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Tainted Evidence of a Trust: *Nelson v Nelson*

New South Wales, Court of Appeal, 29 June 1994
Reported in (1994) 33 NSWLR 740.

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Proof of trust - illegal intention* - Martin v Martin *and* Tinsley v Milligan *considered

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Headings in this case note:

1. The facts
2. History of the case
3. Presumption of advancement
4. The partition argument
5. Degrees of illegality and unjust enrichment
6. Conclusions

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1. The facts

{1} Mr and Mrs Nelson had a son Peter and a daughter Elizabeth. In 1987, Mrs Nelson was aged 67, Peter 37, and Elizabeth 33. Elizabeth had regular employment but Peter did not. Peter was good at renovating houses, and from time to time Mr Nelson seems to have purchased property for him to renovate, though he had to borrow money to do so. Mr and Mrs Nelson left Australia in 1985 intending to spend some years overseas, but difficulties occurred and they returned separately during 1986. In August of that year Mr Nelson was diagnosed as suffering from cancer. In mid-1987, Mr and Mrs Nelson owned no home of their own - Mrs Nelson was living in rented accommodation with Elizabeth, Mr Nelson was living with Peter in a flat that had once been Elizabeth's but from which she had moved. Property prices were rising, and it was decided that a house at Bent Street, Petersham should be purchased at a cost of $145,000. The house would need renovating and was not intended as a permanent family home (though Mrs Nelson and Peter lived in it for a while). Completion of the purchase took place on 4 November 1987, a few hours after Mr Nelson's death.

{2} Mr Nelson was entitled to a war service loan which gave him a right to borrow money at a subsidised rate for purchase of a home. As his widow, Mrs Nelson would enjoy the same right. But it was not available if a domestic property was already owned and, for that reason, Mr Nelson had not been able to utilise the right on previous occasions. So the Bent Street property was put in the names of Peter and Elizabeth to ensure that this time the right would be available when a permanent home was to be acquired either by Mr Nelson or his widow.

{3} In that way too, there would be no pressure to complete the renovations and sell the property by any particular date. The renovations were completed by April 1988 but the property proved difficult to sell, though attempts to do so were made in November 1989 and April 1990. In the meantime, it was decided to acquire a more permanent home for Mrs Nelson and Peter at Kidman Lane, Paddington. Completion of the purchase, at a total cost of $162,000, took place in August 1989 and Mrs Nelson and Peter moved there. To assist with the purchase Mrs Nelson had applied for a war service loan and received one for $25,000. Her application was submitted in April 1989 and had been prepared by Peter though she had signed it herself. In it she answered "no" to the question whether she owned any other dwelling house. But Mr and Mrs Nelson's joint bank account had been used when financing the Bent Street purchase, and Mr Nelson's assets passed to Mrs Nelson under his will. In those circumstances Mrs Nelson was to be treated as the provider of the funds for the purchase.

{4} By 1991 Peter and Elizabeth had fallen out over accounts concerning contributions she had made to the cost of renovations carried out by Peter on different properties that had been owned by Mr Nelson, and Elizabeth took issue with her mother and brother not only on those accounts, but on the beneficial ownership of the proceeds of sale of the Bent Street property. The property had eventually been sold and the proceeds of sale, $390,000, were being held by solicitors. Elizabeth now claimed a half share of that sum beneficially, but Peter denied that either she or he had ever been entitled to a beneficial share in the property; beneficial ownership had always vested solely in Mrs Nelson. He and his mother brought proceedings to establish that this was the case. But Elizabeth was aware of the mis-statement concerning the Bent Street property in Mrs Nelson's application for a war service loan, and she was minded to make use of it.

2. History of the case

{5} It was found at first instance that the common intention at the time of acquisition of the Bent Street property was that the beneficial interest was to be Mrs Nelson's solely. That finding was not challenged in the Court of Appeal. It was also held at first instance that Mrs Nelson's mis-statement in the loan application disentitled her from proving her beneficial ownership. She could not claim any part of the proceeds of sale from Elizabeth, with the consequence that Elizabeth could insist on a half share in the proceeds of sale (plus interest) being paid out to her.

{6} The Court of Appeal affirmed that decision. But an application has been lodged for leave to appeal to the High Court. On two issues it might suffice if the court merely refused leave to appeal, leaving the Court of Appeal's decisions on those matters standing. But on a third issue, a point of importance arises on which precedents conflict, and reconsideration of them by the High Court would be valuable.

