

Neutral Citation Number: [2004] EWHC 1947 (Ch)  
IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION

Royal Courts of Justice  
Strand, London WC2A 2LL  
Date: 22 July 2004

Before:

MR NICHOLAS STRAUSS QC (sitting as a deputy judge of the High Court)

Between:

(1) RICHARD DEAN MARTIN  
(2) JOYCE BULL  
(3) MARY STEVENSON  
(4) CHERYL LAMBERT

Claimants

- and -

(1) STUART LEE MYERS  
(2) SWAIN RICHARD MYERS

Defendants

**Mr Rex Howling** (instructed by **Bakewell**) for the claimants  
**Mr G M Jarand** (instructed by **The Smith Partnership**) for the defendants

Hearing dates: 18 - 19 May 2004

## **APPROVED JUDGMENT**

### **Mr Strauss QC:**

1. In this action the claimants seek an order for the administration of the real and personal estate of Edward Myers and Frances Amy Maud Myers together with all necessary and proper accounts, directions and enquiries.

2. Edward Myers was born on 13 January 1904 and died on 25 April 1977, aged 73. Amy Myers was born on 27 January 1914 and died on 30 April 2001, aged 87.

3. They had seven children:  
Sandra Foster, who was born 5 December 1936 and died on 28 April 1998.  
Terence Myers, born on 10 June 1938.

Philip Myers, who was born on 24 June 1939 and died on 18 July 2002, and whose sons are the defendants in this action.

Margaret Martin, who was born on 4 October 1941 and died on 22 September 2003, originally the first claimant.

Joyce Bull, born on 24 June 1943, the second claimant.

Cheryl Lambert, born on 20 June 1946, the third claimant.

Mary Stevenson, born on 16 July 1947, the fourth claimant.

4. On 28 September 1953, Edward Myers bought a house at 101, Uttoxeter New Road, Derby, which at the date of his death in 1977 was worth £7,500. After his death, Amy Myers remained in the house until about 18 months before she died, when she went to live with the second claimant, Joyce Bull. She left the house in her will to her second son, Philip Myers. After her death, he obtained a grant of probate over her estate, and subsequently letters of administration over his father's estate. On 28 February 2002 he sold the property for £70,000. As stated above, he died on 18 July 2002, and his sons, the personal representatives of his estate, are the defendants in this action.

5. The dispute in this case arises because the claimants, the four daughters who were still living at the date of Amy Myers's death, allege that their parents were never married. They contend that Amy Myers did not inherit the property on Edward Myers's death intestate in 1977 and that it was not hers to leave; therefore the seven children were entitled to equal shares in their father's estate. Terence Smith, the older son, who lives in Australia, has played no part in this dispute.

6. There are two issues between the parties:

(a) Were Edward and Amy Myers married? The defendants rely on the presumption of marriage arising from cohabitation and contend that the claimants have been unable to adduce the clear and convincing evidence necessary to rebut it.

(b) If they were not married, did Amy Myers nonetheless become the owner of the property by her exclusive possession of it for a period exceeding 12 years (in fact some 24 years). This in turn depends upon whether she was a constructive trustee of the property for her children; if so, the effect of section 21(1)(b) of the Limitation Act 1980 is that she could not acquire a possessory title to the property.

7. The claimants' evidence consisted of the written statement of the first claimant, Margaret Martin, made at a time when she knew she was suffering from incurable cancer, and witness statements supplemented by oral evidence in chief and on cross-examination from the other three claimants. I found them to be straightforward and truthful witnesses. The defendants' evidence consisted of their witness statements, again subject to cross-examination. I found them to be equally straightforward and truthful, but through no fault of their own their evidence was of limited value; they had very little personal knowledge of the relevant facts concerning their grandparents. There was also a written statement from Beryl Myers, the divorced wife of Philip Myers, but for reasons explained below, and again through no fault of hers, it was of little relevance.

