



The “Deserted Wife’s Equity” – Forged in the Black Country

Bendall v McWhirter [1952] 2 Q.B. 466 – an historical note

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I. INTRODUCTION – A WIFE’S RIGHTS AGAINST HER HUSBAND IN THE 1950s

The period immediately following the Second World War saw a nationwide housing shortage. The position of a wife living in the matrimonial home, often with children, was precarious. A small minority of wives who had the benefit of some form of independent wealth were protected in that if property had been given to a married woman, either before or after marriage, for her separate use, equity (and later the Married Women’s Property Act 1882) protected that property against her husband. Apart from such rare cases, a wife had scant protection.¹ Such protection as existed was the common law duty a husband had to maintain his wife. This did not necessarily secure the wife the right to a home.

Courts (initially the ancient ecclesiastical courts and from 1857, the civil courts) had historically enforced the duty of married persons to live together. In the absence of blame on the part of the party claiming a remedy, this duty was enforced by the court, by requiring, for example, a husband who had deserted his wife, to return to her. The courts would therefore compel a deserting husband to return to his wife (a court order referred to as one for the restitution of conjugal rights). If the husband refused to return, he could be imprisoned. Under the Matrimonial Causes Act 1884 the courts could order that money be paid to the wife instead of imprisoning the deserting husband.

Although an order for periodical payments to a deserted wife was of some help, it was of limited use (even if paid in full and on time) if she was left without a home. The post-war housing shortage made life particularly challenging for a wife. In law the home was nearly always the property of the husband. In order to provide some level of protection to a deserted wife (and children), the courts did intervene to prevent a husband from using his legal ownership of the home to remove his deserted wife from it. The courts had recognised that a deserted wife had a right, or “equity” as it was called, against her husband to remain there.

Neither the common law, equity nor statute gave the wife any property rights in the house in which she lived with her husband. His duty was to live with his wife and to support her. The duty did not require that she be given any proprietary rights in the matrimonial home

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¹ An unmarried non-owning co-habiting woman partner had no legal rights.

due to her status as a wife. She was lawfully present. Her right to remain there was a personal right against her husband. It did not attach to the home itself. A deserting husband could return to the matrimonial home or provide alternative accommodation for the wife.

The courts had (and continue to have) a power under section 17 of the Married Women's Property Act 1882 to decide questions between a husband and a wife. The courts had intervened to protect a wife's right to live in the matrimonial home by, for example, issuing an injunction to restrain a husband from entering into a contract for the sale of the house while his wife and children were living there until the husband provided suitable alternative accommodation (*Lee v Lee* [1952] 1 All ER 1299). It was generally accepted that if a deserting husband had already sold the matrimonial to a third party, even one who was aware that the wife and children were in occupation, the sale was effective (*Thompson v Earthy* [1951] 2 KB 596). The purchaser could obtain vacant possession against the wife as she had no legal interest in the property. She had no right enforceable against third parties – merely a personal right against her deserting husband.

The court's jurisdiction under section 17 of the 1882 Act had always been recognised as one where the courts could declare and recognise legal rights (and even restrain or postpone the enforcement of those legal rights) but it could not vary established rights to property in an attempt to achieve what the court might regard as justice between the parties.

This then, in broad outline, was the position in 1952. The scene is set for what became a landmark decision. The action took place not far from Wolverhampton.

II. *BENDALL V MCWHIRTER* [1952] 2 QB 466 - THE FACTS

Mrs McWhirter had lived with her husband and children in a house, 1 Buttery Road, Smethwick. Mr McWhirter was owner of the freehold. In April 1950, he deserted her. He told her that she could have the house and furniture. In November 1950, she obtained a maintenance order of £3 for herself and 30 shillings a week for the youngest child. In January 1951, Mr McWhirter was declared bankrupt. Mr Bendall was appointed his trustee in bankruptcy (the person appointed to realise all the assets in the estate and to distribute the proceeds to the creditors in proportion to their debt and recognising any priority rights).

