IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO.E 482/98

IN THE MATTER of premises situate at Greenwich Park in the Parish of St. Ann registered at Volume 1201 Folio 316 of the Register Book of Titles.

AND

IN THE MATTER of the Married Women's Property Act

BETWEEN DONNA ANN-MARIE ARCHER APPLICANT

AND HENRICK VALENTINE ARCHER RESPONDENT

Miss C McFarlane instructed by McNeil & McFarlane for the Applicant
Miss C Rhoden for the Respondent

Heard : May 2, 3, September 19, 2000

HARRISON J

Introduction

The matter before me concerns the division of matrimonial property brought by originating summons under section 16 of the Married Women's Property Act. The parties, Donna Ann-Marie Archer (hereinafter referred to as the applicant) and Henrick Valentine Archer (hereinafter referred to as the respondent) are husband and wife and were married on the 23rd day of November 1985 at St. Ann's Bay, in the Parish of St. Ann. The marriage has broken down and they have been separated since March 1997.

In or around 1992, a house was purchased in their joint names for the sum of $420,000.00 at Greenwich Park, St. Ann. The deposit of $200,000.00 was paid on the 22nd September 1992 and the balance of the purchase price secured on a mortgage from the Bank of Nova Scotia, Ocho Rios, St. Ann. The property which is registered at Volume 1201 Folio 316 of the Register Book of Titles was transferred on the 25th day of September, 1996 to both applicant and respondent as joint tenants. An endorsement on the Certificate of Title shows that the mortgage was discharged on the 21st October 1997.

The applicant now seeks a determination of their respective interests in the said property. She contends that the purchase of the property was a joint venture as they had pooled their funds in order to acquire it. She claims that the money for its acquisition and payment of the monthly mortgage were obtained from their joint bank accounts. She is therefore claiming to be beneficially entitled to 50% interest in the said property.

The respondent contends on the other hand, that the purchase of the property was never a joint venture and except for the applicant's contribution of $15,000.00, he was solely responsible for the deposit and payment of the monthly mortgage. He also contends that at the time he considered purchasing the property the applicant was not aware of his intention to do so until after he had paid the deposit. He further contends that he was purchasing the property for himself and that the applicant's name was only included in the Agreement for Sale and Transfer for convenience in order to transact business on his behalf. He said he worked on a ship and it was difficult at times for him to be contacted. He has asserted therefore that the applicant is only entitled to a 15% share based upon her contribution referred to above.

The Law

The major issues for determination are whether or not the purchase of the property was a joint effort or was it one carried out solely by the respondent for his own benefit? The evidence will therefore have to be examined and the relevant case law considered.

In my view, the dicta of Lord Upjohn in **Pettit v Pettit** [1969] 2 All E.R 385 is a proper starting point. He has stated that:

> "...in the absence of all evidence if a husband puts property in his wife's name he intends it to be a gift to her, but if he puts it into joint names then(in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy."[Emphasis supplied]

It is also necessary to consider the situation where parties have pooled their joint efforts in the acquisition of matrimonial property. In **Nixon v Nixon** [1969] 3 All E.R 1133 Lord Denning, Master of the Rolls, having examined the rights of respective spouses to share in the beneficial interest in property which is in the name of one of the spouses, went on to say that the principle in such cases is:

> "...when husband and wife, by their joint efforts, acquire property which is intended to be a continuing provision for them both for their future, such as the matrimonial home or the furniture in it, the proper inference is that it belongs to them jointly, no matter that it stands in the name of one only. It is sometimes a question of what is the extent of their respective interests, but if there is no other appropriate division, the proper inference is that they hold in equal shares."

In the earlier case of **Rimmer v Rimmer** [1952] 2 All E.R 863 Romer L.J expressed the view that:

> "...cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase of property, and, secondly that the old –established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of that before us, where the facts, as a whole, permit of its application."

Each case therefore, has to be determined and examined on its own facts. Carey J.A stated in **Josephs v Josephs** RMCA 13/84 (unreported) delivered October 13, 1985:

> "...In the absence of express agreement on the part of the spouse the court will presume or impute that having jointly contributed they intended to share equally. That proportion will be altered only where either share can be precisely ascertained or the contribution is trifling."