8. According to the claimants' evidence, Edward and Amy Myers met at Derby railway station, or at a hotel near it, in about 1935. Amy Myers had moved to Derby relatively recently, and worked there as a chambermaid. Edward Myers came from Cumbria, but moved to Derby after meeting her. He seems to have had very little time for his own family, and his own children never became acquainted with any of his siblings.

9. The picture which emerges from the evidence is of a close-knit and loving family. They lived at 101 Uttoxeter Road, which was initially rented, from about 1938 onwards. The claimants' evidence is that their parents told them that they were very hard up in the early days and they never became well off. They did not enjoy a proper holiday until the 1970s. What usually happened was that Mr Myers would take them camping in Somerset, while Mrs Myers stayed at home to have a rest. After Mr Myers's death on 25 April 1977, the surviving children combined to look after their mother in various different ways. Terence invited her to many holidays in Australia; Philip, who was a builder, did substantial work on the house; all the daughters looked after her both financially and in many practical ways, increasingly so in the last years of her life when she was disabled.

10. According to the claimants, their mother was always extremely vague on the question of her marriage. From time to time they would ask her when her wedding anniversary was and she would evade the question by saying that she was too busy or she would change the subject; sometimes if pressed she would give a date, but she gave different dates. She used to say that they had been "together" for 40 years, but never said in terms that they were married. This is where the evidence of Beryl Myers comes in. She says in her statement that on one occasion her mother-in-law said that her wedding anniversary was on the same day as her (Beryl's) birthday. But according to Joyce Bull, other dates were given, including one within a couple of days of Beryl Myers's birthday. Mrs Myers's vagueness on this topic became something of a joke between Mary Stevenson and Philip Myers, who used to say "the old lady was never married".

11. In July 1988, Joyce Bull suffered a tragedy when her son died suddenly. She gave evidence about an incident which occurred in about January 1989 - the date is fixed in her mind because it was shortly after the husband of the fourth claimant, Cheryl Lambert, suffered an accident and was in hospital - when she was talking to her mother about her loss, and said that she was particularly sad that he had never been married. Her mother replied that she too had never married. Joyce asked her why not, and she said that there had never been money enough to do it; it all went to feeding and bringing up the children. Joyce immediately afterwards told her sisters, and the fact that their parents had never been married immediately became common knowledge amongst the siblings; Philip said words to the effect that they should wait until the "old lady" died and then sort things out. None of the claimants ever raised the subject again with Mrs Myers; nor is there any evidence that either of her sons raised it with her.

12. Amy Myers continued to live in the house, becoming increasingly dependent on the help of her daughters, until a year or two before she died she moved in with Joyce Bull. She died on 30 April 2001. She had made a will on 6 October 1989, appointing Philip Myers to be the sole executor of the will or if he could not or would not act, then Sandra Foster (who in the event pre-deceased her). She left £4,000 to Terence, adding that since he had always said that he did not want anything, it should be divided equally between his children. She bequeathed £3,000 to each of her daughters who were living at the time of her death, together with £500 for Margaret for a stone for her late husband's grave. Finally, she left the house to Philip Myers subject to his bearing any inheritance tax and subject to all the other bequests in the will being satisfied first.

13. The will contains the sentence "The reason for my wishes are because I know my son Philip Myers has left his wife and two sons well provided for" and there is also a contemporaneous note reading:

"To all my children I want you to know that my wishes were hard to decide upon because none of you wanted to let me talk about it, you all wanted me to sell the house and spend it. Well I have lived in this house too long

and I am sure I would not have settled anywhere else.

Do not think this is a special favour to Philip because he too wanted me to sell the house and spend it and have a good time, but he is the only one that would afford to do it up which would cost a great deal of money and hard work to put it right, then he could make the house nice and it could possibly still be kept in the family.

I hope you will find the money useful and whatever you, my daughters, might do with it, I hope it gives you pleasure.

Just remember me.”

