

Lord Upjohn in *Pettitt v Pettitt* (above) put the matter thus (at p. 813):

'In the first place, the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document

[1986] 1 FLR 513 at 522

declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage.'

Lord Diplock in *Gissing v Gissing* [1971] AC 886 (at p. 905) reaffirmed the general principle that:

'... where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it.'

However, the reference by Lord Upjohn in *Pettitt v Pettitt* to the possibility of 'fraud or mistake at the time of the transaction' illustrates that there is one (though we think only one) qualification to this principle. The

declaration of trust will no longer be binding if the court is satisfied by appropriate evidence either that the relevant document ought to be rectified (as was Buckley J in a case also named *Wilson v Wilson* [1969] 3 All ER 945) or that it ought to be rescinded on the grounds of fraud or mistake.

The next relevant authority cited to us was the decision of this court in *Leake v Bruzzi* [1974] 2 All ER 1196. That was another case where the conveyance of a house into joint names of husband and wife on trust for sale had declared that they were to hold the proceeds of sale 'in trust for themselves beneficially'. There was no claim for rectification of the conveyance. The court regarded the question of the parties' respective beneficial interests as being concluded by *Wilson v Wilson* [1963] 2 All ER 447 and followed that decision. As Stephenson LJ put it in *Leake v Bruzzi* (at p. 1199):

'... the beneficial interest that [the wife] has in the terms of the trust deed is an interest in one half, and it cannot be reduced to one-third, as the registrar reduced it, without going behind the declaration of trust, which is something that a court of law is forbidden to do.'

*Bedson v Bedson* (above) was apparently not cited to the court in *Leake v Bruzzi* but we venture to think that, even if it had been, this could and would not have altered the decision.

In 1978, in *Pink v Lawrence* (1978) 36 PCR 98, though again it appears that *Bedson v Bedson* was not cited, this court referred to *Wilson v Wilson* [1969] 3 All ER 945. The land in question had been transferred to the plaintiff and defendant expressly as joint tenants both at law and in equity. This court rejected an attempt to establish a beneficial interest greater than one half, in reliance on the doctrine of constructive trusts, on the grounds that where there is an express declaration of trust, the doctrine of constructive trusts cannot be referred to to contradict the expressly declared trust (see at p. 101 *per* Buckley LJ). Buckley LJ referred to the speech of Lord Upjohn in *Pettitt v Pettitt* (above) and continued (at p. 101):

'Once a trust has been effectively declared, it can only be got rid of

[1986] 1 FLR 513 at 523

either by rescinding the document containing the declaration of trust on the ground of fraud or mistake, or rectifying it in the appropriate manner to vary to delete the declaration of trust.'

Though we are not aware of any suggestion of fraud in the present case, our short summary of the evidence indicates at least the theoretical possibilities that the conveyance may have been erroneously drafted and that the plaintiff might have had conceivable grounds for asserting a claim to rectification of the relevant parts of it. It appeared to us that it would be very unsatisfactory for this appeal to proceed to judgment on a pure point of law, if there was any possibility of the plaintiff thereafter seeking to assert a claim to rectification. At the start of the hearing, before proceeding to hear argument, we therefore asked Mr Scott to define his client's attitude on this point. Having taken instructions, he told us that the plaintiff did not intend hereafter to pursue any possible claim to rectification because she accepted that she would not be able to surmount the high evidential burden of proving a common mistake, shared both by herself and the defendant, which she would have to surmount if she were to succeed in any such claim. We proceeded to hear her appeal on this basis.

In these circumstances the overwhelming preponderance of authority, including the three decisions of this court in *Wilson v Wilson* [1963] 2 All ER 447, *Leake v Bruzzi* (above) and *Pink v Lawrence* (above) in our judgment both entitle and oblige us to hold that, in the absence of any claim for rectification or rescission, the provision in the conveyance declaring that the plaintiff and the defendant were to hold the proceeds of sale of the property 'upon trust for themselves as joint tenants' concludes the question of the respective beneficial interests of the two parties in so far as that declaration of trust, on its true construction, exhaustively declares the beneficial interests.

We did not understand Mr Scott, who, if we may say so, has argued this difficult appeal with ability and discretion, in the end to dissent from this proposition. If we understood the essence of his submissions correctly, they ultimately amounted to these. Let it be accepted that some force must be given to the words in the conveyance 'upon trust for themselves as joint tenants' and 'as beneficial joint tenants'. Nevertheless, it is still necessary for the court to determine what, on their true and fair construction, these words mean. In his submission, in their context, they mean no more than that, *unless and until the beneficial joint tenancy has been severed*, each is to own the whole and on the death of one the survivor is to own the whole. The relevant words on their true construction, he suggested, do not declare what is to become of the beneficial interests *once the beneficial joint tenancy has been severed*. Donovan LJ and Russell LJ, he suggested, erred when they suggested in *Wilson v Wilson* (above) that it is inherent in the nature of a beneficial joint tenancy between two persons that a severance of it will necessarily produce a beneficial tenancy in common in two equal shares. In support of these submissions he naturally strongly relied on the judgments of Lord Denning MR in *Bedson v Bedson* (above) and in *Bernard v Josephs* (1983) 4 FLR 178.