Analysis of the evidence and findings

It is without question in the instant case, that both the applicant and the respondent were signatories to the agreement for sale and mortgage deed in respect of the property and they are joint tenants on the certificate of title. The question therefore arises: What was the intention of the parties at the time of its acquisition?

Harrison J. A stated in **Pinnock v Pinnock** SCCA 52/96 (un-reported) delivered on the 26th March 2000:

> "The extent of the appellant's beneficial interest will be, prima facie, that which the parties intended (Gissing v Gissing, supra). Having inferred the common intention, the court would have to look at the contributions in order to determine the percentage of the appellant's interest. In Grant v. Edwards, (supra), the placing of the balance of the insurance monies in the parties joint account was found to be conclusive evidence of equal interests. However, joint ownership does not necessarily mean equal rights in the beneficial interest...."

I have carefully considered the evidence presented and the submissions made by the Attorneys at Law for the parties. The parties were cross-examined upon their respective affidavits so I have had the opportunity to assess their demeanour.

The evidence has revealed that the applicant and respondent had been in full time employment at the time of their marriage and up to their separation in 1997. The

respondent worked on a ship and the applicant was employed initially as a Bank clerk and subsequently as a chemical sales representative. They operated joint bank accounts at the Mutual Security Bank, Eagle Commercial Bank and The Bank of Nova Scotia. The respondent deposed however, in his affidavit of the 16th October, 1998 that :

> "5... the accounts at Mutual Security Bank and Eagle Commercial Bank were opened by the applicant in our joint names, these accounts were operated solely by the applicant. The account at Bank of Nova Scotia was opened by me and although the applicant's name was included on the account, I operated this account solely."

The applicant said under cross-examination that they had discussions as early as 1990 about owning a home of their own since they were living in rented premises. The respondent said it was "his dream that both of them should own a house". He also said they had spoken about getting a house through the National Housing Trust. He had been making contributions to the Trust and had intended that his wife would benefit from this. They had looked at two properties for sale, including the Greenwich Park residence and at one stage the respondent suggested that they repair his parents' house and move in, so as to stop paying rent. The applicant was not receptive however, to this proposal since she did not wish to live in the area where she had grown up.

At paragraph 7 of the respondent's affidavit sworn to on the 27th day of April 2000, he states inter alia, however:

> "7... after living in rented premises, I decided to buy my own house. I negotiated with the vendor and the applicant knew nothing about the transaction until we went to the Lawyer to sign the Agreement..."

He said under cross-examination that he had heard about the Greenwich Park property on September 19th 1992. He had obtained a manager's cheque in the vendor's name but was advised by the Attorney at Law who had carriage of sale to make the cheque payable to

him. This was done, and on the 22nd day of September, 1992 he paid over the deposit of $200,000.00 on the house to Mr. Warren Richmond, Attorney at Law. The cheque was purchased at the Bank of Nova Scotia, Ocho Rios, from funds held jointly in the names of the applicant and himself. An additional cheque for $3,000.00 was also paid over to Mr. Richmond with respect to legal fees. The respondent further testified that it was after the payments were made that he told the applicant that he had made a deposit on a house and that she was to look at it after she left work. He said he had "liked" it so, she was to look at it to see if she also "liked" it.

He has also deposed in his affidavit of the 16th October 1998:

> "8...that the mortgage payments were made solely by me and these payments were sent by me directly to the bank save that the only contribution made by the applicant towards the acquisition of the house was $15,000.00 as exhibited by her Affidavit which I had asked her to advance on my behalf because I was away at sea on that occasion. I had a problem sending the money directly to the Bank..."

Paragraph 10 of the respondent's affidavit sworn to on the 27th April 2000 also states:

> "the mortgage payments were made solely by me and that these payments were sent by me directly to the Bank of Nova Scotia. However sometimes I was late in sending the money directly to the bank and after a while I sent the money directly to the applicant through Western Union which she lodged at Mutual Security Bank and then draw cheques in favour of Bank of Nova Scotia for the mortgage payments. I have not located the Western Union transfer receipts of monies sent to the applicant for the period of the mortgage payments however, I exhibit copies of those money transfer receipts which I could find.....which shows the consistency in which monies were sent to the applicant through this medium."