14. According to the claimants, shortly after their mother's death, they took legal advice and registered a caveat against the estate. There was then a meeting on 8 June 2001, attended by three of the sisters and Philip Myers, at which he asked them to remove the caveat, promising that he would act fairly and give everybody a one-seventh share of the estate. On that basis, the caveat was removed and Philip Myers obtained a grant of probate on 3 August 2001, and letters of administration over his father's estate on 3 December 2001. As I have already mentioned, the house was sold in February 2002, and there is a letter from licensed conveyancers acting on his behalf which states incorrectly that he was “the only child of Mr E Myers” At about this time, he asked his sisters to attend a meeting at a public house at which, according to their evidence, he behaved very badly and was abusive to them. He handed them cheques for their legacies, but made it clear that everything else was his. The evidence suggests that his character changed in the last few years of his life. He left his wife after 40 years of marriage, he had a drink problem and he was not well. He emigrated to Spain in the same month, April 2002, fell ill shortly afterwards and died on 18 July 2002.
15. As I have stated above, the issues in this action are whether Edward and Amy Myers were married and, if not, whether Amy Myers acquired title to the house by retaining exclusive possession of it for over 12 years. The promise made by Philip Myers at the meeting in June 2001, which on the claimants' evidence was broken, is not relied upon in the particulars of claim as a separate ground to justify an order for the administration of the estates or either of them and counsel for the claimants did not contend that he could rely upon it as such. He nevertheless submitted that it would be appropriate for me to take it into account, but it seems to me that — unless relied upon as a separate ground for relief — this evidence is irrelevant. Either Amy Myers acquired title in 1977 or in 1989 or she did not; if she did, the claim must fail. The claimants may have a separate claim for damages for breach of contract, but it is not one over which I have any jurisdiction in this action.
16. There was also some evidence of debts due by Mrs Myers which had not been, or might not have been, paid. However, again there is nothing in the particulars of claim about this and, although counsel for the claimants said that he proposed to ask some questions about it in cross-examination, in the event he did not do so. I doubt whether the defendants would have had sufficient knowledge about their father's administration of the estates of his parents in any event. Since no complaint is made by the creditors, or possible creditors, it does not seem to me to be appropriate to take this any further.
17. On the first issue, section 7(3)(b)(i) of the Civil Evidence Act 1995 preserves the common law presumption of marriage arising from cohabitation, which can only be rebutted by strong evidence to the contrary. Counsel for the defendants submits that this is a particularly strong case for its application, since Edward and Amy Myers lived together for over 40 years as man and wife and brought up a large family. They were always known as Mr and Mrs Myers, and her passport was in that name. Her death certificate referred to her as Mr Myers's widow. The fact that they were married is further evidenced by the headstone on their grave. In addition, he submits Mrs Myers herself had on a number of occasions said that she was married, even if the dates she gave were inconsistent with each other.
18. Counsel for the defendants relied strongly on the decision of the Court of Appeal in *Re Taylor* [1961] 1 WLR 8. As he submitted, this was a case involving a couple resident in this country in modern times, in which the absence of a marriage certificate was not treated as conclusive and in which the decision of the court of first instance, that the presumption of marriage arising from cohabitation over a much shorter period than in the present case had not been displaced, was affirmed in the Court of Appeal.
19. The leading judgment was given by Lord Evershed MR, who drew a distinction between cases in which it could be proved that the parties went through some form of marriage ceremony and the issue was whether that ceremony was valid, and cases in which there was no evidence of any ceremony at all having been gone through, and considered whether the presumption applied at all in the latter kind of case. However, he concluded at p 15 that “at any rate for the purposes of this case” once it was shown that the parties had cohabited and were accepted as man and wife “it is required clearly to be shown that (they) were living not as the result of lawful marriage but in concubinage” He then considered the evidence in detail. This included not only evidence of the kind relied upon by counsel for the defendants in this case, but also evidence that the parties had said at the time that they had just got married: see pp 17-18.
20. He then dealt with the absence of a certificate in the following terms at p 21:

“But then it is said ... after all, why is there no certificate here? We are now in the 20th century. There is no

suggestion that these two people, though at this period they lived a nomadic life, ever travelled any distance at all. How come there can nowhere be found any record of a ceremony? Further, how is it that if they did get and get married no one at all appears to have been invited to the wedding or was told about it at the time? ... These are no doubt formidable points, but if I have stated the law correctly, then I think that the question really in the end of all is one of fact for the judge when he had seen the witnesses, weighting, after hearing their evidence, what they had said: was it "clearly proved" that the inference to be drawn from the cohabitation was wrong? As I said at the beginning, I am by no means satisfied that this court in such a matter should dissent from the view which the judge took .."

21. Harman LJ also held that the presumption arose, and could only be rebutted by evidence which was "firm and clear": see p 22. He said that it was "at least strange" that there was no documentary evidence of any ceremony of marriage and doubted whether he would have reached the same conclusion as the judge if he had been sitting at first instance. But he concluded that the issue turned in the end on the evidence before the judge, and that there was no justification for the Court of Appeal to interfere with his conclusion. Donovan LJ agreed with both judgments.
22. In my view, whilst the decision in *Re Taylor* reaffirms the principle that the presumption of marriage arising from cohabitation can only be displaced by clear evidence, it is otherwise of limited assistance. The Court of Appeal did no more than affirm the decision of Danckwerts J at first instance that, on the detailed evidence before him, the presumption was not rebutted.
23. In this case, I am satisfied that there is clear and convincing evidence establishing that Edward and Amy Myers were not married; indeed, I do not think that there is any reasonable doubt. I so find for the following reasons:
  - (a) As can be seen from the passage in Halsbury referred to above, most of the authorities on this subject are either pre-date the present system of registration of marriages in this country or concern parties who may have been married abroad. In modern times, the absence of a certificate is strong evidence, unless marriage abroad is a real possibility.
  - (b) In the present case, there is clear evidence from the General Register Office that a search has been made in the records for a marriage certificate for the whole of the period between 1924 (when Mrs Myers was 10 years old) and 1977, but none has been found.
  - (c) Counsel for the defendants sought to overcome this in two ways. First, he submitted that there was always a possibility of an error in the records; no doubt this is true, but the possibility is a remote one and, even if clear proof is required, the standard of proof is still on the balance of probabilities. Then, he submitted, it was possible that Mr and Mrs Myers were married elsewhere, for example in the Isle of Man or in Scotland. This possibility was put to Joyce Bull and Mary Stevenson in the course of their evidence; both referred to their parents' lack of means during this period of their lives and considered it highly unlikely that they would have done any such thing. Further, if they had done anything so unusual, it is impossible to see why they would not have spoken of it to their children or indeed had photographs to show them. So this too, it seems to me, is a very remote possibility at best. Nor is there any possibility of a wartime marriage abroad; Mr Myers was in a reserved occupation and did not serve in the forces during the war.
  - (d) Accordingly, the absence of a marriage certificate, taken together with Mrs Myers's original evasiveness on the subject, followed by the conversation clearly recollected by Joyce Bull, provides convincing proof that there was no marriage.
24. It follows from the conclusion that Edward and Amy Myers never married that his estate, including the house 101 Uttoxeter New Road, vested in the probate judge (that is the President of the Family Division) on his death. Any of Edward Myers' surviving children would have been entitled to apply for a grant of administration under Rule 21 of the Non-Contentious Probate Rules 1954 or subsequently Rule 22 of the 1987 Rules. If there had been a grant, the estate would have been administered in accordance with section 46 of the Administration of Estates Act 1925. Amy Myers, as Edward Myers's unmarried partner, had no interest in the estate, and no right to apply for a grant of administration. She would of course have been entitled to apply for provision out of the estate, in accordance with the Inheritance (Family and Dependents) Act 1975.
25. The issue which arises in the present case is whether she acquired title to the property, as against the probate judge, by remaining in occupation of it from 25 April 1977 until her death or shortly before her death. By para 2 of Schedule 1 to the Limitation Act 1980, the right of action in respect of land in the possession of a deceased person is treated as having accrued at the date of his death, and sections 15 and 17 of the Act provides for a period of 12 years starting from the time when the right of action accrued, after which the right of action is lost and the title extinguished.
26. The defendants accordingly contend that any right of action by the probate judge against Amy Myers accrued on 25 April 1977 and expired on 24 April 1989, on which date by virtue of section 17 the title of the probate judge was extinguished and Amy Myers acquired a new and independent title based on adverse possession of 12 years (unless the property was registered land, in which event the probate judge continued to hold on trust for her: see Land Registration Act 1925 s 75(2)).
27. The question is whether Amy Myers was a constructive trustee of the property for her children, and if so whether this prevented her from acquiring a possessory title. If that is the position, it follows that the bequest to Philip Myers was invalid, and the defendants hold the proceeds of sale for the estate of Edward Myers.