The house was worth £1,850 but had a mortgage on it. The debt owed to the mortgagee bank was £1,576. There was therefore some value to the equity of redemption in the home which the trustee in bankruptcy wished to realise in order to pay off some of the bankrupt's creditors. The mortgagee bank would be paid its debt in full from the sale and the surplus proceeds would be made available to the trustee to distribute to the creditors. The trustee asked Mrs McWhirter to give up vacant possession of the house so that he might sell it. She refused. He then brought proceedings against her in the county court in November 1951, claiming possession and £1 a week for mesne profits² since the date of the bankruptcy.

III. THE FIRST INSTANCE DECISION

The county court held that Mrs McWhirter's occupation was that of a licensee and that her licence to occupy the home had come to an end when the property vested in the trustee in

² Mesne profits are payments made for the occupation of land by a person whose occupation is without permission, to a person with the right of immediate occupation. The husband was therefore claiming that he had the right to immediate occupation, that his wife did not have permission to be in residence and therefore she was liable to him for mesne profits.

bankruptcy. The court made an order for possession with mesne profits in favour of the trustee in bankruptcy.

The wife appealed. Her counsel on appeal was the doyen of the bankruptcy bar, Muir Hunter, who was the foremost bankruptcy barrister (and author) in the latter half of the twentieth century. The Court of Appeal was made up of Denning, Romer and Somervell LJ.³

IV. COURT OF APPEAL

In a judgment which became almost a template over the subsequent quarter of a century the majority decision (that of Romer LJ with whom Somervell LJ agreed) decided the case on a relatively narrow ground, whilst the judgment of Denning LJ (as he then was) constituted a novel and significant development for the rights of women. Romer LJ specifically referred to the judgment of his "brother Denning" and explained that although they had reached the same result he had done so "by approaching the question from a somewhat different angle."⁴

a. *Majority Decision (Romer LJ with whom Somervell LJ concurred)*

Romer LJ held that a deserted wife had no legal or equitable interest in the matrimonial home but could not be ejected from the home by the husband as the status of matrimony prevented such action. She was a licensee with a special right. The deserting husband could not bring proceedings which would effectively revoke that licence. The wife was in a more favourable position than an ordinary licensee. The main question was whether that right enjoyed by a wife against her husband held true and was enforceable against the husband's trustee in bankruptcy.

On becoming bankrupt, the whole of the husband's property (with some exceptions irrelevant to the case) vested in the trustee in bankruptcy and became divisible among his creditors. The statutory definition of "property" for these purposes included the matrimonial home. Romer LJ recognised that the trustee in bankruptcy could take no better title to the property than the bankrupt had. The trustee in bankruptcy consequently took title to the home subject to the same equities as affected the property in the bankrupt's hands. This included the rights of the deserted wife. If the trustee in bankruptcy were allowed to sue the wife for possession, it would follow that he acquired a larger beneficial interest in the property than that which the bankrupt husband had previously enjoyed. Therefore, the trustee was no more entitled than was the husband before his bankruptcy to revoke the wife's licence on his own authority and to sue her for possession of the property.

The bankruptcy court had the power to determine questions affecting persons who were not parties to the bankruptcy such as Mrs McWhirter. The court could therefore decide whether Mrs McWhirter should be permitted to remain in occupation of the matrimonial home, and, if so, on what terms. Such terms might include a requirement to pay rent. The court might also decide that she ought to deliver up possession. The court would take into account all the matters that would be relevant to the exercise of its discretion had the action been brought by Mr McWhirter prior to this bankruptcy under section 17 of the Married

³ The Court comprised an entirely male bench. It was not until 1988 that a woman was first appointed to the Court of Appeal. Later awarded a life peerage, Baroness Butler-Sloss as she became, on elevation to the Court of Appeal was initially known as "Lord Justice" Butler-Sloss. Only in 1994 did a practice direction ensure she was subsequently referred to as Lady Justice Butler-Sloss.

⁴ [1952] 2 QB 466 at 486.

