

DEVICES AND DISGUISES - THE ANTI-AVOIDANCE POLICY OF THE COURTS ON PROPERTY TRANSACTIONS

Katharine Holland

Introduction

- 1.1 All property lawyers are very familiar with the general principle learned from student days that the Courts will be "*astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy*"¹. It is, however, perhaps unfortunate that such an important principle and its repercussions only spring to mind in relation to the question of whether an occupier enjoys the status of a tenant or licensee and, perhaps, even more unfortunate that the issue is addressed only in the residential property context.
- 1.2 The objective of this talk is to focus attention on a much wider 'anti-avoidance' policy on the part of the Courts, potentially applicable to larger and more complex transactions and one which is frequently overlooked in practice. In so doing, I will focus on only one case and just one principle. The case is Gisbourne v. Burton² and the principle which emerges from it is that the Courts may interfere with parties transactions not only when the transaction is a 'sham' in the way we have all learned about but also when there is no sham at all. The Courts can and will on occasion treat a private law transaction between consenting and informed parties as something other than it really is. Even when there is a real and genuine agreement between parties, the Court may simply decline to give effect to it if it has the effect of avoiding a statutory scheme.

¹ Per Lord Templeman in Street v Mountford [1985] AC 809 at 825

² [1989] QB 390

The Principle

2. The reality, in practice, is that in property law, just as much as in tax law, there is a Furniss v. Dawson³ anti-avoidance policy to bear in mind. In Gisbourne v Burton Lord Justice Dillon, having referred to Furniss v Dawson stated;

"It seems to me that a similar principle must be applicable wherever there is a pre-ordained series of transactions which is designed to avoid some mandatory statutory provision even if not of a fiscal nature. You must look at the effect of the scheme as a whole..."

Gisbourne v Burton

- 3.1 The facts of this case were based upon the owner of a farm granting a tenancy to his wife and then, on the same day, granting a sub-tenancy to Mr Burton. After his death, his personal representatives served a notice to quit on his wife who did not serve a notice under the Agricultural Holdings Act 1948. Her tenancy consequently came to an end. The personal representatives then sought possession from the defendant, Mr Burton, claiming that as the head lease had determined, the sublease necessarily also determined so that they didn't have to serve notice to quit on the defendant and he wasn't entitled to serve a counter notice under the 1948 Act. It was acknowledged in the evidence that the object was to let Mr Burton have the land but to be able to get the land back if they wished. Upon the face of the documents there was nothing to indicate anything other than perfectly straightforward transactions and no one was deceived. There was no sham at all. Everyone involved was well-informed and happy with the arrangement and it was all openly recorded in the documentation.

³ [1984] AC 474

3.2 The question for the Court of Appeal was whether they should look at the object of the exercise and prevent it taking effect for statutory policy reasons or whether they should accept the documents as they stood.

3.3 The Court of Appeal held (Ralph Gibson LJ dissenting) that the parties had entered into a series of transactions in order to avoid the application of the provisions for granting security of tenure in Section 24 of the Agricultural Holdings Act 1948. Hence, the Court had to consider the transaction as a whole and not simply consider each individual transaction in isolation. As the scheme had been designed to deprive the tenant of security of tenure, the Court would treat it as if there had been a direct tenancy to Mr Burton.

3.4 Gisbourne v Burton is a highly questionable decision. It represents an unwarranted interference with the contracting freedom of parties to a transaction. The real unfairness of the case is demonstrated by the following features of the evidence:-

- The scheme was designed in the beginning because Mr Burton offered to help the farm owner out, this gentleman having been experiencing difficulties over farming the Farm.
- This being the objective of the arrangement the parties wanted to achieve, all parties were well aware that there would be no security of tenure.
- It was even the case that Mr Burton negotiated certain improvements in the terms to 'compensate' for him not having security of tenure.
- It may have been that the Farm would never have been let out at all to Mr Burton if it had been mutually thought that security of tenure could not have been avoided.

- Mr Burton therefore received an unjustified positive windfall benefit from the Court of Appeal decision. He had acquired a tenancy in the first place when he might not otherwise have done so, he had better terms in that tenancy than he would otherwise have done and he found himself entitled to a far better asset than ever he contracted for.

3.5 Remarkably, the majority of the Court of Appeal seem to have regarded these factors as irrelevant. Lord Justice Dillon said;

"The question for us is not whether the defendant is acting as an honourable man in reneging on a scheme to which he had agreed and of which he has had the benefit for over 20 years, but whether the scheme is effective in how to deprive him of the security of tenure of an agricultural holding which he would ordinarily have".

The Consequences

4. The law is a mess on this topic. One only needs to consider the frequently adopted practice of granting company lets to avoid residential statutory protection. It was only three and a half months after the Court of Appeal decision in Gisbourne v Burton, that the Court of Appeal gave this particular practice the seal of approval in Hilton v Plustitle⁴. In that case, an actress wanted to rent a flat and she bought a company off the shelf to act as tenant. The Court of Appeal could see no reason why public policy should override this transaction *"which was deliberately intended to avoid, but not evade the Rent Acts"*. One is left to wonder whether the law is really treating an obvious single step to avoid statutory protection as satisfactory but treating a 'series of steps' as unsatisfactory.

⁴ [1989] 1 WLR 149

The implications for practitioners

5. For transactional lawyers, the following principles might be borne in mind;
- There is no guarantee at all that any anti-avoidance scheme will work;
 - Whatever the intentions, wishes and bargaining position between the parties, this may be of limited relevance to a Court later determining whether statutory protection has been successfully avoided;
 - That the arrangement may not be watertight should be impressed upon the clients. If not, they may point the finger of blame at their original solicitors many years later;
 - A thorough consideration of the statutory provisions of the protection which any scheme is designed to avoid before implementation, is to be recommended;
 - Remember that there is always a risk that the contents of the transaction file may be the subject of future disclosure in litigation and you might even be called upon to give evidence.

For litigation lawyers;

- Don't accept the absence of statutory protection too easily when involved in litigation.
- It may be worth considering challenging the posting in pleadings and disclosure.

@ Katharine Holland