3. Presumption of advancement

{7} The first of the lesser issues raises the question of whether a presumption of advancement arises when property is given by a mother to a child. The Court of Appeal followed the lead

given in its earlier decision in *Brown v Brown* (1993) 31 NSWLR 582 and held that there is such a presumption. The decision involves a departure from earlier precedent, which did not recognise such a presumption generally but only in limited circumstances, perhaps where the mother was widowed or unmarried. Sustained argument on the issue at High Court level is scarcely needed. It would suffice to let the Court of Appeal's view stand. The distinction between mothers and fathers in this context is absurd. Parents wealthy enough to be able to contemplate providing during their own lifetimes for their children will almost certainly have had to think about how best to distribute the family wealth taking tax considerations into account. It is unrealistic to treat fathers and mothers differently on the basis that fathers are intending to discharge their duties to their children while mothers are not. And it is no less absurd for the less wealthy to be differentiated by gender for the purpose. It is the context of a transaction that matters, not the gender of those carrying it out. The facts of the present case as outlined above in fact provide an excellent example of how absurd it would be if different presumptions applied as between Mr and Mrs Nelson. (Cheques to pay for the Bent Street property were drawn on their joint account the day before Mr Nelson's death and cashed after it.) The facts do not provide an opportunity however to review the issue of the use of presumptions generally, though it would be welcome if at some stage the High Court could do so. Much of what is said in even the comparatively recent case of *Calverley v Green* (1984) 156 CLR 242 sounds strange to modern ears. (Cf *Brown v Brown* (1993) 31 NSWLR 582 at 594.) It would seem so much more sensible to start off believing that a document means what it says.

4. The partition argument

{8} The second of the lesser issues arises in this way: suppose, in the context of presumptions, that A, a party on whom lies the burden of pleading and proving a particular point, can adduce evidence of facts and intentions that are sufficient to prove the point without those facts and intentions being in themselves suggestive of an underlying illegality; but that the opposing party, B, brings out in evidence that there is one. Is it proper to conclude that A has proved the relevant point without relying on an illegal matter, so that A's case can prevail? Or is A's evidence to be held tarnished by the illegality?

{9} In the Court of Appeal's view, A's evidence is tarnished. Mrs Nelson cannot escape the charge of relying upon an illegality. Handley JA makes the point with particular clarity (at 742), and his broad manner of doing so is justified. It is artificial to let Mrs Nelson succeed on the basis that she has shown what the common intention as to beneficial ownership was without having to reveal the significance of the facts that she adduces. It may well be that it is Elizabeth, the B in the case, who first introduces the element of illegality into the picture. But the moment when its existence is first mentioned in the witness box should not determine what is correctly seen as an issue of substance. The courts are right not to be fooled by an exercise in partition.

{10} Sheller JA (at 748-749), with whom Meagher JA agrees, pursues the point at greater length, and in doing so deals with the United Kingdom decision in *Tinsley v Milligan* [1993] 3 All ER 65 in 1993. (The case is discussed in *Weston v Beaufils* (1994) 122 ALR 240 at 261 *et seq*, but the decision is not based on it.) In the *Tinsley* case a majority in the House of Lords took the view that different considerations prevail when a resulting trust arises and when a presumption of advancement applies. In the former situation, the partition argument

can succeed - the facts that lead to it can stand on their own; but in the latter a party A who wishes to rebut the presumption cannot do so without raising the proper significance of the facts. Sheller JA disagrees with such a distinction, indicating that the matter is one of substance in both situations. His view is preferable; so much so that it would not seem necessary on this point either for the High Court to hear sustained argument. The issue of the underlying illegality must be the same in both situations.

{11} But the Supreme Court of Victoria seems not to share this view in *Blackburn v YV Properties* [1980] VR 290. Though on very different facts, the court accepted the resulting trust argument which later appealed to the majority of Law Lords in *Tinsley v Milligan*. The Victorian decision is however only a majority decision in a Full Court, and goes even further than allowing a resulting trust to be recognised despite the presence of an illegal element in the transaction; it allows it where the illegal element had been carried to a successful conclusion. On that point it seems to be out of line with earlier High Court precedent (see *Martin v Martin* (1959) 110 CLR 297). But however that may be, the reasoning in the case seems inconsistent with the reasoning of Sheller JA's judgment. There is here a clash of precedents, but what is really at stake is the principal issue in *Nelson* and we should now turn to that.

5. Degrees of illegality and unjust enrichment

{12} Does an illegality that emerges during a case have to dictate the outcome in the case in an inexorable way? Or is the character of the illegality also a factor? Is the degree of use and success of the illegal element to be taken into account? Is the principle of unjust enrichment relevant? Does the court have an independent duty in the matter beyond its duty to the litigants?

{13} It is first necessary to note that *Nelson* arises in the particular context of voluntary dispositions and transfers into the names of those who have not financed the purchase. Problems of illegality can of course arise in other contexts, and the application for leave to appeal in the case introduces issues that arose in those other contexts. In particular it is contended that the approach in the Court of Appeal in the present case is not consistent with the approaches of the courts in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 (the context was one of unauthorised banking business) and *Farrow Mortgage Services Pty Ltd v Edgar* (1993) 114 ALR 1 (the context was one of unauthorised advances by a building society). The introduction of this range of cases is legitimate. There should be consistency in these various contexts; the precedents fluctuate between seeing the matter as one of substance and one that relies on more technical arguments. There would be great value in the High Court determining the approach that should govern future development of the law in all these contexts.