Women's Property Act. The court would consider, amongst other matters, the fact that Mrs McWhirter could not prove (claim her debt) in the bankruptcy for payments due under the maintenance order (certain debts such as criminal fines and matrimonial payment orders have always been non-provable in a bankruptcy). The effect of this was to replicate substantially the position of Mrs McWhirter in relation to the property as existed prior to her husband's bankruptcy.

b. *Denning LJ*

Denning LJ's judgment is a masterpiece of creative, judicial social conscience. His Lordship likens the rights of wives prior to 1882 as being treated by the law "more like a piece of [her husband's] furniture than anything else. The husband could not sue her in ejectment or trespass, but neither could he sue a piece of furniture. He could bundle his furniture out into the street, and so he could his wife."⁵ Although she could pledge her husband's credit for necessaries including the cost of lodgings (assuming someone would trust his credit), she could not pledge her own credit as she could not make her own contract. If the husband became bankrupt the trustee in bankruptcy could turn her out as he could his furniture.

In 1952 all that had changed. According to Denning LJ, a wife was no longer her husband's chattel. According to his Lordship a wife "is beginning to be regarded by the law as a partner in all affairs which are their common concern. Thus the husband can no longer turn her out of the matrimonial home."⁶ This right was effective as against any landlord under a number of cases decided under the Rent Acts. His Lordship described the right of the deserted wife which "the courts have thus evolved."⁷

An analogy was drawn with the right to pledge the husband's credit for necessities: "One of the most obvious necessities of a wife is a roof over her head."⁸ In applying the old rule to modern conditions the wife should have an irrevocable authority, presumed in law to have been conferred on her by her husband, to stay in the matrimonial home. This legal presumption could only be revoked by a court order under section 17 of the 1882 Act. She could remain in the home until the court ordered her out. The authority to remain flowed from the status of marriage and the misconduct of the husband in deserting her. It ended upon divorce or death. The authority was personal to the wife. She was not able to assign it nor did it give her a legal interest in the land.

Denning LJ recognised that not every right created by a man bound his trustee in bankruptcy. A wife's right was analogous to a contractual licence to occupy land. His Lordship considered that as a contractual licence to occupy land was binding on the devisee of the licensor it followed that it was also binding on his trustee in bankruptcy. This is where the judgment became particularly creative although not entirely straightforward to follow.

The objection of the trustee in bankruptcy was that a contractual licence only gave rise to contractual obligations and not to any proprietary rights or interests, and that the burden of it did not therefore run with the land.

In answer to this objection his Lordship started with a consideration of 200 years of common law jurisprudence. Since the early 1600s it had been held that a contractual licence

⁵ [1952] 2 QB 466 at 475.

⁶ [1952] 2 QB 466 at 475.

⁷ [1952] 2 QB 466 at 476.

⁸ [1952] 2 QB 466 at 476.

to use and occupy land, once it was acted on by entry into occupation, bound not only on the licensor but also his successors in title. Such early case law had subsequently been doubted on the grounds that such a licence, at common law, would need to be executed by a deed (executed under seal). His Lordship then commented that this was where the Judicature Acts came into play: "Since the fusion of law and equity"⁹ (a comment not widely regarded as an accurate assessment of the general effect of the Judicature Acts) there was no longer any necessity for a seal. Every contractual licence to use and occupy land, once acted on by entry into occupation, took effect on its own terms. It was not an interest in property, but nevertheless once the licensee had entered into occupation it was an interest against the licensor and his assigns. It was a clog or fetter, like a lien, which was not an interest in property but only a personal right to retain possession. It was nevertheless effective against the owner and his assigns.

His Lordship commented that the old common lawyers of the seventeenth and eighteenth centuries, without knowing it, had applied to contractual licences some equitable principles which have since become well known. By dispensing with a seal when the licence had been acted on, they had anticipated the doctrine of part performance. By enforcing the licence against the successors of the licensor they had anticipated the doctrine of restrictive covenants. Indeed, by the 1950s, equity lawyers had reached the same result as the old common lawyers, even though they had done it in their own way.

