IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2011HCV 03650

BETWEEN	**HEADLEY WEIR**	**CLAIMANT**
AND	**JOHN WOODHAM**	**1ST DEFENDANT**
	CARL BRANDON	**2ND DEFENDANT**
	LLOYD THOMPSON	**3RD DEFENDANT**

Land – Owners hold as tenants in common – 2nd Defendant is part owner in possession who made improvements – Property sold - Whether proceeds of sale to be divided in accordance with an agreement between the co-owners- Whether claim barred by Limitation of Actions Act- Whether one co-owner's investment in the land bars recovery of equal share by the other co-owners.

Carla Brightson and Jacquiline Cumings instructed by Archer Cummings & Co. for Claimant.
Raymond Samuels instructed by Samuels & Samuels for Defendants.

HEARD: 5th, 6th, & 8th November 2013

CORAM: BATTS J.

[1] This Judgment was delivered orally on the 8th November 2013.

[2] In his closing submissions counsel for the Defendants said that this case epitomised the adage "The love of money is the root of all evil". This is because the matter concerns old friends who invested together but find themselves in a dispute as to how the fruit of their investment is to be shared. It is, I suppose, my task to decide whose money or perhaps whose love of money has led to this evil.

[3] There is no dispute that in the early 1980s three friends together purchased property which I will hereinafter refer to as "the Point". It cost $90,000 and each person put up $30,000. All three being the Claimant, the 2nd and 3rd Defendants, were consequently registered as tenants-in-common. The Title to the "Point" was admitted in evidence by consent as **Exhibit 1** being Volume 1436 Folio 918 of the Register Book of Titles. The Title reads,

> *"Date Issued* *1st February 2010*
> *Parent Title* *Volume 1102 F.769*
> *Plan Annexed* *Yes*
> *I. Registered Owner*
> *Lloyd Thompson of Oracabessa, St. Mary, Businessman, Headley Weir and Carl Brandon both of Tower Isle Saint Mary, Businessman and Contractor respectively are now the proprietors of an estate as Tenants-in-Common in equal shares in fee simple subject to the incumbrances notified hereunder."*

[4] This Title was issued in the year 2010 however it is common ground, and the evidence from all parties, that the land was purchased by these three friends in 1983. I find as a fact that the purchase was in 1983 jointly as tenants-in-common in equal shares.It is also common ground that in 1991 when the 2nd Defendant wished to build on the land he first obtained the consent of his two co-owners as per the witness statement of the 2nd Defendant,

> *"9. In 1991 I decided alone to build on the property and Lloyd Thompson and Headley Weir consented to my building on "The Point" after we had discussions."*

[5] These discussions resulted in an agreement whereby the 2nd Defendant would alone pay all the taxes and be entitled to the rents and profits from the land. This clearly was only fair as he was the one expending capital to build on the land. Over several years

he built on and improved the land. He alone continued to enjoy rent and profits. He alone as per the agreement continued to pay the taxes.

[6] It is common ground that in about the year 2009 the 2nd Defendant wished to sell the Point. The Claimant tells us it was because funds were needed to settle some matrimonial issues. The 2nd Defendant admitted this in cross-examination although his witness statement said he "decided to pursue new ventures". The agreed fact is that the 2nd Defendant spoke to the Claimant and the 3rd Defendant and obtained their agreement to sell the Point. The 2nd Defendant tells us in paragraph 15 of his witness statement that they all agreed to the sale price of $35 million at Mr. Woodham's office. Mr. Woodham is the 1st Defendant and was the attorney-at-law who had carriage of sale. . The sale was a cash sale and all 3 co-owners signed the agreement for sale.

[7] It is at this point however that the parties' respective accounts diverge. The Claimant says that when the subject of the sale of the Point was raised he told the 2nd Defendant that so long as he received $8million from the sale of the premises he really did not care how much the property was sold for. He asserts that he also told this to the 3rd Defendant as well as to the 1st Defendant. He said it was agreed by all that he would receive $8million from the proceeds of sale.

[8] The 1st, 2nd and 3rd Defendants all deny ever being told by the Claimant that he was to receive $8million. The 2nd Defendant is clear as per paragraph 20 of his witness statement that,

> *"We made no agreement as to how the money was to be divided. I was the person who invested in this property and enhanced its value so credit would have to be given to me for improving the value of the property."*

[9] The 2nd Defendant says that the three co-owners had not discussed with their attorney (the 1st Defendant) how the proceeds of sale was to be shared. He, the 2nd Defendant, determined that the Claimant and the 3rd Defendant were entitled to $2million each. He says in his witness statement that he did not know the value of the land separately from the buildings but was of the view that $2million was "*adequate compensation for*

the interests of Headley Weir and Lloyd Thompson". In the face of rather skilful cross-examination it became clear that the 2nd Defendant had arbitrarily selected the amount of $2 million.

