

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT E. 290 OF 2002

BETWEEN CAROL FAY REID APPLICANT
AND CLINTON REID RESPONDENT

Mrs. Pamela Benka Coker instructed by Mrs. Debra E. McDonald for Applicant

Mr. Gordon Steer, instructed by Chambers, Bunny & Steer for Respondent

Heard: September 26, October 27, 2005 & January 20, 2006

Coram: Harris, J.

On April 26, 2002 the applicant issued an Originating Summons in which she seeks a declaration that she is entitled to a one half beneficial interest in the following properties:

- (a) 24 Lejune Avenue, Keystone in the parish of St. Catherine registered at Volume 1252 Folio 705 of the Register Book of Titles.
- (b) Land at Green Acres in the parish of St. Catherine registered at Volume 1119 Folio 137 of the Register Book of Titles.
- (c) 92 Brunswick Avenue in the parish of St. Catherine registered at Volume 468 Folio 51 of the Register Book of Titles.

A Consent Order declaring the parties to be equally entitled to an interest in 24 Lejune Avenue and the land at Green Acres was made on November 24, 2004. The only matter which remains to be resolved is that with respect to the respective interests of the parties in 92 Brunswick Avenue.

The applicant is a registered nurse and midwife. The respondent is a veterinary surgeon. They were married on December 27, 1980. The marriage broke down about December 1999. There are two children of the marriage. The first child was born in Jamaica on January 3, 1980 and the second was born in Australia on June 23, 1986.

The applicant had been employed continuously during the subsistence of the marriage. At the time of the marriage, the respondent was resident in Canada pursuing a B.Sc course in veterinary microbiology where he remained for three (3) years. During his absence from Jamaica, the applicant assumed the financial responsibilities for the child and the home. On his return to Jamaica, he remained unemployed for ten (10) months during which time the applicant continued to meet the family obligations. The respondent subsequently took up employment with the Ministry of Agriculture.

In May 1985 he proceeded to Australia on a scholarship to pursue a course in veterinary medicine. The applicant and the child subsequently joined him there. While in Australia, the applicant worked notwithstanding the respondent was receiving an income from the scholarship.

The parties returned to Jamaica in 1989. In 1990 a lot of land at Green Acres was purchased by them and title was conveyed in their joint names. A matrimonial home was bought by them at 24 Lejune Avenue. 92 Brunswick was purchased in 1998 for \$4,440,000.00 in the joint names of the parties for use by the respondent as a veterinary clinic and has since been so used. A deposit of \$660,000.00 was paid and the balance purchase money was secured by way of a mortgage on the property in dispute and on the land at Green Acres. Title to the property was issued in their joint names.

It was averred by the applicant that she contributed to the purchase price of Brunswick Avenue by way of subscribing to the deposit, by contributing to mortgage payments and substantially contributing to the household expenses to enable the respondent to meet mortgage payments.

The respondent declared that the applicant made no contributions to the purchase of the property. He asserted that the deposit on the purchase money was provided by him solely and the applicant's name was placed on the title merely because the mortgagees required additional security for the loan.

Where legal estate in property is vested in the joint names of parties and there is no agreement or understanding to share ownership and a dispute as to ownership arises, in determining the claimant's interest, the court must be guided by the equitable principles accorded by the law of trust.

In dealing with the principles governing the purchase of property in joint names of spouses, where there is no declaration as to the interests of parties in the property, in **Gissing v Gissing [1970] 2 ALLER 790 at 790 Lord Diplock** stated:

“A resulting, implied or constructive trust – and it is unnecessary for present purpose to distinguish between these three classes of trust – is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land”.

A claimant who seeks to establish an entitlement to an interest in property must adduce evidence to show that:

1. There was a common intention, that is, an agreement, understanding or arrangement between the defendant and himself or herself that he or she should acquire a beneficial interest in the property.

11. He or she acted on such arrangement, understanding or agreement that he or she would beneficially share in the property.

In *Grant v Edwards* 1 Ch 1986 638 @ page 646 Norse L.J. observed:

“In a case such as the present, where there has been 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 upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it.

Common intention may be established by contribution to the purchase price or by an express agreement for the claimant to share beneficially in the property. In the absence of express agreement, to establish a trust, it must be shown that the claimant acted on such common intention as existed between the parties.

Where there is evidence of direct contribution and express agreement, then no difficulty arises in determining the common intention. In the absence of such evidence, the court is faced with the onerous task of ascertaining the common intention of the parties as to their proprietary interests at the time of acquisition. The court, in the determination of the

respective parties' intention does so by reference to their conduct. A common intention will be imputed only if the evidence so dictates.

