IN THE SUPREME COURT OF JUDICATURE OF JAMACA

IN THE HIGH COURT CIVIL DIVISION

CLAIM NO. HCV 0886 OF 2004

BETWEEN	**BEVON MARCH-BROWN**	**CLAIMANT**
AND	**XAVIER ST. MICHAEL BROWN**	**DEFENDANT**

Mr. Gordon Steer & Miss D. Dowding instructed by Chambers Bunny & Steer for the Claimant

Mr. Leroy Equiano instructed by Mrs. Duncan Ellis for the Defendant

Heard: October 1, and 4 2007 and September 9, 2008

MCDONALD J

In this application the Claimant seeks a declaration that she is entitled to 100% interest in the property located at 63 West Aintree Section 7 West Greater Portmore in the parish of St. Catherine registered at Volume 1280 Folio 715 of the Registered Book of Titles.

The Defendant is contending that he is entitled to 50% interest in the said property. The parties were married on the 18th December 1983 and at the time of the filing of Claim i.e 10th April 2004 the parties were divorced.

Mr. Steer alluded to the fact that he was proceeding under the Married Women's Property Act and that Section 24 of the Property Rights of Spouses Act permitted him to do so.

However, it is worthy to note that Sections 16 & 17 of the Married Women's Property Act have been repealed.

It is my view that neither Sections 13(1) nor 24 of the Property Rights of Spouses Act are applicable to these proceedings.

The Married Women's Property Act would not apply, either as at the time the action begun the parties were divorced. Logic dictates this approach and I am guided by the case of Myrtle Mowatt v. Mowatt (1979) 16 JLR page 362 where it was held:-

> "Section 16 of the Married Women's Property Act is a procedural Section whereby questions between husband and wife as to property may be decided in a summary way in the interest of justice between the parties. The jurisdiction of the Court in such a matter cannot be invoked unless at the time of the bringing of the action the parties are still married….."

The matter was correctly instituted by way of Claim Form. However it was held in Chambers and not open court which was procedurally incorrect.

I am of the view that this does not vitiate the proceedings as no prejudice would have been caused thereby, each party having exercised their right to cross-examination, each side filed sworn witness statement which were as if viva voce evidence.

Claimant's Case

The Claimant stated that herself and the Defendant were married on the 18th December 1983.

That in 1994 she saw houses advertised in Portmore St. Catherine. She showed the ad to the Defendant who informed her that he was not interest in purchasing a 'matchbox' Portmore house and wanted to buy a house in the hills of the Corporate Area.

She decided to purchase the house on her own from her savings, and sought the assistance of a co-worker to hold a place in the line at the National Stadium.

She said that this co-worker spent two nights in the line. She spent the third night in the line standing alone facing the battering by the throng, while the Defendant who was present watched the proceedings with his friends.

She eventually reached inside and so did the Defendant because 'partners' of the applicants were allowed in. She decided to put his name on the title, as he stood watching her and she 'felt pressured' to include him. There was never any agreement to purchase the house together.

She went in with a deposit i.e. a cheque in the sum of $100,473.00 which she drew from her savings at National Commercial Bank account #374374168 and a loan from her employers.

It is the Claimant's case that the Defendant made no contribution to the purchase of the property. She said he gave her a gift of $20,000 which she used towards the closing costs.

Her application was successful and the balance of the purchase price was financed through a mortgage with Caribbean Housing Finance.

She said that the Defendant's name was placed on the mortgage because his name was on the title.

She stated that only twelve months of mortgage payments were made by the Defendant, otherwise she paid the entire mortgage.

She made additions to the house in 1995 which was financed by her throwing partner, her savings and a loan from her employers at the University of Technology.

In 2001 she made further additions again solely financed by herself. Her retroactive salary was utilized to do this and she arranged with the contractor to pay him $10,000 per month.

The Claimant said that the extent of the Defendant's contribution to any improvement to the premises was limited to installing a grill costing $14,000 and rewiring of the kitchen at a cost of $8,000.

In cross-examination she said that at the time of the purchase the Defendant and herself were living together as a family and the relationship was good.

At the time the house was bought the intention was that they both would use it as the family home.

She admitted that the account from which the deposit came was in their joint names although he "did not put a penny in it". She had only put his name in the account just in case anything happened to her.

She said the house was rented for two years and the Defendant paid the mortgage from rent collected.

In the latter part of 1999 they moved into the house.

She gave the Defendant the money to pay the mortgage. When he was away from the house she would go and pay the mortgage.

The Claimant said that their relationship broke down in about 2000 and he moved out before 2002, he was going back and forth.

She found out in 1999 that he had an extended family and demanded that he start to pay the mortgage by himself and take care of his child.

Her monthly salary in 1994 was not as low as $6,154.00. Her salary was not only dependant on basic but on overtime and honorarium from time to time and profit sharing.

