

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. H.C.V. 0654 OF 2003

BETWEEN	MARTIN O'KEITH KELLIER	CLAIMANT
AND	STEPHANIE KELLIER	DEFENDANT
BETWEEN	STEPHANIE KELLIER	ANCILLARY CLAIMANT
AND	MARTIN KELLIER	1 <sup>ST</sup> ANCILLARY DEFENDANT
AND	KENNETH KELLIER	2 <sup>ND</sup> ANCILLARY DEFENDANT

Mr. Gordon Steer and Miss Judith Cooper instructed by Chambers Bunny and Steer for the Claimant. Mrs. Georgia Gibson-Henlin and Miss Kerry-Anne Rowe instructed by Nunes Scholefield De Leon and Co. for the Defendant.

**Heard:** 6<sup>th</sup> and 7<sup>th</sup> December 2004 and 22<sup>nd</sup> April 2005

**Mangatal J:**

1. This is an application by a husband against a wife by way of fixed date claim form for the following orders:

- (a) (a declaration) That the property located at Lot 341 Pen Housing Scheme, Montego Bay, in the Parish of Saint James, is owned by the parties in equal shares.

- (b) That a report on and valuation of the said premises be taken or alternatively that a valuation agreed upon by the Claimant and the Defendant be taken and that costs of same be shared equally by the parties.
- (c) That the said premises be put on sale on the open market or by public auction or by private treaty.
- (d) That the Registrar of the Supreme Court be empowered to sign any and all documents to make effective any and all orders of this Honourable Court if either party is unable or unwilling so to do.
- (e) Liberty to Apply.

2. This matter arose for my consideration on the 6<sup>th</sup> and 7<sup>th</sup> of December 2004, having been fixed for two days hearing in the presence of the Attorneys and their clients on the 25<sup>th</sup> of May 2004. On that date it was ordered that the parties were to be present for cross-examination.

3. On the 6<sup>th</sup> of December 2004 the husband was present but the wife was not. Mrs. Gibson-Henlin, on behalf of the wife applied for an adjournment of the matter on the basis that her client, who lives in New York, had communicated with her that she was unable to be present because of financial difficulties in purchasing her airline ticket. This

information was communicated to the husband's Attorney-at-Law about one week before the hearing date.

4. Mr. Steer, on behalf of the husband opposed the application, and asked that the matter proceed, with the Affidavits of the wife and the ancillary claim being struck out.

5. Mrs. Henlin indicated that her client was at present unable to obtain proof of service on the 2<sup>nd</sup> Ancillary Defendant of the ancillary claim.

6. I ordered that the ancillary claim be dealt with separately, pursuant to Rule 18.9 of the Civil Procedure Rules " the C.P.R.". The ancillary claim is now fixed for hearing on the 31<sup>st</sup> of May 2005.

7. I took the view that it was not appropriate to adjourn the claim, it having been fixed from so long ago. However, it also did not appear to me to be appropriate to strike out the wife's affidavits. I ordered that the matter proceed and allowed the wife's affidavits to be used, subject to her being made available to the husband's Attorneys for cross-examination at a later date. The husband was cross-examined. Mr. Steer indicated that having regard to the evidence before the Court, he did not think it necessary and would not proceed to cross-examine the wife.

**The Husband's Case**

8. The husband's case was that he was married to the wife on the 19<sup>th</sup> of January 1983. Before that the parties had been living together in rented accommodation and in 1979 had decided that they needed their own home. He claims in his Affidavit sworn to on the 3<sup>rd</sup> of April 2003 that he and the wife made a joint application at the Ministry of Housing for a house. He said that at the time, although they were married, he was living in the United States and he came to Jamaica frequently.

9. While he was in the United States, the wife called and informed him that the Ministry had accepted the application and that she needed \$3,500.00 to make a deposit. The purchase price the husband says was \$32,500.00. The husband instructed his cousin Frank Kellier to give the Defendant the money, which he did. A letter was exhibited 'M.K.1' dated March 24 2003, in which Frank Kellier confirms that he gave the wife \$3,500.00 on behalf of the husband to make payment to their house situated at Lot 341 Farm Heights, Montego Bay, Saint James, while he [the husband] was overseas.

10. The husband claims that he had to repay this money to Frank in the United States. The husband stated that when he returned to Jamaica he realized that although the application was accepted no money was yet required. He said that in total he gave the wife the money for the deposit three times.