28. Until the passing of s 19 of the Limitation Act 1939, which is in substantially the same terms as s 21 of the 1980 Act, only an express trustee was prevented, by s 8 of the Trustee Act 1888, from relying upon the provisions of the Limitation Acts. The effect of this is explained in an article by Mr Frank Hinks in 38 *The Conveyancer* p 176 entitled 'EXECUTORS DE SON TORT AND THE LIMITATION OF ACTIONS'. As he explains, in general neither an executor nor an *executor de son tort* was an express trustee, and therefore both could establish title to property of a deceased person against those interested in the estate by adverse possession. However, in some circumstances, especially where infants were involved, the executor or the executor de son tort were regarded as express trustees. This was so, for example, where on the death intestate of her husband, the widow remained in possession of the property without obtaining grant of letters of administration; she could not acquire a possessory title to the property against infant children entitled to an interest in the estate. This was because she was regarded as the equivalent of a guardian to the children, and therefore as an express trustee. This was apparently something which occurred quite often in Ireland. However, the position was different where all the other persons interested in the estate were adults. The widow was then not a trustee, and could establish a possessory title: see *Doyle v Foley* [1903] 2 LR. 95.

29. Section 21 of the 1980 Act provides (so far as material):

"(1) No period of limitation prescribed by this Act shall apply to any action by a beneficiary under trust, being an action -

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use .."

30. Section 38 provides that the expressions 'trust' and 'trustee' have the same meaning respectively as in the Trustee Act 1925. Section 68(17) of that Act extends the meaning of those words to implied and constructive trusts.

31. These provisions were considered by Millett LJ in *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 at 407f et seq. He drew a distinction between cases of constructive trust arising where the defendant, although not expressly appointed as trustee, has assumed the duties of trustee by a lawful transaction which was independent of and preceded the breach of trust, and cases where the trust obligation arose as the direct consequence of the unlawful transaction which was impeached by the plaintiff. An example of the first kind of case was *Pallant v Morgan* [1953] Ch 43, where there had been an agreement that the defendant would buy a property on behalf of himself and the plaintiff, which lawful transaction was relied upon by the plaintiff to prevent the defendant from subsequently asserting that the property was his alone. The second kind of case arises where, if the defendant received trust property at all, it is adversely to the plaintiff by an unlawful transaction and the constructive trust is not a real trust but "nothing more than a formula for equitable relief": see *Selangor United Rubber Estates Limited v Cradock (No 3)* [1968] 1 WLR 1555 at 1582 per Goode-Thomas J.