She also said that her salary was not her only income, as the father of her nieces (who lived at the house) assisted her with food and money.

Claimant's Supporting Witnesses

Mr. Haughton Jacobs, haulage contractor said that at the request of the Claimant, he delivered sand, gravel, blocks and other building material to her house in Greater Portmore on several occasions.

The Claimant would pay him at the now University of Technology.

He has never met the Defendant.

In cross-examination he admitted to seeing the Defendant once over at the house where they were living and he showed the Defendant a scar on his chest.

He also said he did not deliver material at the premises it was his driver.

Mr. Dexter Perry, a contractor said that the Claimant asked him to do additions to her house at 63 West Aintree Section 7 West Greater Portmore.

The Claimant and himself agreed a price of $800,000 for the work. He was paid $872,402.66 by the Claimant for material and labour.

He was paid over a period of time and accepted her offer to pay $10,000 per month for his labour costs after her money ran out.

He denied receiving money from the Defendant on several occasions and said that he had never contracted any financial business with him. Where any conflict arises in their evidence I accept Mr. Perry's evidence over that of Mr. Jacobs.

Case for the Defendant

The Defendant's evidence is that the Claimant and himself both decided to purchase the property together having seen the advertisement in the Daily Gleaner in 1994.

The processing of the applications took place at the National Stadium, and each of them took turns staying at the Stadium because they had small children at home.

On the third night both he and the Claimant stayed.

The cheque for the deposit was drawn from their joint account # 374374168.

He said that he gave the Claimant an additional $25,000 in cash to meet the deposit. That they obtained a mortgage to offset the balance of the purchase price. The premises was rented between 1995 and 1997 and the proceeds were used to pay the mortgage.

It was agreed between them that he would pay the mortgage and the Claimant the household expenses. He paid the mortgage solely from 1997 to December 2002.

He stated that both the Claimant and himself decided to extend the premises and they both contributed to the costs of all additions and improvements.

In cross-examination the Defendant said that he joined the line after the deposit was paid.

He said that in 1994 he was employed to Colgate as a machine operator and received a weekly salary of $9,000. He saved sometimes, and he would give the Claimant money out of the savings to assist with bills. He saved money at home.

He is unaware of the full amount of the deposit withdrawn from the savings account. On examination of the passbook he admitted to seeing a withdrawal of $100,473 and agreed that a manager's cheque was bought by the Claimant drawn on WHICON.

The Defendant stated that the house was rented for $5,000 per month and he believed the rental agreement was completed in June 1997.

He admitted to saying in his witness statement that he was unemployed between 1996 and March 1997. In cross-examination he said this was incorrect as he was employed by the Jamaica Defence Force as a reserve soldier between March 1996 and December 1996.

The Defendant said that between 1992 and 2002 he paid the mortgage solely.

In 1997 he was working at Wackenhut and paid the mortgage from his salary. He stopped working there late 1999 to early 2000 and started working at the United States Embassy late 2000 to 2001.

He claimed that he was not unemployed between early 2000 to 2001 as his movement from Wackenhut was a transition.

He testified that he was paid more salary at Wackenhut than at Colgate.

He claimed that work was done on the house about six times by different contractors. The periods of constructions by Mr. Perry took about 6 months. He said that he believes the cost could be $100,000, it could also be $800,000.

He said that he contributed manual labour to the construction and paid Mr. Perry $20,000 on one occasion and $10,000 on another towards the costs of the building.

The Defendant stated that there was an agreement between himself and the Claimant that he would pay the mortgage and she pay for the construction.

Analysis and Findings

In determining this case, the Court is guided by the principles which govern the law of trusts. There is no dispute that the property is registered in the parties' joint names.

As Harrison P stated in the case of Cecillia Mitchell Davy v. Riley Adolphus Davy SCCA No. 11/2004 page 2.

> "Where land is transferred into the names of husband and wife jointly, prima facia they are jointly entitled. However, such entitlement is not determinate of the beneficial ownership of each. If each contributes to its acquisition, the legal estate is in both jointly and the equitable interest is held by them in the proportion in which each contributed."

Where evidence of a common intention between the parties can be ascertained, then the court will give effect to these intentions.

As stated by Rowe J in Edmondson v. Edmondson SCCA 87/91 page 4

> "It is clear that proof of an express agreement may be relied on to determine the interest of the parties. This would, of course be the best possible evidence of a common intention for joint ownership of the property……
>
> Thus where there is no express agreement the court needs to address itself to whether there is evidence of a common intention at the time of its acquisition that the property is to be owned jointly.
>
> In determining whether or not there was such a common intention, regard can be paid to the conduct of the parties and also any expenditure incurred by them which is related to the property."