11. The wife, the husband says at paragraph 11 of his Affidavit sworn to on the 3<sup>rd</sup> day of April 2003, had the house registered in the names of herself and her father. He says he did not know this at the time as the agreement and understanding was that the property was to be in both their names and equally owned.

12. The husband states that he paid all of the monthly mortgage instalments personally up to 2001. He paid the instalments at the Ministry of Housing at Albion in Montego Bay on a monthly basis. He said that it was on one such occasion while paying the instalments that he realized his name was totally excluded. The title had not yet been issued.

13. He states that he spoke to the Defendant about this and she said that he was not included because he was overseas. They however decided to remedy this and signed documentation from the Ministry of Housing instructing them to delete the Defendant's father's name and add his, the husband's. This document was signed by them both and witnessed by a Justice of the Peace. The husband took the document to the Ministry of Housing. He said that the Defendant received the Title in 2001 and that was when he the husband saw it. A copy of the title was exhibited and shows that the property was registered in the sole name of the wife.

14. The husband relied heavily on Affidavit evidence filed in Suit No. FK 017 of 1992 in which the wife had applied for maintenance .So far as relevant the Affidavit of Means of Martin Kellier sworn to on the 15<sup>th</sup> October 1996 states:

*3. That my gross income for the last three years is as follows:-*

*.... ....*

*Giving an average income of \$407,333.33 per annum from salary.*

*4. That I have to pay the following per month:-*

*mortgage \$ 3,300.00*

*electricity 5,000.00*

*.....*

*6. That my wife is a businesswoman and earns in excess of \$30,000.00 per month. That she goes to America and purchases goods for sale in Jamaica.*

*7. That my wife is also a one half owner in the matrimonial home situated at Lot 341 Farm Pen Housing Scheme which is valued at \$7,000,000.00.*

*8. That my wife also collects the rental of part of the matrimonial home which is \$10,000.00 per month.*

15. In her Affidavit in Reply sworn to on the 14<sup>th</sup> day of April 1997, the wife states:-

*3. That paragraph 3 is incorrect; the Respondent has greatly understated his income and the average income stated by him of \$407,333.33 per annum is what he collects in a week.*

*4. That in paragraph 4 the Respondent has overstated some expenses, for example the Mortgage payment for Lot 341 is \$269.00*

*per month and not \$3,300.00 as stated; and electricity bill is \$2,000.00 not \$5,000.00; but he does not pay the electricity bill, I pay and I attach the latest bill which is in the name of my sister, but paid by me.*

*6. That as to paragraph 6 it is not stated accurately. I used to be a businesswoman years ago, but I am not in any business now. I am not earning \$30,000.00 per month; the only money I earn is \$10,000.00 mentioned in paragraph 8 of the Respondent's Affidavit of Means.*

*7. That I do not deny paragraph 7 of the Respondent's Affidavit, but say that the Respondent did not add that he owns another lot of land at Farm Pen.*

*8. That I admit paragraph 8 of the Respondent's aforementioned Affidavit.*

16. The husband indicated that he added to the original structure which consisted of two bedrooms and one bathroom. He says that he has added three bedrooms, one bathroom, verandah, garage, and a washroom. He also added a flat downstairs consisting of two bedrooms, one bathroom, kitchen and living room. He says that he paid for these himself without the assistance of the wife, save and except for four hundred building blocks to assist with the washroom and money to contribute to a wall.

### **The Wife's Case**

17. The wife in her Affidavits states that in 1979 she applied to the Ministry of Housing for a house. The purchase price for the house was \$37,000.00 and the deposit on the house was \$2,500.00. She received

the sum of \$2,500.00 as a gift from her father Dudley Robinson. This was the only association that her father had with the property as it was always registered in her name only. It was never registered in her father's name. She recalled receiving the sum of \$3,500.00 from Mr. Frank Kellier but she never received money from him in relation to the purchase of her house.

18. As regards sums received from Linette, the wife says that she borrowed the sums she needed for personal use from Linette who was her friend, not the husband's friend. She didn't know whether the husband repaid these sums to Linette, but, she says, at no time did Linette give her money on behalf of the husband to make a deposit on her house. She denied receiving money from the husband three times to deposit on the property.

19. She had no understanding with the husband to register the property in their joint names.

20. Throughout the years, the wife improved the house by adding three bedrooms, one bathroom, a verandah, garage, a washroom and a flat downstairs. She had no agreement to place the husband's name on the Title in exchange for improvements or at all.



