

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E-207 of 1998

IN THE MATTER of the respective
rights of PAULETTE MARIE HEW
and EDMUND SAMUEL HEW in
various properties.

BETWEEN	PAULETTE MARIE HEW	PLAINTIFF
A N D	EDMUND SAMUEL HEW	FIRST DEFENDANT
A N D	FOXBOROUGH JAMAICA LIMITED	SECOND DEFENDANT
A N D	SMEDWA LIMITED	THIRD DEFENDANT

Mr. Robinson instructed by Patterson, Phillips & Graham for Plaintiff

Mr. G. Steer instructed by Chambers, Bunny & Steer for first Defendant

HEARD: 28.9.99, 29.9.99, 30.9.99, 3.11.99 and 26.1.2001

ELLIS J.

The plaintiff in this Summons under the Married Women's Property Act make claim for an Order that:-

1. All questions between them concerning their respective interests in the above properties be determined.
2. Directions be given for the division, sale or other disposition of the said properties.

AND IN PARTICULAR for the following Orders:-

1. A Declaration that the plaintiff is beneficially entitled to one half interest

in all that parcel of land with dwelling house thereon situated at Corniche Villas, Montego Bay in the parish of Saint James being a part of the land comprised in Certificate of Title registered at Volume 158 Folio 90 of the Register Book of Titles.

- 2 A Declaration that the plaintiff is beneficially entitled to half of the furniture and appliances in the said dwelling house.
- 3 A Declaration that the shares in the company **FOXBOROUGH [JAMAICA] LIMITED** are held upon trust by the first defendant and Lorraine Locking as follows:-
 - (a) as to 50 per cent for the plaintiff;
 - (b) as to 50 per cent for the first defendant
- 4 A Declaration that the plaintiff is beneficially entitled to one half interest in properties known as Apartments, 3, 5, 7, 8, 9, 10, 11 and 12 Corniche Villas, Montego Bay in the parish of Saint James being the properties registered in Certificate of Title registered at Volume 1218 Folios 862, 863, 865, 867, 868, 869, 870, 871 and 872 respectively of the Register Book of Titles.
- 5 A Declaration that the plaintiff is beneficially entitled to one half interest in the sale proceeds of properties known as Apartments Nos. 1, 4, 6, 13 and 14 Corniche Villas, Corniche Road, Montego Bay in the parish of St. James being the properties comprised in Certificate of Title registered at Volume 1218 Folios 861, 864, 868, 873 and 874 respectively of the Register Book of Titles.

- 6 A Declaration that the plaintiff is beneficially entitled to 30 per cent interest in the proceeds of all that parcel of land known as 8 Church Street, Montego Bay in the parish of Saint James comprised in Certificate of Title registered at Volume 990 Folio 518 of the Register Book of Titles.
- 7 A Declaration that the plaintiff is beneficially entitled to 30 per cent interest in all that parcel of land now known as China Doll Plaza situated at 10 Church Street, Montego Bay in the parish of Saint James and to 30 per cent interest in the rental income from the said property.
- 8 An Order that the first defendant account to the plaintiff for all the rental income received by the first defendant in respect of the property known as China Doll Plaza aforesaid.
- 9 A Declaration that the property known as 23-25 41st Street, Miami, Florida in the United States of America is held by Paula Young-Hew, Hazel Young and Frederick Cha upon trusts for the plaintiff and the first defendant in the following shares:-
- (a) as to the plaintiff – 50 per cent;
 - (b) as to the first defendant – 50 per cent
- 10 A Declaration that 1000 shares registered in the name of the first defendant in the company **FACHOY FOODS LIMITED** are held by the first defendant upon trust for the plaintiff and the first defendant in equal shares.
- 11 A Declaration that the plaintiff is beneficially entitled to one half interest

in the sum of US\$13000 withdrawn by the first defendant from Account No. 023351947 at Mutual Security Bank, Sam Sharpe Square, Montego Bay, St. James.