In this case there is no express agreement to indicate a common intention between the parties to share the beneficial interest in the property. The court is therefore entitled to determine from the parties conduct and contribution what was their common intention at the time of the acquisition of the property.

Common intention may be established by contribution to the purchase price.

There is no dispute that the deposit for the house was partly financed by NCB managers cheque for $100,473 drawn by the Claimant from the parties joint account # 37437468.

The Claimant's case is that the Defendant made no contribution to this account. Her salary was lodged to it and it was her sole property.

The Defendant contends that in 1994 when he worked at Colgate, he saved at home and it was when he started working at Wackenhut in 1997 that he opened a joint account in his and the Claimant's name.

Although the Defendant's name is on the account, he has given no evidence of depositing any funds therein. In cross-examination before being shown the passbook he was unaware as to whether or not the full amount of the deposit was drawn from the account. He also was not sure when the account was closed.

I accept the Claimant's evidence that she only put the Defendant's name on the account just incase anything happened to her.

I find that although it was labelled joint account, he did not contribute to this account. In other words it did not contain pooled resources.

The Defendant's pattern of saving bears some resemblance to the Claimant's in that the Defendant maintained a savings account in the joint name of himself and the Claimant, first at Workers Bank, then Bank of Nova Scotia and Money Market. He alone saved in these accounts and his salary went to the savings accounts.

I find that the parties saved separately although the respective accounts were in their joint names.

I accept the Claimant's evidence that she borrowed $30,000 from her employers at the University of Technology to assist with the down payment and so find.

In cross-examination the Defendant said that he was aware that the Claimant obtained a loan of $30,000.

The Defendant's evidence is that he gave the Claimant an additional $25,000 in cash to meet the deposit required. The Claimant states that he gave her $20,000 as a gift which she used towards closing costs.

I find that the Defendant gave the Claimant $25,000 towards the deposit and I do not regard it as a trifling contribution.

I need to address paragraphs 4 and 5 of the Reply in which the Claimant states that account #37437168 was in her sole name and she exhibited letter dated 21st September 2004 from NCB to confirm this assertion. Paragraph 2 of the letter reads:-

> "Mrs. March-Brown commenced banking relations with us on 1988 April 25, when she opened savings account number 37437168. This account was subsequently closed and funds transferred to a new account in 1997 January 21.
>
> Two other savings accounts in both local and foreign currencies were subsequently opened. These accounts are in all the name Bevon March-Brown only….."

In my opinion the wording is ambiguous and I assume the earlier letter from the bank was in error if the interpretation is adopted that it is in the name of the Claimant only.

The Defendant exhibited a later letter dated November 6, 2006 from the bank which states that the said account was maintained in the names of Bevon Brown and/or Xavier Brown. The important issue however is that both parties agree that it was a joint account.

The purchase of the property was not a cash purchase. The purchase price included not only deposit but mortgage payments.

Both parties agree that for two years rent from the property was used to pay the mortgage.

The Claimant asserts that she made all the mortgage payments except for a twelve month period which was paid by the Defendant.

The Defendant's case is that he paid all mortgage instalments from 1997 to December 2002.

The mortgage was in their joint names, and this joint agreement fixes both parties with the obligation of meeting the instalments under the agreement. Therefore the payments would be to the benefit of both parties.

It is common ground between the parties that the Defendant paid mortgage instalments for one year from his own resources.

The Claimant asserts that the Defendant was not employed for long periods after 1996 and as such could not contribute to the mortgage, and that when he did have money, he used it to maintain his other households.

The Defendant's pleadings disclose that he worked at Wackenhut from April 1997 to March 2001 and at the US Embassy from March 2001.

At the hearing he said that he worked at Wakenhut from 1997 to late 1999/early 2000 and started working at the Embassy late 2000/2001.

When asked in cross-examination if he was employed between early 2000 to 2001 he replied no, his movement from Wackenhut was a transition.

I reject this evidence and the assertions in the pleadings as to the dates of his employment. I find that he was unemployed from late 1999/early 2000 to 24th March 2001.

I find that it was the Claimant who provided him with the money to pay the mortgage instalments except for a one year period.

The Claimant's evidence is that at the time of purchase the parties' relationship was good; the house was purchased with the intention that they would live in it together and that it would be used as the family home.

The Defendant stated that both he and the Claimant decided together to purchase the house having seen the advertisement in the Daily Gleaner.

Both parties were present at the time of the processing of the application and execution of the mortgage documents.

The Claimant's evidence is that when she found out in 1999 that he had another extended family she "demanded he start paying for the mortgage by himself and take care of his child."

This suggests to me that he could have made some payments before. Based on her statement I must ask myself why would the Claimant after finding out about the child, demand that he pay the mortgage by himself, unless there was an initial intention that he had an interest.

I am of the view that she is thereby acknowledging that he had an interest in the property and forcing him to contribute more to his interest in the house.