Under cross-examination he said that whilst he was abroad between 1993 and 1994 he had paid the monthly mortgage directly to the bank since he "wanted to make sure that

the mortgage was paid". He was unable to locate any of the receipts for payment of the mortgage however, but maintained that the applicant had received all the receipts from the bank. He went to the bank for a record of the payments but was told that it could not be located since the transactions were done a long time ago. He had stopped sending money to the bank after 1994 and contended that he was not duplicating the monthly mortgage payments. He agreed that exhibit "DAA3" (encashed cheques) were payments for mortgage for the years 1993 – 1995 and that these cheques were all signed by the applicant.

The applicant on the other hand, exhibited twenty-six (26) encashed cheques drawn by her in respect of monthly mortgage payments for the years 1993, 1994 and 1995. They were for monthly payments of $6200.00 and $7000.00 respectively. She has deposed that there was some difficulty locating other returned cheques.

She deposed at paragraph 4 of her affidavit sworn to on the 3rd December 1998:

> "...for the most part the respondent sent me monies mainly for the children and to assist with the mortgage which we were both responsible for paying"

The respondent agreed under cross-examination that the applicant was the person who handled his finance. He also said that she was responsible for payment of the mortgage and utility bills. She was responsible for the payment of bills for the children, helper, medical, and motorcar upkeep. He agreed that the funds for these payments were kept in their joint accounts at the Bank of Nova Scotia and the Mutual Security Bank. He also agreed that both the applicant and himself had lodged monies in the Mutual Security Bank account. Under further cross-examination he said the applicant kept all the local pass books and he did not know if she had lodged monies in the accounts. He maintained however, that the monthly expenses were paid from monies he had sent to the applicant.

The applicant has admitted that the respondent sent her sums of money monthly from abroad but she said that they had pooled their income and paid the monthly bills and

household expenses from their joint bank accounts. At the material times she was employed as a bank clerk. Cheques that were drawn on accounts held at Mutual Security Bank and Eagle Commercial Bank were exhibited to her affidavits. The respondent had drawn three of these cheques on the Mutual Security Bank account. He had paid cheques for $3000.00, $5,473.00 and $1600.00 respectively to Warren Richmond, Attorney at Law. The cheque for $3000.00 was paid to the Attorney at Law on the very day that the deposit of $200,000.00 was paid to him. The respondent was confronted with these cheques that he had paid to Mr. Richmond and has retracted his statement that the account kept at Mutual Security Bank was solely operated by the applicant. He has explained his use of the Mutual Security Bank cheques however at paragraph 2 of the affidavit sworn to on the 27th April 2000. He states:

> "The cheques drawn on the Mutual Security Bank account and exhibited as DAA1 on the applicant's affidavit sworn to on the 3rd day of December 1998, represents payment of legal fees and costs to the Attorney at Law Mr. Warren Richmond, in the sale transaction and represents funds in the account which was generated from the mini bus operation. I refer to my statement at paragraph 5 of my affidavit sworn to on the 16th October 1998, and now say that all accounts except the Bank of Nova Scotia account were controlled by the applicant."

When all the matters are taken into consideration, it is my considered view that the respondent has attempted to mislead the court by stating that the account at Mutual Security Bank was controlled solely by the applicant. I am also of the view that he has further misled the court into thinking that the applicant had advanced $15,000.00 on his behalf (Exhibits DA 1, DAA 3) in order to pay two months' mortgage and that this is how she was entitled to her share in the property. The exhibited cheque bears the number 268 and it is dated 23/2/94. The monthly mortgage was between $7000.00 and $6,200.00 so, how many months and for which months did the $15,000.00 cover? The respondent has not supplied an answer to this question. The applicant had signed all of the exhibited cheques in respect of the monthly mortgage. Cheque number 249 dated 2/2/94 was for $6,200.00. Cheque 271 dated 3/3/94 was also for $6,200.00. Cheque 296 dated 5/4/94

was however for $8075.00. Mortgage payments for $6,200.00 were also made to the Bank of Nova Scotia on the 4/5/94, 6/6/94, 5/7/95, 4/8/94 respectively.

The applicant told the court that from her recollection the cheque for $15,000.00 could have been made paid to the Bank of Nova Scotia in respect of insurance coverage for the property. I have no reason to disbelieve her.