We have already made our observations on the former judgment. The latter was a case where the conveyance of the house into joint names contained no declaration of trust, so that it has no binding force in a case

[1986] 1 FLR 513 at 524

such as the present. However, Lord Denning MR had this to say at p. 181H:

"When the house is conveyed into *joint names*, the question often arises: "What are the shares of the two parties in the house?" And "At what date are those shares to be ascertained?" If the conveyance contains an express declaration of the shares, that is decisive, as we held recently in *Godwin v Bedwell* (1982) *The Times*, 10 March. But often there is, as here, no such declaration. In such a case it used to be thought that the shares would always be equal shares. That was the view of Russell LJ in *Bedson v Bedson* [1965] 2 QB, at p. 689C when he said:

"If there be two beneficial joint tenants, severance produces a beneficial tenancy in common in two equal shares . . . by declaration of the beneficial joint tenancy between A and B, their respective rights and titles are no less clearly laid down and established than if there had been a declaration of a beneficial tenancy in common in equal undivided shares."

Russell LJ had previously said much the same in *Wilson v Wilson* [1963] 1 WLR 601 at p. 609. But that view has not prevailed.'

We respectfully agree with Lord Denning's observation that 'a conveyance into joint names does not necessarily mean equal shares', for it does not necessarily have this meaning when the conveyance contains no declaration of the beneficial interests (see, for example, *Crisp v Mullings* (1976) 239 EG 119). But we must respectfully dissent from his observation that the relevant views expressed by Russell LJ in *Bedson v Bedson* and *Wilson v Wilson* 'have not prevailed'. In our opinion, those views (relating as they did, solely to the case where the conveyance does contain a declaration of this nature) have prevailed, as is indicated by the decisions of this court in *Leake v Bruzzi* (above) and *Pink v Lawrence* (above); and we are bound to follow them.

We have thought it right explicitly to state this conclusion in a full and considered judgment because Mr Scott told us that, to his own knowledge, the conflicting views of Lord Denning MR and Russell LJ are occasioning considerable difficulty in lower courts in cases where a conveyance into joint names contains a declaration of a beneficial joint tenancy. We hope that this judgment may perhaps lay this controversy to rest. It will also well illustrate the importance of the presence or absence of a declaration of trust in a conveyance into joint names and of the form of any such declaration - points which the draftsmen of such conveyances will no doubt carefully bear in mind.

Lest it be thought that our conclusions are simply based on earlier authority and that we have doubts as to

the correctness of Russell LJ's views as to the construction and effect of a declaration of beneficial joint tenancy, of the nature now under consideration, we should add this. Contrary to Mr Scott's submission and, quite apart from authority, it seems to us that it is of the very nature of a joint tenancy that, upon a severance, each takes an equal aliquot share according to the number of joint tenants. Paragraph 529 in *Halsbury's Laws of England*, 4th edn, which is headed 'Nature of joint tenants' interests' begins with the words:

[1986] 1 FLR 513 at 525

'Each joint tenant has an identical interest in the whole land and every part of it. The title of each arises by the same act. The interest of each is the same in extent, nature and duration.' [Note 2 to this passage begins:] 'Until severance, each has the whole, but upon severance each has an aliquot part (a half or less) according to the number of joint tenants. . . .'

The Note then points out that severance can only now take effect in respect of the beneficial interests.

A passage and note in more or less identical terms is to be found in *Halsbury's Laws*, 2nd edn (1937), vol. 27 at p. 658. It therefore owes none of its authority to *Wilson v Wilson* (above). It would no doubt be possible for a trust in terms to provide that the beneficial interests of two parties should be equivalent to those of joint tenants unless and until severance occurred, but that in the event of severance their interests should be otherwise than in equal shares. In our judgment, however, such an arrangement cannot be spelt out of the relevant wording of the conveyance in the present case, which must be construed according to the traditional sense of a beneficial joint tenancy, with all its incidents, including those relating to the effect of severance.

For these reasons, we think that the judge clearly reached the correct conclusion and we must dismiss this appeal. In the light of this decision, the plaintiff will no doubt take advice as to whether any alternative form of remedy is available to her.

*Appeal dismissed with costs, such order for costs not to be enforced until dwelling-house is sold and the proceeds of sale received by the vendor's solicitors. Legal aid taxation for both parties. Application for leave to appeal to the House of Lords refused.*

*Solicitors: Gregson Owles & Roach for the appellant;*

*Parker, Fogg & Pinsent for the respondent.*

B.C.