- 12 A Declaration that the plaintiff is beneficially entitled to one half interest in the proceeds of a Fixed Deposit Account formerly at Eagle Merchant Bank in the names of **EDMUND HEW** and/or **PAULETTE HEW**.
- 13 An Order that the first defendant account to the plaintiff for the proceeds of the said Fixed Deposit Account.
- 14 A Declaration that the plaintiff is beneficially entitled to one half interest in the sum of US \$12,500.00 formerly in Account No. 02 090 39368 at Jamaica Citizens Bank, St. James Place, Montego Bay, St. James.
- 15 A Declaration that **ERNEST HEW** holds the sum of **CANS250,000.00** upon trust for the plaintiff and the first defendant in equal shares.
- 16 A Declaration that the plaintiff is beneficially entitled to one half interest in the portfolio of shares formerly at Eagle Merchant Bank Limited in the names of **EDMUND HEW** and/or **PAULETTE HEW**.
- 17 That there be such further or consequential order as to this Honourable Court seems just.
- 18 That the defendants bear costs of this application.

The parties were married on the 16th of June, 1974 when the plaintiff was 22 and first defendant 32 years old. Three children have been produced during the marriage.

In her affidavit the plaintiff deposes that she at the time of the marriage, was employed at the Royal Bank of Canada as a Head Teller in charge of the Bank's Treasury.

At the time of the marriage the first defendant assisted his parents in the running of a family business (a small restaurant called China Doll) on premises 35 James Street and 8 Church Street, Montego Bay. The premises were owned by first defendant's father and one Stephen Hew. The downstairs part of this premises was rented to the plaintiff by the first defendant's father Walter Hew. She in those premises operated a Gift Shop.

It was her deposition that the income from the Gift Shop, apart from that which was used to buy stock and to meet expenses, was paid into the general family funds.

She operated the Gift Shop until 1979 when she went to Canada for the birth of her second child. On her return to Jamaica in 1980, the Stock for the shop was depleted. She received no cash or other proceeds for that stock.

Mr. Walter Hew first defendant's father told her that she was now part of the Hew's family. In that position she was merely operating the Gift Shop as her contribution to the family enterprise. She closed the shop as there was no stock and went to work full time in the China Doll.

In 1976 the first defendant's uncle sold his bakery at Hopewell in Hanover to him. She worked in the bakery from 1980 until 1985. In 1981 the first defendant underwent heart surgery and the applicant had to be the sole manager of the bakery. The bakery made profit from its operation. The profits formed the source of business enterprises by

the first defendant and herself. The profits in part were also used in the Hew's family business.

In 1985 when the first defendant recovered from his illness he did not return to work at the bakery. However by that time, they both had a substantial financial base which largely came from the bakery. That financial base formed the foundation of their further development.

The first defendant said that throughout his marriage to the plaintiff he worked hard to make provision for his family.

He admitted that the plaintiff worked in the family's business without salary.

In his affidavit evidence and by his evidence in cross examination, the first defendant maintained that, with the exception of the bakery at Hopewell, all the properties and businesses were owned by the Hew's family. His father was head of that family and controlled all businesses.

In relation to the apartment, he made admissions as to joint ownership which they rented from time to time. Mr. Hew said he purchased a Mr. Pushell's share in the apartments in 1986 - 1987 for \$5000,00. He obtained all of the purchase price from his father and brothers. After that purchase the plaintiff collected the rent and none of the apartments was given to his father.

Throughout the cross examination the first defendant by his answers suggested that all the funding for purchasing property during the marriage came from his father and some of his brothers.

He therefore denied the plaintiff's claim to be entitled to share in the properties over and above what she has taken in the rental from the apartments.

The proceedings within the Married Women's Property Act against the second and third defendants were quite properly withdrawn by plaintiff's attorney. Those proceedings concerned the claims by the plaintiff for sharing in properties acquired in names of persons other than the first defendant.