21. The wife said that the flat consists of two bedrooms, one bathroom, kitchen and a living room.

22. She says that she asked the husband to make mortgage instalments on her behalf when she was in the United States but none was made to the best of her knowledge information and belief. She says that in any event when she made that request she did not make any promises that his name would be going on the Title or at all.

### **PRINCIPLES TO BE GLEANED FROM THE CASES**

23. "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house and managing their joint affairs, has there at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel" per Lord Bridge in **Lloyd's Bank plc. V Rosset** [1990] 1 All. E.R. p. at 1118h - 1119a.

24. "In sharp contrast to the situation outlined above is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to each(have?) such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the

purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a resulting trust” per Lord Bridge in **Lloyd's Bank**.

25. Presumption of advancement-Lord Upjohn in **Pettit v. Pettit** [1969] 2 A.ll.E.R. 385page 405I- 406B and 407F-G....

“But the document may be silent as to the beneficial title. The property may be conveyed into the names of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the beneficial ownership that was intended by them at the time of acquisition and if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw the inference as to their intentions from their conduct. If there is no such available evidence then what are called the presumptions come into play. They have been criticized as being out of touch with the realities of today but when properly understood and applied to the circumstances of today I remain of opinion that they remain as useful as ever in solving questions of title.....

So that in the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her but if he puts it in joint names then (in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy. If a wife puts property into her husband's name it may be that in the absence of all other evidence he is a trustee for her but in practice there will in almost every case be some explanation(however slight) of this(today) rather unusual course. If a wife puts property into their joint names I would myself think that a joint beneficial tenancy was intended, for I can see no other reason for it.

But where both spouses contribute to the acquisition of a property, then my own view(of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of an application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of evidence enabling the wife to claim an advancement to her, for it is against all the probabilities of the case unless the husband's contribution is very small.” (my emphasis).

26. Where on the evidence a common intention is found as to the beneficial ownership the operation of the presumption of advancement is precluded-the Privy Council decision **Neo Tai Kim v. Foo Stie Wah** Privy Council Appeal No. 30 of 1982, delivered the 4<sup>th</sup> March 1985. Also in **Neville Lynch v. Maureen Lynch** (1991) 28 J.L.R 8 it was held by our Court of Appeal that where a husband purchases property in the joint names of his wife and himself a gift to the wife is presumed in the absence of evidence to the contrary. Also, following **Neo Tai Kim**, that the doctrine of presumption of advancement operates only where there is no evidence of intention and one has to be imputed.

### **Improvements**

27. Lord Reid in **Pettit v. Pettit** at page 390E-H had this to say -

“But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there is in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement he requires(acquires?) no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse who owns the property is absent and without his or her knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.”

28. In **Muetzel v. Muetzel** [1970] 1 A.ll E.R. 443, it was held that a wife's beneficial interest was not restricted to the proportion that

her initial financial contribution bore to the original purchase price for the court did not look only at the direct money contribution but at all contributions, direct and indirect, made by the wife and she was also entitled to an interest in the extension made to the home in the same proportion as her interest in the original homepage 445a-b per Lord Denning M.R.

“Now for the extension to the house. The Registrar seemed to think that the extension was wholly the husband’s and that the wife could claim no interest whatsoever in it. When they put on the extension, they were still happily married. They planned it together, They added a bathroom and other accommodation for their growing family. The money for the extension was raised on mortgage. It is plain to me that the extension follows the original house. They have the same interest in it.”

Edmund Davies page 445f-h “If one postulates that the matrimonial home has been acquired by joint efforts..., the fact that one spouse spends money on extension of that house does not mean that the other can claim no part of the increased value of the property resulting from the extension. On the contrary, in the absence of a specific agreement, the extension should be regarded as accretions to the respective shares of each, and not as affecting the distribution of the beneficial interests. In other words, the divisors must stand whether applied to the house in its original or extended form.”

29. In **Brickwood v. Young**[1905] 2 C.L.R. 387 (H.C.), a case from the High Court of New South Wales, the headnote reads as follows:-

“A tenant in common who at his own cost repairs or improves the property cannot recover from other tenants in common a proportionate part of the cost. But if the tenancy in common is brought to an end by partition, sale by order of the court, compulsory acquisition, or the like, the tenant who has expended money on the property is entitled to a lien for the amount by which he increased the value of the shares of the other tenants in common.”