In equity, every contractual licence imported a negative covenant that the licensor would not interfere with the use and occupation of the licensee in breach of the contract. This negative covenant was binding on the successors in title of the licensor in the same way as was a restrictive covenant. It did not run with the land so as to give a cause of action in damages for breach of contract against the successor. However, it was binding in equity on the conscience of any successor who took with notice of it. His Lordship cited the famous case of *Tulk v. Moxhay* (1848) 2 Phillips 774: "If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the person from whom he purchased."¹⁰

His Lordship then considered a number of cases which looked at, amongst other things: contractual licences to use land for the purposes of burial; a covenant to permit work to be done on land; and contracts where the owner of goods agreed to allow another person to use them on hire. In all these categories the agreement was binding not only on the original owner but also on successors in title. The person making the claim had to have a sufficient interest to warrant the intervention of equity. Possession or actual occupation of the land or chattel was sufficient.

Denning LJ then triumphantly concluded: "I have thus shown, I hope, that equity has reached the same result as did the old common lawyers."¹¹

His Lordship's conclusion was that a contractual licensee, who was in actual occupation of land by virtue of the licence, had an interest which was valid, if not at law, at any rate in equity, against the successors in title of the licensor, including his trustee in bankruptcy. It was not a legal interest in land, like a tenancy, but a clog or fetter like a lien. It was a personal right, but it was nevertheless binding on successors of the licensor.

⁹ [1952] 2 QB 466 at 479.

¹⁰ [1952] 2 QB 466 at 481 quoting Lord Cottenham LC in *Tulk v Moxhay*.

¹¹ [1952] 2 QB 466 at 483.

On the facts of the case, the trustee in bankruptcy took subject to equities. He took therefore subject to Mrs McWhirter's right, for it was an equity. The trustee had to apply to the court for possession, and the judge who heard the case would take into account the various competing interests. The judge would have regard to the fact that, so far as existing assets were concerned, the general body of creditors had a substantial priority over the wife because they could prove for the debts due to them, but she could not prove for arrears of maintenance due to her. The judge would also remember that, so far as the bankrupt's personal earnings were concerned, the wife had a substantial priority over the creditors because the bankrupt had to support his wife and children out of his earnings before any of it went to the creditors. If she was allowed to stay in the matrimonial home she would receive less maintenance, and the creditors would get more out of his personal earnings. But if she was turned out of the matrimonial home she would be entitled to more maintenance out of his earnings and there would be less available for the creditors. In these circumstances the justice of the case might be met by allowing the wife to stay in the house temporarily until she finds alternative accommodation and the court can make appropriate orders to that end.

Denning LJ held that the deserted wife had an equity which allowed her to stay in the matrimonial home unless and until the court ordered her to leave. The equity was binding upon third parties such as the deserting husband's trustee in bankruptcy. The court would look to do what justice required in making any order. It might be that the wife was permitted to remain in possession only temporarily but consideration of her needs both in terms of maintenance payments and locating alternative accommodation were factors the court would consider in doing justice.

V. WHAT HAPPENED NEXT?

Although to modern eyes, Denning LJ's attempts at creating a just balance between a bankrupt's creditors on the one hand and his wife and family on the other, may seem entirely laudable and fair, not everyone saw it that way at the time. One correspondent commented as follows:

"Dear Sir: You are a disgrace to all mankind to let these women break up homes and expect us chaps to keep them while they rob us of what we have worked for and put us out on the street. I only hope you have the same trouble as us. So do us all a favour and take a Rolls and run off Beachy Head and don't come back."¹²

Subsequent to *Bendall v McWhirter*, we experienced a decade of some uncertainty as to whether the majority judgment or Denning LJ's views should be followed. Denning LJ himself followed his own reasoning in other cases. This culminated in *National Provincial Bank v Ainsworth* [1964] Ch 665; [1965] AC 1175 where the Court of Appeal, led by Denning LJ, held that the deserted wife's equity took priority over a bank mortgagee who wished to enforce a sale of the mortgaged matrimonial home. Although the wife was successful in the Court of Appeal, the House of Lords reversed that decision and overruled *Bendall v McWhirter*. The deserted wife's equity did not bind anyone except the husband. The bank was able to sell the

¹² Edmund Heward, *Lord Denning: A Biography* (Weidenfeld & Nicholson, 1990) 52.

home and the wife was forced out. The House of Lords recognised what it called the unsatisfactory state of the law.