[10] The 1st Defendant was also subjected to a patient cross-examination. This revealed that his final statement of account for the transaction was in several respects erroneous. This perhaps is not surprising as Mr. Woodham admitted that his area of practice is the criminal law and he does not do many conveyances.By the time his cross-examintion ended **Exhibit 4** had to be adjusted to reflect the net proceeds of sale as $31,929,150.00. This means that 1/3 of the net proceeds is $10,643,050.00.

[11] This was not the only troubling feature of the 1st Defendant's evidence. When cross-examined he admitted to making an offer to settle to the Claimant's attorneys,

> *"Q: This was on Mr. Brandon's instructions?*
> *A: I took it on myself to do it"*

When however his letter dated 12th May 2011 was put in evidence as **Exhibit 5**, it clearly stated,

> *"We have had extensive discussions with Mr. Brandon on the matter of payment to your client and based upon his instructions your client contributed $30,000 to the purchase of the land. Based upon this premise he instructs that he is prepared to pay your client $3,888,888 as his share."*

[12] When faced with that document Mr. Woodham stated,

> *"I took it upon myself. He was not aware of the sum but as to making a settlement he agreed."*

This is of course most extraordinary coming from an attorney-at-law, moreso one with Mr. Woodham's years of experience. More was to come however because, when questioned on the basis on which he arrived at 1/3 of the land's value being $3,888,888.00 (which was the offer made), Mr. Woodham could not provide an

explanation. Indeed he said that he had received no expert advice in that regard; and yet this attorney, who admitted that all 3 gentlemen, the Claimant, the 2nd and 3rd Defendants were his clients, also admitted that he retained $6million in his possession as,

"In my consideration it should be about what Mr. Weir should get"

The final blow to Mr. Woodham's credibility came with his admission to counsel that $35 million when divided by 3 came to $11,666,666, this was the amount reflected as the value of the land in the letter he wrote. Mr. Woodham, attempted to deny ever taking instructions from the Claimant and stated that all communication was through the 2nd Defendant. He however recanted and admitted having telephone contact in addition to a meeting with the Claimant in connection with the sale.

[13] It is important to note also that, although the three Defendants signed witness statements which averred that Mr. Thompson, the 3rd Defendant, also received $2million, they all reversed themselves on this. In fact and as admitted by the 2nd and 3rd Defendants, Mr. Thompson had sold his 1/3 share to the 2nd Defendant in or about 1993. The price then was 1.5 million. The Claimant be it noted was unaware of this. The 3rd Defendant therefore received no part of the proceeds of sale.

[14] The Claimant has filed a claim for:

1. A declaration that he is entitled to the sum of 8 million dollars or alternatively 1/3 of the net proceeds of the sale of property known as The Point.

At the commencement of the trial, I allowed an amendment to claim damages. This was only fair as it is manifest that this was the intent of the pleader. The claim to interest for example made no sense without it. On the subject of pleading I should say that it is preferable that the cause of action relied upon is clearly stated. Pleading in my view should not read like an affidavit which only states a chronology of occurrences.

[15] My findings of fact on the disputed areas are that:

a) The Claimant did advise the 2nd Defendant, who agreed, that after the property was sold the Claimant would be given $8 million.

b) The Claimant and the 2nd Defendant informed the 1st Defendant of this at the time of their meeting in his office.

I did not regard the 1st and 2nd Defendants as truthful witnesses. The 2nd Defendant's love of money resulted in him not honouring that agreement.

[18] The Defendants' counsel contends by way of Defence that as a matter of law the Claimant is not entitled to the sum of $8million or to 1/3 of the net proceeds of sale. He says firstly this is because the Claimant's interest was extinguished by operation of the Limitation of Actions Act. He relied on **Wills v Wills Privy Council Appeal No. 50 of 2002u, Paradise Beach and Transportation Co Ltd v Price Robinson [1968] AC 1072, JA Pye (Oxford) Oxford Ltd. v Graham [2003] AC 419** and other cases. This defence fails however because in the first place the Limitation of Actions Act was not pleaded by the Defendants. In any event there is no basis on which this court could find that the 2nd Defendant was in possession as the sole owner. All the evidence points to his regarding his fellow joint owners as beneficially entitled . He obtained their consent to invest and build on the property. He did this with their agreement. He consulted with them prior to sale and finally, he tendered an amount which he thought was representative of the Claimant's interest. At all times therefore he acknowledged his co-owners' interest and clearly did not see that as having been extinguished. While in possession he did not have the requisite intent. This limb of the Defence therefore fails.

