

NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 297/91

BETWEEN

OWEN DeCORDOVA ALLEN

APPLICANT

A N D

UNA MAY LAURETTA ALLEN

RESPONDENT

Miss Jacqueline Cummings for the Applicant  
instructed by Gaynair & Frazer

Mr. Robin Smith for the Respondent

Heard: 23rd & 24th September, 1992, 17th June, 1993  
9th June, 1997 and 10th January, 2000

JUDGMENT

Reckord J.

In this originating summons the applicant claims under the Married  
Womens Property Act for a declaration and or Orders that

1. he is beneficially entitled to an undivided share  
in premises known as 1 Twickenham Drive, Greendale  
in the parish of St. Catherine and registered at  
Volume 1010, Folio 608 of the Register Book of  
Titles.

That he is entitled to half share; that the property  
be sold and divided between them.

That the Respondent render account of rents and  
profits.

The parties were married on 22nd September, 1971, and lived for a  
while at 111 Maxfield Avenue, St. Andrew. Shortly after the marriage the  
Respondent started travelling abroad where she engaged in domestic work.  
She made a few trips to Jamaica and finally returned in 1989. The Applicant  
during this time remained in Jamaica working as a taxi operator. In 1975,  
the premises at Twickenham Drive was purchased for \$32,000.00 with the title  
solely in the Respondent's name. The Applicant lived in the premises for a  
while with the permission of the Respondent until the return of Respondent when  
he was put out.

The Applicant contends that he made contribution to the initial  
down payment from the monies held in a joint account and also contributed to

the subsequent mortgage payments and spent considerable sums on repairs and maintenance of the premises during 1976-1989. He tendered several receipts bearing his name.

The Respondent claims she is the sole proprietor of the premises. That she communicated with the vendor and that all documents were sent to her abroad for signing and the title is in her name only. That there was never any intention for the Applicant to have a beneficial interest in the property. That the Applicant's function was to act as an agent. She made all monetary payments. The Applicant was merely a courier and he knew this. The Applicant's name was put on the mortgage accounts as a matter of convenience.

#### The Law

In Grant v Edwards (1986) 2 A.E.R 426 the principle stated by Browne-Williamson V.C. is that if the legal estate in the property is vested in one of the parties, the legal owner, (the other party) the claimant in order to establish a beneficial interest has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated.

- (a) that there was a common intention that both would have a beneficial interest; and
- (b) that the claimant has acted to his or her detriment on the basis of that common intention.

The intention of the parties must therefore be considered. This area of the law was enunciated in Gissing v Gissing (1970) 2 A.E.R. 780 and applied in Azan v Azan - S.C.C.A. No. 53/87 where Forte J.A. stated

"In determining whether there was a common intention to share the beneficial interest, an expressed agreement to that effect would be sufficient. However where as in most cases there is no such agreement, the common intention of the parties may be inferred from their words or conduct"

"The relevant intention .... is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicated to the other party" per Lord Diplop in 'Gissing'.

It follows therefore, where there has been an initial contribution to the purchase deposit and legal charges by both even if the property was transferred in one name only, the other party should have a beneficial interest in the property.

If one party made no such contribution, but made subsequent regular and substantial contribution to the mortgage instalments, it would be reasonable to infer a common intention that the contributing spouse should be entitled to same interest in the matrimonial home. What would be their respective share? In 'Gissing' the House held

"There is no distinction to be drawn in law between the position where a contributing spouse who makes direct contributions towards the purchase of the matrimonial home and where the contributing spouse makes, indirect contributions, although in the latter instance the relevant share in the beneficial interest is likely to be less easy to evaluate."

#### The Evidence

The Applicant claims in his first affidavit that in or about 1975 the Respondent and himself agreed to purchase the premises in dispute for \$32,000.00. That the money for the deposit came from a joint account they both held from other funds provided by Respondent and from a \$20,000.00 mortgage. He exhibits correspondence from Messrs. Samuel and Samuel indicating a "further payment" to his account of \$3000.00 towards the same premises. He signed the agreement for sale. He regularly paid the mortgage payments to Victoria Mutual Building Society mainly from his own funds and from rental of the premises. He exhibits receipts from November 1976 to March 1985.

In 1978, he discovered that the mortgage payments were in arrears and was informed for the first time that the title for the premises was in Respondent's name only. He contacted his wife in the United States of America and she promised she would put his name on the title when next she came to Jamaica.

In January 1989, his wife locked him out of the house and in June, 1989, she prevented him from going into his room. He has not been back there since.

He has spent considerable sums for repairs and maintenance of the premises apart from those already mentioned. He wrote to the Respondent that he was leaving the premises since his name was not on the title and would cease paying the mortgage.

When cross-examined the Applicant said he regarded the marriage at an end in 1983. He never signed any mortgage document for the property. The house was furnished by the Respondent, but he gave a part of the money. He himself had painted the house several times. He built a new drive way and replaced pipes. He knew the mortgage was in arrears once. The wife never sent money from abroad to pay the mortgage. This was paid from rent and his taxi earnings.

The Respondent in her affidavit said from the outset the marriage did not go well. She denied she agreed to purchase the property with the Applicant. She had communicated with the vendor from abroad. She had sent money to the Applicant to take to the vendor and other business places. There was no intention for the Applicant to have any share or interest in the property and he was fully aware of this. She had paid the deposit of \$5,500.00 from her own money to the vendor. The account at Victoria Mutual Building Society was made up of her funds alone and the Applicant's name was added only for convenience. She had solely obtained a loan of \$20,000.00 from Messrs. Samuel & Samuel. The Applicant had contributed no funds to her acquiring the property. The Applicant had acted as her messenger or agent but had no share of the premises. She was not aware that he had signed the Agreement for Sale..

