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Sex & Immorality: The Court's Take

Early this year, the Supreme Court of New South Wales handed down its decision in Ashton v Pratt. This was an action by Ms Ashton to enforce a promise made by Richard Pratt - director of Visy Industries and well known philanthropist. The Court accepted (though somewhat reluctantly it seems) that Mr Pratt had told Ms Ashton that he would establish trusts of $2.5 million for each of her two children, pay her an allowance of $500,000 per year, pay up to $36,000 per annum for rental accommodation for her, and pay $30,000 per annum for her business expenses, particularly travel. [para 28].

In exchange, Ms Ashton agreed not to return to the escort industry, and provide services (non-exclusively) to Mr Pratt as his mistress on occasions when he was in Sydney.

In spite of the Court finding that such a promise existed, it refused to uphold the promise. Others have commented on the decision - eg here and here - however what interests me in particular is one basis for this refusal; that even if there were a contract, the Court would not enforce it on grounds of public policy. The question that springs to my mind is why the law would still presume to find an apparently consensual sexual relationship - for money or otherwise - immoral to such an extent that it fell foul of 'public policy'.

Arrangement Against Public Policy

Although the Court found there were insufficient indicia of a contract (ie the arrangement lacked intention to create legal relations) Brereton J nonetheless turned his mind to whether such an arrangement could theoretically be enforceable, or whether it would be against public policy. The public policy in question was rendering void and illegal, contracts that are 'sexually immoral and/or prejudicial to the status of marriage'.

Despite the defendant (Mr Pratt's executor) not making this argument, the Court felt 'bound to address the issue'. [para 37]

The Court first discussed a line of decisions on extra-marital cohabitation (which is considered an immoral purpose at law). Many of these contracts were in fact upheld because the parties were *already cohabiting* - therefore the contract did not *bring about* this 'immoral' state. In my view, this is an example of framing the facts to fit the law. In terms of co-habitation generally, the Court pointed out that statute now recognised unmarried cohabitation 'notwithstanding any rule of public policy to the contrary'.

The Court then turned its mind to the real issue, namely whether the arrangement was for 'meretricious sexual services'. In other words, did this contract tend to encourage sexual immorality, therefore rendering it void as against public policy.

As with the cohabitation cases, the courts have upheld agreements where the sexual immorality already existed: so the contract was not one that *brought about* sexual immorality. Therefore it would not be void against public policy.

Brereton J acknowledged that social mores continue to change, but that 'as authority stands such a contract remains contrary to public policy and illegal'. [para 50] It seems that where the law has advanced lies in that 'a distinction is now drawn between contracts with purely meretricious purposes and those which are intended to regulate stable extra-marital relationships' [citing *Treitel on Contracts*, 390].

The relationship between Ms Ashton and Mr Pratt was not however such a 'stable' relationship. The Court sought to characterise their relationship based on a helpful classification from *Markulin v Drew* (1993, NSWSC, Young J, unreported):

> It should be remembered, however, that traditionally there were in fact three classes of cases: (i) a contract of cohabitation; (ii) a contract by a

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> man with a woman to provide occasional sexual services; and (iii) an agreement with a common prostitute. Cases such as *Bainham v Manning* (1691) 23 ER 756 suggest that while relief would not be given to a man against a bond he had given to a common strumpet or prostitute, equity would not countenance a transaction whereby a man had given a bond to a housekeeper to secure a sum of money to her if she provided "secret services", presuming attending on her master for sex if required. Accordingly, "meretricious" probably means not a contract with a prostitute, but a contract treating a woman as if she were a prostitute.

In *Ashton v Pratt*, Brereton J found that the arrangements sought to establish a 'mistress relationship', and that the evidence did not reveal a relationship or consideration beyond 'meretricious sexual services'. On this basis the arrangements were contrary to public policy and illegal. [para 52] The Court did not discuss the impact, if any, of the arrangement on Mr Pratt's marriage, but only its meretriciousness.