30. In Supreme Court Civil Appeal No. 29/95 **Wessel George Patten v. Florence Edwards**, our Court of Appeal approved of and applied **Muetzel**. At page 6, Patterson J.A., who delivered the judgment of the Court stated:

“ The true position is this: The value of the undivided share of each tenant in common will increase but the proportion in which they hold their respective share remains constant. But the money expended by one tenant in common to effect the improvement can be recovered in a suit for partition or on a distribution of the value of the property as was decided in **Brickwood v. Young**.”

### **ISSUES**

31. The following are the issues in this case:-

- (a) Did the parties have an agreement or express discussions as to the beneficial ownership of the property?
- (b) In the absence of express agreement, is there conduct from which the Court may infer a common intention to share the property beneficially?
- (c) Who effected the improvements to the property and when?

32. Whilst I had the opportunity to see the husband and his evidence was tested by cross-examination, the wife did not attend Court. I offered Counsel for the husband the opportunity to cross-examine the wife at a later date. However, he declined to do so. I am of the view that I cannot

in those circumstances treat the wife's evidence as carrying less weight than the husband's. I will nevertheless have to look at the issues and resolve issues of credibility, plausibility and probabilities.

**The First issue-whether express agreement?**

33. Overall, I found the husband's evidence far more credible than the wife's. The wife, it appears to me, gave evidence which was at times grossly exaggerated and there are glaring issues of credibility arising on her sworn evidence in this Suit contrasting with her sworn evidence in the maintenance Suit. The wife admits that she received money from the sources which the husband cites in terms of payment of the deposit on the property, but she denies that she got these monies for payment of the deposit or for property acquisition. She at no time says anything to contradict the husband's statement in paragraph 3 of his Affidavit of 3<sup>rd</sup> April 2003 and the further information in relation thereto dated 19<sup>th</sup> May 2004, to the effect that she and the husband were living together before marriage and at the time when the application was made to the Ministry of Housing. I appreciate that it is the husband who bears the burden of proof but, in the context of the wife's statement that she made the application before marriage, the question of whether they were living together before marriage would be an important consideration deserving of response. In paragraph 7 of her Affidavit in the maintenance Suit the wife appears to admit that she is a part-owner of the matrimonial home

but goes on to say that the husband did not mention that he owns another lot of land at Farm Pen(my emphasis). She did not say he also owns a lot of land at Farm Pen which would have implied that he did not own part of the matrimonial home. The use of the word " another" clearly implies that the husband is also an owner of the matrimonial home. It is true as Mrs. Gibson-Henlin argued, that the husband did not, in the maintenance Suit seek to be credited for half of the rental which he would have been entitled to if he was a part-owner. However to my mind there could be several possible explanations for this which would not derogate from his instant claim to be joint owner of the matrimonial property.

34. An example of the wife's gross exaggeration, or saying things when it suits her, is in paragraph 3 of the Reply to Affidavit of Means where she says that the average yearly figure of \$407,333.33 per annum from salary which the husband said he earned is really what he earned per week. This was clearly unsubstantiated and on a balance of probabilities was likely a gross exaggeration to suit her cause. She would be saying that in the years 1993-1996 the husband was earning in excess of \$21 million per year. Possible, but not without more, probable. On the other hand, I accept , as Mrs. Gibson-Henlin has pointed out in paragraph 15 of her written submissions, that the figure which the husband had stated in the maintenance suit. i.e.\$3,300.00 is many times more than the

\$269.00 which the husband has conceded was the monthly sum. However I accept his explanation given during cross-examination that the sum stated by him in the maintenance suit was so stated by him because that was the sum paid some months because he paid off and on and that that was what was owed from time to time.

35. On the first issue, I accept and find that there was an express agreement between the parties that they were to own the property jointly and that the husband relied to his detriment on that agreement by providing the money for the deposit and by paying mortgage instalments.