32. In Millett LJ's view, it was at least arguable that section 21 of the Limitation Act 1980 had no application to the position of a constructive trustee of the second kind and that the contrary decision of the Court of Appeal of the Isle of Man in *Barlow Clowes International Limited v Eurotrust International Limited*, 31 March 1998 was wrong. However, it is clear that the Court of Appeal in *James v Williams* [1999] 3 WLR 451, to which I refer below, proceeded on the assumption that section 21(1)(b) applied to constructive trusts of the second kind. It may be that, since *Paragon* was not cited in *James v Williams*, and the point was not considered at all, it may be open for reconsideration in the Court of Appeal; but I am plainly bound by *James v Williams* and must proceed to consider whether, on the facts of the case, Amy Myers was a constructive trustee.

33. In Mr Hinks's article, which was extensively relied upon by Aldous LJ in *James v Williams*, he considered the situation which had arisen in *Doyle v Foley* and in other cases, in which a member of the deceased's family seeks to establish title by adverse possession against other adult members of the family in the light of the post-1939 limitation provisions. In his view

"... there would appear to be every justification for imposing a constructive trust. The widow is no doubt aware of the existence of her children, the brother of the existence of his brothers and sisters. Both are no doubt aware that the deceased has died without leaving a will, and hence ought to be aware that they are not the only people interested in the estate. Perhaps the children or brothers and sisters have refrained from asserting their rights for fear of depriving the widow or brother of her or his home. The fact that they have been willing to postpone their rights does not mean that they ought to forfeit them ... everything will depend upon the facts of the particular case, but it is thought that whenever an executor de son tort claims title by lapse of time against his relatives, the courts ought to consider whether he should be prevented from relying upon his position by the imposition of a constructive trust. The opening of the possibility of the imposition of a constructive trust enables the courts to do justice in a particular case, to examine the reasons why a party has failed to assert his rights at an earlier date, without the arbitrary divide of the limitation periods. This does not mean that the courts must open their gates to stale claims."

34. In *James v Williams*, on the death intestate of their mother, two out of the three siblings continued to live in her property for more than 12 years. One of them then died bequeathing his share of the property to the other and her daughter, and the other then died bequeathing the whole of the property to her daughter. The third sibling claimed a one third beneficial interest in the property, and the issue was whether the deceased siblings had held her share as constructive trustees. Aldous LJ, with whom Sir Stephen Brown P and Swinton Thomas LJ agreed, cited the passage in Mr Hinks's article referred to above with approval and stated at p. 458 that:

“As a general rule a constructive trust attaches by law to property which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property.”

35. Aldous LJ, having rejected the submission that there had been deliberate concealment by the first two siblings of the plaintiff's right to a share and deliberate exclusion, nevertheless went on to hold that there was a constructive trust. His reasons are set out in the following passage:

“In the present case, William Junior knew that the grandfather had purchased the house and that on his death the grandmother had acquired his interest. He also knew that the grandmother had died intestate. In those circumstances, he could not have believed that he alone was entitled to the property. He must have known that the plaintiff was entitled to a share. If he had taken out letters of administration, then he would have become a personal representative and would have taken on the duties instant to that office. The result, in my view, would have been that there would have been a trust within the definition of section 68 of the Limitation Act 1980 and he would have owed a fiduciary duty to his sisters. It is the fact that letters of administration were not taken out that made it possible for the defendant to contend that no fiduciary duty was owed. I accept that there is no duty on a person to become a personal representative, but I believe that the failure by William Junior to take out letters of administration is relevant, when considering what is the equitable position in this case, as equity envisages that what should have been done has been done.

In my view the circumstances of this case were such that the constructive trust arose in about 1972 on the death of the grandmother. William Junior knew that he was not solely entitled to the property. He took it upon himself to take possession of the property as if he owned it and assumed responsibility for its upkeep. In my view he was under an equitable duty to hold the property for himself and his sisters. Looking at the state of affairs as at the grandmother's death, the law envisaged that the property would be held on statutory trust for the children. It would be inequitable to allow William Junior and, through him the defendant, to take advantage of his decision not to take out letters of administration and to act as if he was the owner with the full knowledge that he was not ...”