Why this decision is unfortunate

> Definition of *Meretricious* 1: of or relating to a prostitute: having the nature of prostitution <meretricious relationships>...
>
> Origin of *Meretricious*
> Latin *meretricius*, from *meretric-, meretrix* prostitute, from *merēre* to earn...
>
> First Known Use: 1626

Though not called upon to do so by the parties' submissions, the Court chose to characterise the parties' arrangement as 'meretricious'. The Court found itself bound by the thinking prevalent in 1691, demonstrated by its approval of *Markulin v Drew,* citing *Bainham v Manning* in spite of accepting that 'social mores have no doubt continued to change' [para 50].

A feminist reading of this case might identify that the Court framed its inquiry around the 'social' and sexual (ie private) nature of the arrangement. In positioning Ms Ashton's claim as private, it existed outside the law. This reveals how contract law privileges the so-called objective, rational, autonomous public face of the market place - for it is these arrangements that will be enforced by the law while others within the domestic or social sphere will not.

The law reveals its gendered nature in presuming that a person will delineate their life in a work/home dichotomy. In contrast, in the private sphere a person might see work and family as mutually defining. This would however fall outside the consideration of the law. In this way, the processes of contract law subtly privilege that which inhabits the public domain to the exclusion of inhabits the private. (See Chapter 10 of my LLM thesis (2006) here for more discussion on this.)

In categorising the nature of this contract so easily into one of 'establishing the relationship of mistress' the Court makes a number of assumptions. First, it denies the possibility that Mr Pratt might have been genuinely seeking to support Ms Ashton. While this is likely impossible to prove now that Mr Pratt is deceased, the evidence accepted by the Court seems to indicate that he felt tenderness towards her an obligation (a moral obligation?) to support her and her children. This represents a rejection of the domestic and the personal in the Court's considerations. In finding the arrangement immoral, is it possible that the Court may instead have breached Mr Pratt's own perceived moral obligation?

More importantly perhaps as a representation of that which is public, the Court effectively privileged what it assumed to be Mr Pratt's view of the arrangement without consideration of Ms Ashton's own view of what the arrangement might represent.

It is clear from Ms Ashton's testimony, and indeed the nature of the arrangement - which included a $2.5 million trust settlement on each of her children - that Ms Ashton was concerned for the financial future of both her and her two children. In my view, for Ms Ashton this arrangement represented security for her family. This was nowhere considered by the Court in assessing the validity or otherwise of the arrangement. Instead, it chooses to find it meretricious and in doing so, brands Ms Ashton as an immoral woman and ignores any stated wishes (or moral obligation) of Mr Pratt in offering to provide.

While the Court's labelling of this arrangement as meretricious in one sense reflects on both parties, it is really Ms Ashton who suffers the taint of court-declared immorality. It is she, after all, who is the one receiving money for the granting of

sexual services where the context for this arrangement was excluded from the Court's consideration. Mr Pratt on the other hand lived a high-profile life and enjoyed both respect and notoriety. His 'extraordinary wealth' [para 23] and his power means that regardless of such a finding, even in death he will continue to enjoy a high reputation.

In purporting to safeguard 'public policy' as to morality, the Court in this case has instead represented an archaic and therefore unsustainable approach to adjudication of contractual disputes. It has done so first in applying the entrenched public/private dichotomy that privileges the world of rational, documented, considered and objective commerce, while suppressing the domestic and lived experience of those who appear before it. In doing so, it effectively taints a woman and protects the estate of a man who had the capacity to honour the arrangement.

Secondly, it has insisted on the bindingness of ancient standards of morality, failing to take the opportunity to bring the law into the present and provide for the future. Contrast the Court's approach in Mabo:

> If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning. [para 29]

In my respectful opinion, if the Court felt bound to consider the issue of public policy on the basis of immorality, it should instead have posed the question of whether the rule should be maintained, and on what basis. Instead it has reinforced the capacity of the courts to define people - usually women - such as Ms Ashton as immoral based upon an arrangement for consensual sex.

One could ask then, what exactly is the public policy being upheld, who is affected by such an approach, and how does it relate to a contemporary Australian understanding of morality?

Posted by Kate Galloway at 15:24

Labels: contract, feminism, immorality, law, meretricious, public/private, women