In this case the relevant properties in which the plaintiff claims beneficial interest were in the name of the first defendant above. In order to establish beneficial interest in the circumstances, resort must be had to the law of trust as was explained in *Grant v Edwards [1986] 2 All E.R. 426* Lord Mustill in his judgment, at page 435 b admitted that this is a difficult area of the law.

He however set out some propositions and principles which are to be considered in dealing with case such as this.

They are:-

- (1) The law does not recognize a concept of family property whereby people who live together in settled relationship ipso facto share rights of ownership in the assets acquired and used for the purposes of life together nor does the law acknowledge that by the mere fact of doing work on the asset of one party to the relationship of the other party will acquire a beneficial interest in that asset
- (2) The question whether one party to the relationship acquires rights to property the legal title to which is vested in the other party must be answered in the existing law of trusts.

There are no special doctrines of equity applicable in this field alone.

- (3) In a case such as the pervert the enquiry must proceed in two stages. First by considering whether something happened between the parties in nature of bargain promise on tacit common intention at the time of the acquisition. Second if the answer is yes, by asking whether the claimant subsequently conducted herself in a manner which was (a) detrimental to herself and (b) referable to whatever happened on acquisition.
- (4) (d) a common intention, not made explicit, to the effect that the claim will have an interest in the property if she subsequently acts in a particular way.
- (5) The court must decide whether subsequent conduct of the claimant is referable to the common intention, if there is one. The court will do so according to the nature of the conduct and of the intention.

The cited proposals of Lord Mustill are not exhaustive but for the purposes of this case, the others have not been cited. Reference may however be made to them later.

The plaintiff in this case, has not presented any express agreement as to her beneficial entitlement to any property. To be entitled beneficially she must establish a common intention and that she acted with reference to that intention.

Was there a common intention which was acted upon by the plaintiff?

The plaintiff submitted that from the start of the marriage and through its course there were several acts by her relevant to a common intention to acquire property. She did so act to her detriment with the common intention to be beneficially entitled to share in the property. She mentioned the fact that she left her job on her marriage to the defendant and worked in the family business. Moreover, she worked without pay.

The defendant at paragraph 28 of his affidavit of 7th November 1998 deposed that "This business belonged to my wife and I, and we began operations in about 1997". It is also to be noted that on being cross examined the defendant admitted that "through the marriage I worked hard and made provisions for his family. I had asked Mrs. Hew to come and work in the Hew's business – the Gift Shop and bakery at Hopewell. She got no salary for work in restaurant, gift shop and bakery".

The defendant has not expressly refuted the existence of a common intention that plaintiff should share in the said properties acquired in his name. All the business and properties in which he was involved belonged to his father as head of the Hew's family. Even the cash gifts which his wife and himself got as wedding presents went to the Hew's family common fund.

The defendant's claim that his father owned and controlled all property in the Hew's family in my opinion was advanced to negate any common intention within the decision of *Grant v Edwards [1986] 2 All E.R. 426*.

It is quite possible that the culture of the ethnic group to which the parties belong fosters a situation as that to which the defendant refer and I here make no judgment as to its propriety.

becomes virtually a partner in it.....and she is entitled, prima facie, to an equal share in it”.

I accept that submission of the plaintiff as sound and applicable to this case.

I find that the following properties and/or assets owe their origins to the bakery at Hopewell.

- (i) The apartments at Corniche Road
- (ii) The Matrimonial Home
- (iii) The furniture and appliances in the Matrimonial home

The only apartment which can be the subject of any order here is apartment No. 9. It is declared that the plaintiff and the defendant are beneficially entitled to equal shares in that apartment.

The claim to apartments 2,3,5,7,8,10,11 and 12 which are registered in the name of Foxborough Jamaica Limited is dependent on the ownership of the shares in Foxborough Jamaica Limited.