The lack of protection for deserted (and other) wives in such circumstances led swiftly to the Matrimonial Homes Act 1967 which provided for a wife to have a statutory right of occupation against the husband, and if registered, against third parties. This right was repeated in the Matrimonial Homes Act 1983 and (with minor amendments) is now found in the Family Law Act 1996.

Although Denning's judgment in *Bendall v McWhirter* was ultimately overruled by the House of Lords, his Lordship went on to use equitable principles to develop new protections for unmarried co-habitees (in the 1970s). His Lordship created what became known as the New Model Constructive Trust (see for example, *Hussey v Palmer* [1972] 1 WLR 1286 and *Eves v Eves* [1975] 3 All ER 768). Although accused of introducing uncertain 'palm tree' justice to the question of the beneficial ownership of jointly occupied homes,¹³ it did highlight the issue very effectively. Denning's work in this area was slowly eroded with more conventional resulting and constructive trust principles being applied to such cases.¹⁴ The current law does attempt to balance certainty with an element of fairness to claimants (see now the leading cases of *Stack v Dowden* [2007] UKHL 17; [2007] 2 WLR 831 and *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776).

VI. WHAT WOULD HAPPEN TODAY?

Notwithstanding the statutory protection brought in by the Matrimonial Homes Act 1967, it was felt that families required further protection in the event of the homeowner spouse becoming bankrupt. In terms of how a wife would be treated today on the facts of *Bendall v McWhirter*, the law is now found in section 335A of the Insolvency Act 1986. The effect of section 335A almost replicates the result the Court of Appeal decided upon in 1952. The trustee in bankruptcy is able to apply to court for the sale of the matrimonial home (and therefore to require the wife to vacate) but the court has a power to make such order as it thinks just and reasonable. It must take into account:

- (a) the interests of the bankrupt's creditors;
- (b) where the application is made in respect of the matrimonial home: (i) the conduct of the wife so far as contributing to the bankruptcy; (ii) the needs and financial resources of the wife; and (iii) the needs of any children; and
- (c) all the circumstances of the case other than the needs of the bankrupt.

After the period of one year beginning with the date of the bankruptcy the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations. Therefore, in practice, unless there are exceptional circumstances, such as a seriously ill wife or children, the home will be ordered to be sold a year after the bankruptcy has commenced. This statutory solution is seen as balancing all the

¹³ See e.g. AJ Oakley 'Has the constructive trust become a general equitable remedy?' (1973) 26 *Current Legal Problems* 17. The Australian court pulled no punches in the case of *Allen v Snyder* [1977] 2 NSWLR 685 at 701 where it commented: "the legitimacy of the New Model is at least suspect; at best it is a mutant from which further breeding should be discouraged."

¹⁴ See e.g. J McGhee ed., *Snell's Equity* (33rd Edn, Sweet & Maxwell, 2018) Part 5, Chapter 24.

interests of the various stakeholders and is reminiscent of the result reached in *Bendall v McWhirter*.

If decided today, it is likely that Mrs McWhirter, in the absence of any exceptional circumstances, would be allowed to stay in the matrimonial home for a year after her husband's bankruptcy. An order for sale would most likely be made at that point if, for example, she was unable to buy out the bankrupt's interest in the property. Her entitlement to maintenance payments from her husband would take priority over payments to creditors.

Postscript

I had the privilege of speaking to Muir Hunter QC in the late 1980s about his impact on the law. I asked him about his proudest achievements. Mr Hunter was pre-eminent in his field, a prolific author, a highly successful barrister with many great wins in the highest courts in the land as well as a great contributor to law reform efforts. He told me he was probably most pleased with the day he persuaded "Tom" Denning to follow his arguments in *Bendall v McWhirter*.