{14} A greater number of precedents in these areas favour treating the issue of an underlying illegality as a matter of substance, and not one of the manner in which evidence is given and relied upon. *Blackburn* is to the contrary, and so is the majority approach in *Tinsley v Milligan*. I prefer the view that the matter is one of substance in all cases, reflecting policies present in the law. I also believe that the courts have an independent duty in considering these matters - it is not just an issue between litigants. That view gains support from the judgment in *Martin*. On that basis, the High Court should consider whether *Tinsley v Milligan*

represents an acceptable approach to these matters in Australia; and if it does not, the court should consider whether the approach of the court in *Blackburn* was correct.

{15} But that does not mean that the severe approach of the minority in *Tinsley v Milligan* is justifiable. A number of judges have felt that the impact of an illegality on the litigation before them needs to be assessed carefully and not simplistically. This is in fact the main reason for the divergences of opinion that have developed throughout this area of the law. Refusal of relief to a party should not be automatic. The Court of Appeal in *Tinsley v Milligan* [1992] 2 All ER 391 made suggestions that favoured a flexible approach (see particularly the judgment of Nicholls LJ), but such an approach was rejected by all the Law Lords. I believe however that it is perfectly possible to both breed respect for the law and do justice to litigants, without the law degenerating into discretion as a consequence. The court in *Nelson* put virtually exclusive emphasis on the fact that the ruse of putting the Bent Street property into the names of Peter and Elizabeth succeeded, in that Mrs Nelson obtained the war service loan subsidy when she should not have done so. This exclusive emphasis is not justified. Earlier cases certainly show that the success or otherwise of such a ruse is relevant (see *Martin* and also *Perpetual Executors and Trustees Association v Wright* (1917) 23 CLR 185). But that should not be the only consideration. Other factors ought to be weighed in the balance: (i) the character of the illegality, (ii) the relationship between the parties, (iii) the consequences for the parties, (iv) the possibility of double penalties. The facts in *Nelson* are apt in showing how necessary it is to take these wider considerations into account, as are variants to the facts as found that are well within the bounds of possibility.

{16} On the character of the illegality, there is quite a difference between putting property in the name of another so as to (a) mislead creditors or evade tax (alas not uncommon), (b) make a party in a matrimonial cause seem less affluent, (c) make an objection to a planning application at a hearing seem to come from someone who is disinterested (which is *Blackburn*), (d) obtain sums to which one is not entitled from a social security fund (which is *Tinsley v Milligan*), (e) obtain a subsidy to which one is entitled despite a temporary disqualification. The last is *Nelson*; and it should be noted that the Bent Street property did get sold when market conditions improved. Mrs Nelson was not the owner of two properties for very long.

{17} On the relationship of the parties, it would not need much variation to the facts of *Nelson* to have Mrs Nelson reliant on Peter when applying for the loan and signing without a true appreciation of the real legal position. At that time Elizabeth may have added her persuasions too. Would the answer still have to be the same? And what if both Peter and Elizabeth had taken against their mother? Again, in *Tinsley v Milligan* the opposed parties were equally involved in the planning and carrying out of the illegality (though as a very possible variant of the facts one could have been under the domination of the other). Are these factors to be irrelevant in all circumstances?

{18} On the consequences for the parties, Elizabeth receives a windfall of virtually $200,000 while Mrs Nelson, in her seventies, suffers a major reduction in her limited free capital. (In *Farrow v Edgar* (1993) 114 ALR 1 the Federal Court held the occurrence of a windfall gain to be a relevant consideration in the case.) Yet her gain, given that she received not a grant but only a loan that was repayable in any event, could not have exceeded the amount of the element of subsidy on a loan of $25,000.

{19} On the issue of double penalties, it is not permissible to argue that an illegality can be overlooked because an offer is made to repay any improper gain. But it may in *Nelson* be permissible to take some account of the government's right to recall a war service loan at any time if an application for one contained a mis-statement. The consequence of a recall will be repayment of the subsidy and recovery of any loss; for all we know, the government department concerned may have done so or be intending to do so. There will be cases too, where a criminal conviction is followed by orders of repayment.

{20} In these varied circumstances, to talk of clean hands is too simplistic. It is better to get the whole facts out and weigh them. It need not involve an unacceptable degree of moral agonising. Thus the decision in *Blackburn* can be justified on the ground that refusal of relief would have been out of proportion to the wrong committed, and the decision in *Tinsley v Milligan* justified since a contrary decision would fail to recognise the joint nature of the criminal endeavour. For these reasons, there is room to argue that the Court of Appeal was too ready in refusing relief to Mrs Nelson.

6. Conclusions

{21} The plea of unjust enrichment appeared for the first time in the case only at the stage of the application for leave to appeal. This is a matter for regret, for the High Court may refuse to hear arguments relating to it. Yet an unjust enrichment argument is involved. In pleading terms, Mrs Nelson adduced evidence to show that she was intended to enjoy the whole beneficial interest in the Bent Street property. A declaration to that effect would normally have followed. But Elizabeth denied her mother's right to that declaration on the ground that her evidence was tainted with illegality. I think it was so tainted; but Mrs Nelson might have responded by alleging unjust enrichment in Elizabeth if the latter's illegality argument were to prevail. Issue is joined on matters that are relevant, and noble detachment from them is not a merit.