**The second issue-in absence of agreement, can common intention be inferred?**

36. Even if I am wrong about the first issue, i.e. that there was an express agreement, it is clear that there is evidence from which the Court may infer a common intention to share the property beneficially. The case of **Lloyd's Bank** is authority for the proposition that the conduct of the parties can be relied upon both as a basis for inferring common intention as well as the basis giving rise to a constructive trust. Direct contributions to the purchase price are treated as being made not only initially, but also by payment of mortgage instalments. I accept that the husband provided the money for the deposit and made substantial payments towards the mortgage, and I accept that this was well-known to the wife. It is clear that in paragraph 4 of her Affidavit in Reply in the



maintenance Suit the wife admits that the husband had paid the mortgage instalments on Lot 341. In that paragraph the wife denied that the husband was paying the electricity bill as he contended and she said that the amount which he said he paid for mortgage was an exaggeration. Clearly if he was not paying the mortgage at all she would have said so. Additionally, if the husband had been making insubstantial or markedly infrequent payments towards the mortgage one would expect that the wife would also have pointed that out. Instead, the Affidavit evidence in the maintenance suit clearly demonstrates that the husband was making substantial direct contributions to the periodical mortgage payments. Indeed, it is significant that there appears to have been an understanding between the parties that the husband had responsibility for meeting the payments. Yet here is the wife now trying to deny that the husband paid any mortgage instalments. These are very serious credibility issues right there on the face of the wife's sworn evidence. Although the husband did not exhibit any receipts to show the amounts paid towards the mortgage, I accept his explanation that this was because he had given their son the receipts to give to the wife so that she could claim back for sums overpaid by her when she eventually paid up arrears on the mortgage. All of this must be viewed against the backdrop of the wife saying in her Affidavit in the maintenance Suit that she was not then working and her only source of income was the rental from part of the property. In the Affidavit of-20<sup>th</sup> June 2003 the wife admits to

borrowing and receiving money from other persons to meet her personal needs. I reject the wife's later statements in this suit that she only asked the husband to pay the mortgage while she was abroad and that "to the best of her knowledge, information, and belief" he did not pay any instalments. I also reject the submission put forward on the wife's behalf that the husband's statement in the maintenance suit that he was paying the mortgage is merely a statement that he was making provision for his family by making mortgage payments and was not a statement that it was based on any common intention that he should benefit from the property.

37. It is true that some of the husband's answers in cross-examination, and in the further information to his Affidavit provided 19<sup>th</sup> May 2004, in particular as to whether he signed the application form, whether it was jointly signed, or whether the wife alone signed it and as to dates when different things occurred have varied from his other evidence. However to my mind those inconsistencies do not go to the root of the husband's case or destroy his credibility. They in my view point more towards imperfections of memory for dates and detail rather than to untruth. They are of a completely different nature from the inconsistencies in the wife's evidence which totally destroy her credibility.

38. On the Second Issue I therefore find that there is conduct from which I infer that there was a common intention to share the property beneficially in equal shares, from the fact that the husband provided the deposit, and from his substantial payment towards the mortgage. This conduct can also be relied upon to give rise to a constructive trust whereby the legal owner the wife holds the beneficial estate in trust for herself and her husband in equal shares.

39. As Mr. Steer argued on behalf of the husband, and as held in **Neo Tai Kim** and in **Neville Lynch v. Maureen Lynch**, although the property is registered in the wife's sole name, the finding of a common intention precludes the operation of the presumption of advancement and so I will not address the arguments concerning the presumption submitted on behalf of the wife.

**Third Issue-Who effected the improvements to the property and when**

40. I accept the husband's evidence that he effected the improvements/extensions in about 1986-1989 and 1991(see the Further Information provided in relation to paragraph 17 of his Affidavit). This work was done at a time when the parties were living together amicably. As was held in **Muetzel** and in **Patten v. Edwards**, I hold that the improvements/ extensions are to be regarded as accretions to the respective interests of each and not as affecting the beneficial interests. As was held in **Wessell Patten v. Florence Edwards**, and in **Bricklewood v. Young**, if the tenancy in common is brought to an end by sale by order of the Court the tenant who has expended money is entitled to a lien for the amount by which he increased the value of the

share of the other tenant in common. However, in this case I am not satisfied as to the sum which the husband has asserted that he spent and there is not a scintilla of documentary evidence to support this aspect of the case so as to ground a lien in a specific amount. This is not a case where the wife has admitted the amount. On the contrary, she has denied that the husband carried out improvements.

41. I therefore make the declarations and orders sought in paragraphs (a)-(e) inclusive of the Husband's Fixed Date Claim Form.

I also order that there be an accounting by both parties of all rental received from the property at Lot 341.

I declare that the two mortgages to the Bank of Nova Scotia, endorsed on the Title in the sums of \$1,350,000.00 and \$2,150,000.00 on the 15<sup>th</sup> December 2000 and the 26<sup>th</sup> of February 2002 respectively, are for the sole account of the wife, to be deducted from her share in the proceeds of sale of the said property.