Judgement Book.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 87/91

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

BETWEEN	MICHAEL EDMONSON	APPELLANT
AND	JOAN EDMONSON	RESPONDENT

Garth McBean instructed by Dunn, Cox and Orrett for appellant

Gordon Steer instructed by Chambers, Bunny & Steer for respondent

June 2 and 23, 1992

ROWE, P.:

On June 2, we heard and allowed this appeal and indicated that we would give our reasons in writing.

The parties were married on the 3rd day of September 1983. Both were contributors to the National Housing Trust and applied for homes from the Trust. Their applications were accepted but the Trust has a policy of not allocating more than one house to a family. It was therefore only possible for one house to be allocated.

By letter dated January 19, 1988 the parties were informed that their application for a loan of One Hundred and Ten Thousand Dollars ($110,000.00) for the purchase of Lot 33, Boone Hall, Saint Andrew, had been approved by the Trust. It was a one hundred percent (100%) mortgage. Some time later the respondent/wife signed a "Tenancy Agreement" consenting to the placing of the appellant's name on the Certificate of Title along with hers,

as "joint tenants." The Certificate of Title for the property in question has not yet been issued.

After acquiring the property it was leased. Both parties agreed that the rental from the property should be used to pay the mortgage instalments. In May 1988 the respondent borrowed the sum of Ten Thousand Dollars ($10,000.00) in her name only, in order to effect improvements on the house.

The parties separated on the 12th day of January 1989. On the 8th day of September 1989 a letter was addressed to the National Housing Trust requesting its permission for the sale of the property. This letter was signed by both parties. It stated, inter alia:

> "Dear Sirs:
>
> RE: LOT 33 - BOONE HALL HOUSING SCHEME
>
> The above unit is jointly owned by my husband (Michael Edmonson) and I. ... In order for our divorce to be final, we have been advised by our lawyers to make a settlement where the property is concerned and this we plan to do by selling the unit.
>
> I am therefore humbly asking your kind approval for the sale of this unit so that my husband and I may proceed with our divorce."

By letter dated the 9th February 1990 the Trust granted permission to sell the unit.

On the 17th day of July 1990 the appellant/husband filed an Originating Summons under section 16 of the Married Women's Property Act for a determination of questions between himself and the respondent relating to the ownership of the property and particularly for:

> "(1) A Declaration that each party is entitled to half share in the property."

Panton J. heard the application on the 14th and 29th May, 1991. In his judgment he found as a fact that the allocation of Lot 33, Boone Hall, was made solely to the respondent/wife. In support of this finding he indicated that:

> "The 'tenancy agreement' was signed, it should be noted, by the respondent only. It confirms that the allocation was made to her and that she consented to the applicant being joined on the certificate of title.
>
> In my judgment the addition of the applicant's name to the certificate of title was done, not because of any interest he was asserting, claiming or protecting, but rather to meet the requirements of the Trust."

The learned trial judge also found that the appellant's claim to an entitlement in the beneficial interest of the property was substantially based on the fact that he and the respondent had obtained a mortgage in their joint names. He found that the respondent paid the mortgage instalments primarily from the rental income derived from the property; that the respondent obtained a loan, the proceeds of which she utilized to substantially improve the house; and that she was the one repaying that loan. In the light of all those findings, the learned trial judge concluded that the property belonged solely to the respondent/wife and therefore he refused the application made by the appellant.

The grounds of appeal advanced by the appellant are as follows:

> "1. That the Learned Judge erred in finding that the housing unit/property, the subject of the Application, was allocated by the National Housing Trust to the Respondent only having regard to the following evidence:
>
> (a) The evidence that both parties applied for and obtained a mortgage for one hundred per cent (100%) of the purchase price of the property.
>
> (b) The evidence that each party applied for and was entitled to a housing unit but in comformity with the policy of the National Housing Trust were, in respect of their separate

" entitlement, allocated one housing unit.

2. That the Learned Judge erred in finding that the Respondent has been paying the instalments albeit primarily from the rental and that the Applicant's contribution has been minimal having regard to the following evidence:

(a) Evidence that that (sic) parties orally agreed that after its acquisition the property would be rented and that the rental so received be used towards paying the mortgage instalments.

(b) Evidence that payments of the mortgage instalments were made from a Bank account which was in the joint names of the parties."

What are the principles applied by the Court in determining whether a party has acquired an interest in property? 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.

Nourse L.J. in **Grant v. Edwards** [1986] 2 All E.R. 426 at 431 stated:

> "... where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted on by her, that she should have a beneficial interest in 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 however,

at the outset neither party made a down payment on the purchase price of the house. Thus it is the conduct of the parties in the light of the evidence which is to be analysed.