[19] The Defendants' second limb is that as a matter of law one co-owner cannot recover the value where that has been the result of the expenditure and sacrifice of the other co-owner. For this rather intriguing submission counsel sought support in the following authorities: **Leigh v Dickinson[1881-85] AllER Rep 1099, Re Pavlou (a bankrupt) [1993] 3 AllER 955, Swan v Swan 146 ER 1281 and Ravi Vajpeyi v Shuaib Yijsaf [2003] EWHC 2339 (Ch).**

[20] In her reply to this submission counsel for the Claimant said firstly that the 1st Defendant has no counterclaim for an account or for partition or for a claim to adjust

the share in the property. Further she submits that this court has no jurisdiction to make such property adjustments in the absence of an application for Partition or in the absence of an agreement. She relied upon **Teasdale v Sanderson (1864) 55ER476, Leigh v Dickenson (cited above) and Squire v Rogers (1979) 39 FLR 106 (Australia)** among other cases.

[21] After careful consideration I find that the Defendants' second submission also fails. On the facts of this case the title indicates ownership is in equal shares. Furthermore the owners agreed to allow the 2nd Defendant to improve the property, the quid pro quo was that he would retain all rent and profits earned but he would pay all taxes. Upon their agreeing to sell the land, it was agreed that the Claimant would receive $8 million. This was his condition to agreeing to the sale. He allowed the 2nd Defendant to keep anything over and above that amount. The cases relied upon by the Defendants' counsel have no application to this situation. They relate to applications for partition, where accounts of rent and profits are being sought. In such circumstances, a court of equity will allow contributions and improvements to be set off against rent, profit and such the like.

[22] The submission I find fails for another reason also. In **Leigh v Dickenson (cited above)** the Master of the Rolls, Lord Brett, stated,

> *"Suppose a case where one tenant in common wishes to repair a house, and the other does not, no action at law and no suit in equity will lie to recover a contribution for the cost of the repairs, although all the tenants are necessarily benefitted. I have looked into the titles, Account Contribution and Action upon the case in the Digests; and it is not a little singular that no remedy for any of these inconveniences attending a tenancy in common can be found except that of partition. Tenancy in common is a tenure of an inconvenient nature and it is unfit for persons who cannot agree amongst themselves; but the evils attaching to it can be dealt with only in a suit for partition or sale, in which the rights of the various owners can properly be adjusted."*

As I have said here the owners did agree but in the end, the 2nd Defendant did not wish to carry out that agreement and felt his co-owner was getting too much, the love of money I suppose.

[23] In this case there is no action for Partition or Sale. This is because all are aware that the entitlement of each party is to 1/3 of the property and all agreed to sell. The principle stated in **Squire v Rogers (cited above)** is therefore not applicable where there is agreement.

[24] The Defendants have in any event not placed before the court any evidence as to the dollar value of improvements or the relationship between those improvements and the change in the value of the land. Information deemed necessary in the last mentioned case before a court of equity can on Partition make the necessary adjustment. The Defendants, I believe, failed to take into account the fact that where you knowingly improve the property of another that other is entitled to the improvement. In this case there was no inducement to the 2nd Defendant, neither was there misrepresentation or fraud. He was allowed, having done the improvement, to retain rent and receipts. At all material times he knew his co-owners were each entitled to a 1/3 interest in the entirety. The Defence therefore fails.

[25] For the reasons stated above, I grant the following Declaration, Orders and Directions:

1. I Declare that the Claimant is entitled to the sum of $8 million being that portion of the net proceeds of sale which the 2nd Defendant agreed ought to be allowed to him in respect of his 1/3 interest in the land referred to as “The Point” registered at Volume 1436 Folio 918 of the Register Book of Titles.

2. The 1st Defendant is an officer of this court and in exercise of my supervisory jurisdiction over officers of the court I direct that he forthwith pay to the Claimant or the Claimant’s attorneys-at-law the entire balance of the net proceeds of sale remaining in his possession, which on the evidence amounts to $4 million, along with the interest earned thereon from the 24th February 2011 to the date of payment. As to which a full statement of account is to be rendered.

3. I award Damages against the 2nd Defendant assessed at $4 million (being $8 million the sum agreed less the $4 million held by the 1st Defendant to the account of the Claimant).

4. Interest on the said award of $4million at a rate of 6% per annum from the 24th February 2011 to the date of payment.

5. Costs to the Claimant against the 1st and 2nd Defendants to be taxed if not agreed. If necessary I order that the 1st and 2nd Defendants pay the costs of the 3rd Defendant who is not liable to the Claimant but who it was reasonable for the Claimant to join given the circumstances of this case.

6. Stay of Execution refused.

David Batts
Puisne Judge