A court will not imply an intention that joint purchasers should share the beneficial interest in property unless it is clearly of the opinion that no reasonable men could have failed to form a common intention that the beneficial interest should be shared. A common intention will only be inferred from their conduct if in relation to their proprietary rights, they formed an actual common intention.

In keeping with the foregoing proposition in **Pettitt v Pettitt [1969] 2 ALLER 385 at 413 Lord Diplock** said:

"How, then, does the court ascertain the "common intention" of spouses as to their respective proprietary interests in a family asset when at the time that it was acquired or improved as a result of contributions in money or money's worth by each of them they failed to formulate it themselves. It may be possible to infer from their conduct that they did in fact form an actual common intention as to their respective proprietary interests and where this is possible the courts should give effect to it:

At page 414 he went on to state:

"Unless it is possible to infer from the conduct of the spouses at the time of the concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts on the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses."

The crucial question for determination, therefore, is whether there is evidence from which it can be shown that the applicant acquired a beneficial interest in the property. Is there a share in 92 Brunswick Avenue, which the respondent now holds on

trust for the applicant? Was there a common interest between the applicant and the respondent that she should share beneficially in the property?

The answers to these questions lie in whether by the conduct of the parties any reasonable inference can be drawn imputing an understanding or an arrangement between the parties which confers on the applicant an interest in the estate, and she acted upon such arrangement or understanding to her detriment.

The evidence discloses that throughout the marriage the applicant substantially contributed to the family's welfare by way of financial support and the funding of household expenses. She worked incessantly. It is clear that her contributions were of manifest assistance to the respondent, which led to the parties purchasing properties in their joint names. Although a pattern of purchasing and owning properties jointly developed during the marriage, it must be shown that a part of the legal estate in 92 Brunswick Avenue is vested in the applicant as a result of shared intention of the parties.

The applicant asserted that she contributed to the purchase price of the property by assistance with the down payment and by meeting household expenses.

A deposit of \$660,000.00 was paid on the purchase money. This sum, the applicant asserted, was made up as follows:

- (a) \$350,000.00 from a joint account held at Jamaica Money Market Brokers in the joint names of the respondent and herself.**
- (b) \$100,000.00 by way of a loan from the applicant's brother.**
- (c) \$150,000.00 from the respondent's own resources.**

The evidence discloses that the applicant opened and maintained the joint account

at Jamaica Money Market Brokers. No funds were ever deposited to the account by the respondent although the majority of the withdrawals were made by him between January 1 – December 31, 1998. The deposit on purchase money for Brunswick Avenue was paid in 1998, sometime before July 22, 1998. However, a Statement of Account from the Jamaica Money Market, which was exhibited, does not reflect a withdrawal by the respondent for \$350,000.00. It cannot be acknowledged therefore, that the \$350,000.00 originated from the applicant's resources, or the joint resources of the parties.

There is evidence however, which is uncontradicted, that the loan of \$100,000.00 was made by the applicant's brother. This sum facilitated the funding of the deposit purchase money. In my view, one half of this sum ought to be regarded as a contribution by the applicant towards the purchase price.

The object of the purchase was to provide a home for the respondent's veterinary clinic. It was the respondent's contention that at the time of purchase the marriage had begun to deteriorate and no discussions relating to the acquisition of the property had taken place between the applicant and himself. I am not persuaded that this is true. It is my opinion that prior to purchase of the property and during the negotiations for purchase the parties communicated.

There is evidence from the applicant, which I accept, that she was the one who suggested that a property be purchased to accommodate the clinic as she had found that a sum payable under a lease which the respondent had decided to undertake was exorbitant. The respondent had taken the lease for her to sign, which prompted her to make the suggestion. To this suggestion he agreed.

He thereafter located Brunswick Avenue. It is clear that the purchase of the property was discussed.

The property was bought in 1998. At that time the parties were experiencing matrimonial difficulties. This notwithstanding, the applicant wished the marriage to continue and was in full agreement with the purchase. The parties separated in December 1999, this however, would not detract from the true intention of the parties at the time of the acquisition of the property.

The applicant executed the Agreement for Sale as well as the transfer. It is also of great significance that she did not only execute the mortgage on the security of Brunswick Avenue but acted to her detriment in the execution of a mortgage of Green Acres. Additional security was needed to satisfy a requisition of the mortgagee, the Bank of Nova Scotia. The purchase of Brunswick Avenue would not have materialized had she not executed the mortgage over Green Acres. Clearly, these are acts referable to a common intention that the applicant should obtain a beneficial interest in Brunswick Avenue.