The "Tenancy Agreement" which makes provision for the names of both parties to be placed on the Certificate of Title is of importance. Generally speaking, if the matrimonial home is conveyed to both spouses as joint tenants it will be exceptional for either to be able to claim that this gives anything other than a joint interest in the property.

However if it can be proven that a party's name was placed on the title as a matter of convenience only and not in pursuance of a common intention that the property be jointly owned, it might be possible to also prove that the beneficial interest in the property is vested in one party only.

In **Lynch v. Lynch** S.C.C.A. No. 36/89 Carey J.A. at page 10 stated:

> "It is now a fact of modern economic reality that many building societies require as a matter of policy the names of husband and wife to be joined as parties to a mortgage loan."

In that case it was found that the mere fact of the mortgage having been issued in the names of the husband and wife was not sufficient to give the wife an entitlement to a share in the beneficial interest of the property. The same principle, in a sense, applies to the situation where property is conveyed in the names of both parties in that although prima facie the parties are jointly entitled, evidence may be given to prove that there was no common intention that the property would be jointly owned - (see **Harris v. Harris**, S.C.C.A. No. 1/81).

The common intention that both parties should be beneficially entitled to the house is transparently clear from the admissions of the respondent. There was no dispute that due to the policy of the National Housing Trust one family could

only be allocated one house and on that basis the respondent swore in her affidavit that:

> "We both joined together and obtained the house and the mortgage was one hundred percent of the sale price as well as all costs incidental to the purchase."

The underlined words indicate that the parties accepted the unit as their joint entitlement and then set about to obtain funds to purchase same. The significance of the one hundred percent (100%) mortgage was not explained but it may be inferred that this was possibly due to the qualification of both husband and wife for a Housing Trust unit.

In the letter of September 8, 1989 the respondent boldly asserted that "the unit is jointly owned by my husband (Michael Edmonson) and I" and went on to state that she wished to settle the accounts with him before the final dissolution of the marriage. No dispute arose as to the claim by the appellant that the mortgage payments were made from the proceeds of the rent which incidentally first passed through a joint account held by the parties before getting to the mortgagor. In my opinion the wife's open admissions, her consistent conduct over the mortgage and the "Tenancy Agreement" together with the husband's conduct in applying for the mortgage, in acquiescing in the application to sell the property, and in co-operating in the total application of the rents towards the mortgage and loan repayments are irrefutable indications of a common, expressed and implied, intention of the parties to be the beneficial owners of the unit.

It is now necessary to address the share in the beneficial interest in the property to which each party is entitled. Earlier it was stated that generally where Title is issued in the names of both parties and there is no direct evidence of down payments, the Court would lean towards declaring that the parties have an equal interest. In the instant circumstances

the fact that the respondent took out a loan to improve the property is relevant to determine the respective interests.

The evidence disclosed that the rental income from the house was Nine Hundred Dollars ($900.00) monthly. The mortgage payments were Six Hundred and Thirty-Two Dollars Twenty-Nine Cents ($632.29) per month. Thus there was an excess of over Two Hundred and Sixty Dollars ($260.00) after the mortgage payments were made each month. This excess could be used to cover periods when the unit was not rented, to effect decoration, eg. periodical painting and as assisting with the repayment of the loan acquired by the respondent. However the contributions made from the excess rent would not be sufficient for the entire repayment of the loan. In the circumstances the loan balance and repayments attributable solely to the respondent would increase her beneficial interest.

Mr. McBean suggested that if the loan is to be considered, the maximum entitlement of the respondent in the beneficial interest of the property would be sixty percent (60%), and the appellant would therefore have forty percent (40%). Mr. Steer is amenable to that suggestion.

For the reasons given herein the appeal is allowed and the order of the Court below is set aside.

It is hereby declared:

(1) That the appellant/husband is entitled to forty percent (40%) beneficial interest in the house and the respondent/wife to sixty percent (60%) beneficial interest.

(2) That the property be valued and that each party be at liberty to purchase the share of the other with the respondent/wife having the first option to purchase the share of the appellant.

Alternatively:

(3) That the property be sold at public auction and the net proceeds be divided as at (1) above.

(4) That in the event of sale at (3) above the Registrar be empowered to sign a Transfer if the respondent fails or is unable to do so.

(5) That there be no order as to costs here or in the Court below.

FORTE, J.A.:

I agree.

WOLFE, J.A. (Ag.):

I agree.