36. *James v Williams* can be contrasted with the decision of the Court of Appeal *Pollard v Jackson* [1999] 3 WLR 451, in which a tenant of part of a property was held to have acquired title to the whole of the property by adverse possession after the death of the owner of the property. Again, it seems to have been assumed that section 21 of the Limitation Act 1980 applied to all kinds of constructive trust, but the Court of Appeal rejected the argument that a constructive trust arose simply because the tenant knew that he was occupying trust property. Dillon LJ put the matter in this way at 331:

“Then it is said that he became a constructive trustee. Again, I find that very strange. Mr Jennings shrinks from saying that any person who occupies land as a squatter is a constructive trustee for the true owner, or is under a duty to notify the true owner of his occupation of the land. But he says that it is different where the land is trust property and the squatter has grounds for suspecting that it is trust property. This would mean that nobody could acquire a title by limitation to land, the true owner of which was known to have died, when there was a delay before anyone came forward to obtain a grant and assert title to the land. It would also mean that if a person was in the course of acquiring a title to land by adverse possession, the true owner died and the squatter knew of the death, time would cease to run in favour of the squatter and would only start again when a grant of representation had been obtained. I find that wholly out of kilter with the clearly stated and long understood law in the Limitation Act as the acquisition of title by adverse possession ...”

37. Thus, it is clear that a constructive trust will not be imposed merely because the person occupying the land knows or suspects that it is held on trust for someone who does not know, or may not know, of its existence. Something more must be found in the relationship between the parties involved which would make it unconscionable for the party remaining in occupation of the property to acquire a possessory title.

38. The passage in the judgment of Dillon LJ cited above raises the question, at what point in time does the constructive trust, if there is one, arise? At least two answers are possible, namely when the occupation starts or at the expiration of the 12-year period. In Mr Hinks's article, he seems to have envisaged that in this kind of case a constructive trust would be likely to arise at the time when title would otherwise be acquired by adverse possession: see the passage referred to earlier in which it is said that “whenever an *executor de son tort* claims title by lapse of time against his relatives” the courts ought to consider whether to impose a constructive trust so as to prevent him from relying upon possession. Similarly, in *Paragon*, Millett LJ stated at 408 that a constructive trust arises

“... whenever the circumstances are such that it would be unconscionable for the owner of property ... to assert his own beneficial interest in the property and deny the beneficial interests of another.”

39. This approach has the advantage of enabling the court to take into account all the events which have occurred during the period of occupation, and to consider whether in all the circumstances then obtaining it would be unconscionable for the person who has occupied the property to acquire a possessory title. This seems right as a matter of principle, and it is preferable to the alternative, which may give rise to complications if the circumstances have altered over time, so that it has at some times during a long period of occupation been ‘unconscionable’ for the occupier to be acquiring a

possessory title and at other times not.

40. In addition, there is the difficulty that, at the beginning of the period of occupation, the occupier by definition has no title to the property but is simply in possession in circumstances in which, until letters of administration had been taken out, legal title is nowadays vested in the Public Trustee (until 1994 in the probate judge). As was said by Kekewich J in *Re Barney* [1892] 2 Ch 265 at 272-273:

“[I]t is essential to the character of the trustee that he should have trust property actually vested in him or so far under his control that he has nothing to do but require that, perhaps by one process, perhaps by another, it should be vested in him.”

41. Nevertheless, in *James v Williams* the Court of Appeal held that the constructive trust commenced at the beginning of the period of occupation, basing its decision principally on the failure by the brother to take out letters of administration, in circumstances in which not to do so while taking the benefit of the property was unconscionable. The fact that the brother, as one of the persons competent to take out letters of administration, was in a position to require that the property be vested in him, was sufficient to make the property trust property and to justify the imposition of a trust. However, it does not follow that the only time when a constructive trust can arise, in any case of this kind, is the time when the period of occupation begins; it is necessary to consider the question as at the end of the period as well.