She had allowed the Applicant to occupy part of the house in 1978. All repairs were done from her funds, not the Applicant's and she furnished the house fully. Because of the Applicant's default, Victorial Mutual Building Society threatened to sell the premises and she had to pay over \$21,000.00 to pay off the mortgage. She had sent money to the Applicant to pay taxes and she obtained the receipts. She denied that the Applicant is entitled to the orders sought but ask instead that the Applicant render an account of rental he collected between January 1986 to December, 1988.

When cross-examined she denied that Applicant paid \$3000.00 to assist purchasing the property. She had paid \$7,000.00 to Mr. Coke directly for the land and house. Between 1973 - '74, she communicated with Mr. Coke about Twickenham Drive. About 1975 she signed the Agreement for sale sent to her abroad by Samuel & Samuel. Her name alone was on the Agreement.

In 1978 the Applicant never wrote or called her on the telephone to complain that he discovered house in "my name" alone. She never agreed to straighten things out when she returned.

When the house was completed in 1975 it was rented out until 1978. The Applicant asked her to allow him to occupy Twickenham Drive and she allowed him. There was no intention to make the house a matrimonial house. It was built to be rented and to make money. The Applicant never made any contribution to the house. She denied that Applicant paid taxes and mortgage from his own money.

She was present in Jamaica when fence was repaired in 1980. She got Mr. Corrington to do this and other repairs. She had to pay taxes which were in arrears when she returned home.

(The hearing was adjourned on 17.6.93 for submissions by Counsel for the parties to be made on a date to be fixed by Registrar).

The Affidavit of Miss Jennifer Messado was not read as it was served long after the hearing began.

After a long period of time during which the file could not be located the submissions were made on the 9th of June, 1997.

Miss Cummings for the Applicant submitted that there was sufficient evidence to satisfy his claim for half interest in the house. In paying short-fall on the mortgage he had acted to his detriment and there was a common intention that he was entitled to an interest in the house.

Mr. Smith for the Respondent submitted that it was never the common intention of the parties to share the property. No material contribution had been made by the Applicant, he never signed the Agreement for Sale and was not a party to the mortgage agreement.

FINDINGS

There is no dispute that the property was purchased in 1975 and registered in the sole name of the Respondent. There is no direct evidence that the Respondent intended the Applicant to share in the interest in the property. They both agreed that there was a joint account.

Where money is in an account in joint names each may withdraw for his own benefit. Any investment made in the name of one party belongs to the party who made it except the account was for a special purpose - See National Provisional Bank Ltd. v Bishop et al (1965) 1 A.E.R page 249.

The Respondent had made an initial deposit of \$5,500.00. The Applicant had made a "further payment" of \$3,000.00 from the joint account. I treat this as a direct contribution on behalf of both Applicant and Respondent made towards the deposit in the initial acquisition of the property. There is further evidence that the Respondent took out a mortgage of \$20,000.00.

To prevent the sale of the property she had to pay over \$21,000.00 with the Applicant making no contribution towards it. I find that when the Applicant made the further payment of \$3,000.00 from the joint account, he was contributing \$1,500.00 on behalf of the Respondent who had already made an investment in the said property. He would therefore be entitled to the percentage that this sum of \$1,500.00 represents to the total deposit of \$8,500.00, that is roughly 20% or one-fifth.

The Respondent made a payment of \$5,500.00 towards the initial deposit and took out a mortgage of \$20,000.00, making a total contribution by her of \$25,500.00. This total would have been insufficient to complete the purchase of the property valued \$32,000.00.

I find therefore that where the Applicant made the said payment of \$3,000.00 to Samuel & Samuel on the 24.1.75 he was making a contribution towards the initial acquisition of the property in the nature of a further payment. See receipt attached to the Affidavit of Owen Allen dated 2nd August, 1991.

The total initial deposit on the evidence is \$8,500. The Respondent must have been aware that the said \$3,000.00 was received by the Attorneys-at-Law Samuel & Samuel towards the completion of the purchase. I find that this is evidence of a common intention.

There is evidence from the Respondent that she paid \$7,000.00 to Mr. Coke directly - \$5,000.00 towards the land and \$2,000.00 on completion of the house. Even when this \$5,000.00 is added to the initial deposit on the land, the total contributed by the Respondent would be \$30,500.00. Still short of the value of the property.

I find that when the Respondent made payment of \$21,000.00 to clear off the mortgage debt which was partially the obligation of the Applicant, this created a duty on the Applicant to repay to the Respondent one-fifth of the said \$21,000.00.

In respect of the rental of the said house, while he resided there, the rental was used to assist in the payment of the mortgage. The fact that he was entitled to a share in the property he had a right to reside there. The Respondent had an equal right of residence.

From the date that the Respondent excluded the Applicant from the premises she had an obligation to account to him for one-fifth of any rental that she collected.

I therefore conclude that the parties are entitled to the said property in the proportion of one-fifth to the Applicant and four-fifth to the Respondent.

I order that the property be sold and the proceeds divided in the said proportion of one-fifth to the Applicant and four-fifth to the Respondent provided however that the Applicant's share should be reduced in the sum of \$4,248.08 being one-fifth of \$21,240.41, the lump-sum mortgage payment made by the Respondent to clear off the mortgage.

The Registrar of the Supreme Court shall take an account of the rental collected by the Respondent since the date that the Applicant was excluded from the property. The Applicant is entitled to one-fifth of the net amount account of such rental found to have

been collected after the deduction of any necessary costs and expenses.

The parties shall bear their own costs.

I wish to express my regrets to the parties and their Attorneys-at-Law for the circumstances which led to the inordinate delay in completing this hearing.