The applicant had always played an intrinsic and integral role in assisting with the purchase of property by direct and indirect contributions. It appears to me that although she admitted in cross examination that she did not assist with the mortgage payments on Brunswick Avenue, she continued to meet household expenses which relieved the respondent of the responsibility of defraying those household expenses which he would have otherwise borne up to the time of separation at the end of 1999. Her contribution would therefore not be limited to that which she had made by virtue of the loan from her brother but also her financial contributions to the household. It could not be said that on

the purchase of Brunswick Avenue there was not a common intention that she should have secured an interest in the property.

In the circumstances of this case, the true inference is that, at the time of the acquisition of the property the applicant and the respondent formed a common intention as to their rights in 92 Brunswick Avenue. Such an intention was that they should hold the legal estate therein, jointly.

There remains to be considered the issue as to the respective shares to which each party is entitled. Mrs. Benka Coker submitted that the evidence discloses that the parties had a common intention to share the proprietary interest in the property equally.

It was argued by Mr. Steer that if the evidence of the applicant is accepted then her contribution is ascertainable, which would be \$50,000.00, one half of the loan from her brother and her infinitesimal indirect contribution between January and December 1999 and therefore would not be entitled to fifty percent interest in the property. In support of his submission he cited **Gissing v Gissing (supra) in which, at page 782**

Lord Reid said:

“It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half-share. I think that the high-sounding brocard “equality is equity” has been misused. There will be of course be cases Is a reasonable estimation, but there will be many others where a fair estimate might be tenth or a quarter or sometimes even more than a half”.

Where there is no express agreement as to the extent of the proportionate shares in which each party holds in property jointly owned, the court is under a duty to assess the

proportionate share of each. If there is evidence of the specific amounts contributed by each party, then each is entitled to such proportion commensurate with his or her contribution.

However, where there is evidence of contribution by a party but there is uncertainty of the precise extent of such contribution then the court seeks to ascertain the common intention of the parties as to their respective shares.

On examination of the facts, the parties had always purchased properties jointly in equal shares. This points to the fact that the parties would have formed a common intention to purchase Brunswick Avenue equally. The applicant had contributed directly to the purchase by way of the sum of \$50,000.00. She also made contributions indirectly by financial provision towards the household expenditure which in my view were substantial.

The sums expended by her on the household expense up to December 1999, although substantial are unascertainable. Since such sums would be difficult to compute, the maxim "equality is equity" becomes operable. In my judgment, the property is owned by the parties in equal shares as there was a common intention that they should so hold.

It is important to point out that since the applicant had indirectly contributed to the mortgage payments the benefit of the indirect payments accruing to her would only be applicable up to December 1999. After December 1999 she assumed the position of an ordinary joint mortgagor in the redemption of a mortgage and the respondent would be entitled to a 50% contribution from her with respect to the mortgage payments subsequent to that date.

In dealing with the principle of co-mortgagor's right of recovery of a proportion of the mortgage which his co-mortgagor is liable to pay, in **Wilson v Wilson 2 All ER 447 at 454 Russell, L.J.** said:

"In the result in my judgment the appeal should be allowed and it should be declared that the wife is entitled to half of the net – proceeds of sale of the house. I think, however, that there must be some adjustment in respect of mortgage installments paid by the husband, between the time when the wife left the matrimonial home in July 1959 and the sale of the house in March 1961: I do not think that the presumption of gift can continue to apply after the separation, nor consequently that the husband can be taken to have given to the wife the benefit of half these post separation payments; he is in respect of these payments in the ordinary position of a joint mortgagor redeeming a mortgage and entitled to contribution from the co-mortgagor in proportion to their interest, and from her half of the proceeds of sale, half of such payments should be deducted and added to his half. If necessary, there must be an inquiry to ascertain the amount".

The respondent would be entitled to one half of the mortgage payments from January 1, 2000 up to and inclusive of such date on which the mortgage shall have been redeemed.

It is declared that:

- (1) The applicant and the respondent are entitled to the property 92 Brunswick Avenue in the parish of St. Catherine registered at Volume 468 Folio 51 in equal shares.
- (2) The property be sold and the proceeds divided equally between the parties.
- (3) That the respondent be given first option to purchase the applicant's interest.

- (4) A valuation of the property be done by Messers D C Tavares & Finson of 1 Belmont Road, Kingston 5 and cost of the valuation be borne by the parties equally.
- (5) Accounts be taken of the sum now due and owing to the mortgagees
- (6) The respondent is entitled to recover from the applicant one half of mortgage payments made by him after December 31, 1999 inclusive of one half of such sum as shall be paid by him to redeem the mortgage.
- (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 repose to do so.
- (8) Mrs. Debra E. McDonald, attorney-at-law shall have carriage of sale.
- (9) Costs to the applicant to be agreed or taxed.