42. In the present case, I do not consider that any constructive trust arose in 1977 on the death of Edward Myers. Amy Myers did nothing other than to remain in the property in circumstances in which title was vested in the probate judge. As the unmarried partner of Edward Myers, she had no standing to obtain a grant of administration, and was therefore not in a position to have the property vested in her. Even if her conduct had been unconscionable she was not in control of the property. *James v Williams* is clearly distinguishable.

43. In any event, the basic principle underlying the imposition of a constructive trust is that the owner of the legal interest should not be entitled to hold property, where the circumstances are such as to make it inequitable or unconscionable for him to do so. There must be factors which “affect his conscience”: see per Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington LBC* [1996] AC 669 at 705, 709. It seems to me quite artificial to suggest that any such factors affected Amy Myers’ conscience immediately on Edward Myers’s death. She simply remained in her home, as no doubt all her children wished her to do whatever suspicions they might have held as to whether or not there had been a marriage.

44. The appropriate question to ask, in my view, is whether a constructive trust arose in April 1989 so as to prevent Amy Myers from acquiring a possessory title. I have not found it easy to answer it, but I have come to the conclusion that it has not been established on the evidence that the circumstances in April 1989 were such as to make it inequitable or unconscionable for Amy Myers to rely on her 12 years’ possession of the house. My main reasons are as follows:

(a) As stated above, unlike *James v Williams*, this is not a case in which she either could or should have applied for a grant of administration at any stage.

(b) I do not think that it can be assumed that, because she knew that there had been no marriage, she therefore knew that she was not entitled to the house. She might well have had the notion that as a “common law wife” she was entitled to it. She was clearly, on all the evidence, devoted to her family and the very fact that — some months after she knew perfectly well that the secret was out — she made a will disposing of the house as her own property suggests that she may have had some such belief. There is no direct evidence as to her state of knowledge, and a finding that she was aware that she was not entitled to the house, but nevertheless bequeathed it in her will as though she was, is not justified. This again is a clear difference from the facts of *James v Williams*, in which the Court of Appeal held that the deceased siblings’ conduct had been unconscionable precisely because they must have known that their sister had an interest.

(c) In some circumstances, it might be sufficient that the person in occupation knew the facts even if he did not realise that they meant that other persons were entitled to it. But knowledge of the entitlement was central to the decision in *James v Williams* and, in this case, if Amy Myers had known the legal position, she might well have been able to claim the house under the 1975 Act.

(d) It also seems to me that the terms of her note also militate against any finding of unconscionability. None of the witnesses suggested that it was inaccurate, and it appears to evidence a desire on the part of all her children, still in existence several months after they knew the truth, that she should sell the house and enjoy herself on the proceeds, presumably relying on them to look after her. Whilst there is no evidence as to the precise dates on which Amy Myers’s children expressed this wish, the note does not read as if it had been in the immediately preceding days or weeks and I think that I am justified in drawing the inference that this kind of thing had been said over time and had not been withdrawn after the truth came out in about January 1989. It follows that Amy Myers would have been entitled, at the relevant time in April 1989, to regard her children as content, whatever the legal position, that she should treat the house as her own, and if that is so, I can see nothing unconscionable in her acquisition of a possessory title.

45. In these circumstances, I do not consider that Amy Myers held the property as constructive trustee, from which it follows that she was entitled to bequeath it to her son. I reach this conclusion with some reluctance, as it seems clear from

her note that she envisaged that the house would in some way be used for the benefit of the family as a whole, and might well not have been very happy had she known that her son would sell it and simply keep the proceeds. Nevertheless, the result is that this action must be dismissed.

46. I am very grateful to both counsel for their assistance. If the parties are able to let me have an agreed order by 1pm on the day before judgment is to be given, there will be no need for anyone to attend.