I do not find it possible to determine the ownership of the shares in these proceedings. The circumstances on which the claim is based have not been clearly established. Furthermore, I hold that the ownership of shares which involves Company Law cannot be determined on affidavit evidence in the absence of admission expressly or inferentially. The plaintiff will have to seek determination of those issues in other proceedings.

The beneficial ownership in the matrimonial home is held jointly by the parties in equal shares.

I accept the plaintiff's evidence of her involvement in the acquisition of the property. That involvement in the acquisition, the common intention for her to share and her subsequent conduct satisfy me as to her beneficial interest in the property in equal share with the defendant.

The defendant does not oppose the claim for equal share in the furniture and appliances in the home.

Other properties held in the names of the parties

The Fixed Deposit of US\$50,000. There is clear evidence, which I accept, that this amount was deposited in names of plaintiff and defendant. The defendant submitted that although that deposit was so made, it was made on trust for an entity called China Doll Ltd. I do not hold that the submission of trusteeship for another displaces the strong presumption of ownership as stated in *James v Maynard [1951] 1 All E.R. 802* and *Harris v Harris [1982] 19 J.L.R. 319*. Accordingly, I declare that the plaintiff is entitled to share in that deposit equally with the defendant. The trusteeship, if any, is not of moment here.

The deposit in account No. 23351947 at Mutual Security Bank was in the name of plaintiff and defendant. That deposit from which defendant withdrew US\$13000, attracts the presumption of equal ownership (See *Jones v Maynard*).

I therefore declare that the plaintiff is entitled to half of US\$13000. The plaintiff is also entitled to half of the US\$12,500 withdrawn by the defendant from account No. 0209038368 at the then Jamaica Citizens Bank at Montego Bay.

In relation to property at 23-25 N.E. 41st Street Miami, Florida the court makes no order or declaration of entitlement as claimed. It is the defendant's submission that that

property is in names of persons who are not parties to this suit. I accept the correctness of that submission.

It is the declaration that the plaintiff is entitled to share equally in the portfolio shares of the then Eagle Merchant Bank. An account is to be taken to establish existence and value of such shares.

There has been a withdrawal of the claims for shares in Fachoy Foods Ltd. and a Canadian Bank Account with C\$250,000.

In summary, the particular orders and declarations sought at paragraphs 1; 2; 12; 13; 14; 15; and 17 of the Originating Summons are made.

Costs of the proceedings are to be the plaintiffs to be taxed if not agreed.

LIBERTY TO APPLY

I am not however, prepared to accept that that to which the defendant refers can in Jamaican Law, negate the existence of a common intention to share in properties acquired during the parties' marriage. The law cannot be swept aside by a cultural sidewind.

It is my finding, on the evidence, that a common intention, as contemplated in *Evis v E. [1975] 3 All E.R. 774* and in *Grant v Edwards [1986] 2 All E.R. 426*.

There is evidence from the plaintiff and admitted by the defendant that the plaintiff worked in the bakery and other business without wages. I hold that the plaintiff's work in the bakery and other business was conducted subsequent to the common intention that she would share in acquired property. She acted to her detriment by working without wages. Her so acting was specifically referable to that common intention.

I entertain no doubt that the plaintiff is beneficially entitled to an interest in properties acquired during the currency of the parties' marriage.

Which properties are attractive of entitlement?

The bakery at Hopewell appears to be the medium which generated funds by way of profits. Those profits were used in the subsequent acquisition of properties and business enterprise.

Mr. Robinson for the plaintiff submitted that the parties were joint beneficial owners of the bakery. In that circumstance, the properties and business enterprises acquired from the profits are jointly owned. He cited dictum from Lord Denning in *Nixon v Nixon [1969] 3 All E.R. at 1136*. If they acquire the shop and business after they marry by their joint efforts – then it is their joint property, no matter that is taken in the husband's name. In such a case when she works in the business afterwards she