I reject the Claimant's evidence that she decided to purchase the house on her own.

I reject her evidence that the Defendant told her he was not interested in purchasing a matchbox Portmore house and wanted to buy a home in the hills of the corporate area.

If the court were to accept as true the Claimant's evidence that she only added the Defendant's name to the title because she felt pressured and or as said in her rely because they were married, and not in pursuance of a common intention that the property be jointly owned, then it might be possible to prove that the beneficial interest in the property vested in the Claimant only.

In Grant v Edwards (1986) 2 AER 426 at page 435 Mustill J said:

> "The law does not recognize a concept of family property whereby people who live together in a settled relationship ipso facto share the rights of ownership in the assets acquired and used for the purposes of their life together.
>
> Nor does the law acknowledge that by the mere fact of doing work on the assets of one party to the relationship the other party will acquire a beneficial interest in that asset."

I reject the reasons proferred by the Claimant for including the Defendant's name on the title.

The Claimant's evidence in her witness statement is that because the Defendant's name was placed on the title; his name was also placed on the mortgage documents.

This implies that the Defendant's becoming a party to the mortgage agreement was not necessary or required to facilitate her procuring a mortgage.

I find the Claimant's reason to be untrue.

It is clear that the Claimant needed a mortgage and obtained one.

I find that the Defendant was a party to the acquisition of the mortgage. He was expected to be a contributor and I find that the Claimant could not have got the mortgage on her own, and that he did pay a portion of the mortgage at least twelve months.

I find that at the time of purchase, the parties intended that they should share equally and that the property should be a continuing provision for them during their joint lives.

I find that the Defendant's name on the title indicates an intention to possess jointly and in equal shares.

I adopt the words of Rowe J in Jones v Jones SCCA 19/88 decided March 8, 1990, when he stated

> "The law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal, the law leans towards the view that the beneficial intent is held in equal shares."

The case of Forrest v Forrest SCCA No 78/93 decided April 7, 1995 is a useful guide in determining how mortgage payments affect entitlement between contributing parties. Rattray P at page 11 and 12 said:

> "If the court is to give effect to the common intention of the parties, the conclusion must be that they should share equally as that was their obvious intention at the time of the acquisition and at least up to the time of their separation.
>
> The question to be decided however is whether the payment of the mortgage arrears entitles the wife to a greater share in the property than that which they intended at the time of the acquisition. In my view, in the absence of evidence as to an agreement either expressed or implied between the parties to vary the original beneficial interests as was clearly in the intention of the parties at the time of the acquisition the court can do nothing else but give effect to what was the common intention of the parties. There being no such evidence in this case, the court cannot vary the beneficial interest of the parties based on mortgage payments being paid by one of the parties. However the wife would be entitled to recover the share of the mortgage arrears payment of which the husband would have been liable to pay, that is 50% thereof."

The court therefore has to take into account what the Defendant should have paid and did not and which the Claimant paid on his behalf.

In the Claimant's Reply, it is stated that additions were made to the house between 1995 – 1997 and "2000 – 2004" the material and labour costs amounted to $428,311 and $872,402.66 respectively.

Mr. Perry supports expenditure of $872,402.66 only. The Claimant has not furnished the court with any documentary evidence in support of these expenditures.

The Defendant's case is that both the Claimant and himself contributed to the cost of all additions and improvements. He too provided no receipts of expenditure to substantiate same. The only expenditure he has quantiied is for grilling and wiring of the house totaling $22,000.00.

I find that the money spent towards the improvement of the house would accrue to the benefit of both Claimant and Defendant seeing he did contribute albeit a much lesser sum.

1. Declaration that the Claimant and Defendant are each entitled to a 50% interest in the property known as 63 West Aintree Sector 7 West Greater Portmore in the parish of St. Catherine registered at Volume 1280 Folio 75 of the Registrar Book of Titles.

2. Order for Partition and sale of the said property on the open market and distribution of the net assets in shares stated in paragraphs 1 and 5.

3. The Claimant has first option to purchase the interest of the Defendant in West Aintree Sector 7 West Greater Portmore.

4. That an account be taken by the Registrar of the Supreme Court of all mortgage payments made by the Claimant from 1997 to day of judgment.

5. That there be deducted from the Defendant's share and paid to the Claimant half the sum of the mortgage payments made by the Claimant

from 1997 to date of judgment excepting half of one year's mortgage paid by the Defendant in 1999.

6. That the property be valued by a competent valuator to be agreed between the parties, failing which Registrar of the Supreme Court shall appoint a valuator and the costs of this valuation are to be shared equally by the parties.

7. The Registrar of the Supreme Court is empowered to execute all documents relevant to effecting a registrable transfer of the property should either party fail, neglect or refuse to do so.

8. No order as to costs.