I also accept the evidence that the parties had lodged monies to the joint accounts and it was from these accounts that the monthly mortgage, personal and household expenses were paid . This was property out of which either party would be entitled to draw and did utilize. The evidence has shown that the respondent made use of the facility and had used Mutual Security Bank cheques to pay bills. This is contrary to the earlier assertions that he made.

It is my considered view that the respondent has not been quite frank with the court. He has not impressed me as a truthful witness. The applicant on the other hand has been quite honest and I am impressed with her as a witness of truth. I must ask the question: Why would the respondent ask the applicant to look at the premises and see if she liked it if he had intended it to be his house? (Emphasis supplied)

I accept the evidence that the money that was used to make the deposit on the property was taken from the joint account at the Bank of Nova Scotia. I do not believe the respondent however when he tells the court that the applicant's name was only included on this account and he alone operated it. The evidence shows that the applicant was in possession of all bank passbooks including the book for the Bank of Nova Scotia. The applicant has further demonstrated that by making the monthly mortgage payment from their joint account she was carrying out her obligations under the mortgage. The respondent on the other hand, would have wished the court to believe that she was a mere messenger carrying out his instructions. I also accept the applicant's evidence that they were joint account holders at the Bank of Nova Scotia, St. Ann's Bay before the said account was transferred to the Ocho Rios branch.

Application of the law to the facts

The dicta of Carey J.A in **Harris v Harris** (1982) 19 JLR is quite instructive on joint property. He stated that where:

> "...the joint property has been used to purchase property for the future enjoyment of both, the court in doing what is just between the parties should declare that they hold the property equally."

Vaisley J in **Jones v Maynard** (1951) 1 All E. R 802 had this to say on the common pool:

> "In my judgment where there is a joint purse between husband and wife a common pool into which they put all their resources – it is not consistent that the joint account should thereafter be divided up with reference to the respective contributions of husband and wife crediting the husband with the whole of his earnings and the wife with the whole of her dividends...when the money goes into the pool it is there as joint property."(emphasis added)

In **National Provincial Bank Ltd v Bishop and Ors.** (1965) 1 All E.R 249, Stamp J stated :

> "...if one of the spouses draws on the account to make a purchase in the joint names of the spouses, the property purchased in joint names is prima facie, joint property."

I am of the view that the case of **Azan v Azan** (1988) 25 JLR 301 is distinguishable from the instant case. That case held inter alia, that "where assets are acquired by one party with funds from a joint account set up for the parties' general use, that asset belongs to the person in whose name it is purchased or invested". In the instant case as well as the Azan case the joint account was not for any specific or limited purpose. The distinguishing factor is that in Azan's case the purchase of shares by the husband was

done in his sole name whereas in the instant case the property was purchased in the joint names of the applicant and the respondent. It follows therefore, that the property would belong to the persons in whose name it was purchased.

Bingham J.A delivering the judgment of the Court of Appeal in **Prestwidge v Prestwidge** SCCA 60/99 (un-reported) delivered on the 31st July, 2000 said:

> "..it is without question that there was evidence not only that the documents relative to the purchase of the property was signed by both parties, thus evidencing a common intention in the parties to take the conveyance in their joint names, but equally in so doing acted to their detriment in undertaking the joint obligation for repayment of the mortgage debt."

I adopt these words. They are quite applicable to the facts of the instant case. With respect to the applicant, I also accept and endorse the words stated by Carey J.A in **Harris v Harris** (1982) 19 JLR :

> "...it would be most unlikely that she would have undertaken this onerous responsibility of a mortgagor in respect of property to which she appreciated she was to have no interest?"

It is therefore my considered view and I so hold, that the property was bought from joint funds and it was the common intention of the parties that they should hold it equally. As a consequence, I hold that the division ought to be made equally also.

The question of the repairs to the premises needs to be addressed. The respondent claimed that he spent $80,000.00 of his own money for repairs to be carried out citing his source as money brought from abroad. Would this affect the beneficial interest the parties hold in the property? I do not think so. In **Muetzel v Muetzel** (1970) 1 All E. R Lord Denning stated:

> "...if a wife has an interest in the original house she has the self same interest in the extension to it...and the extension should be regarded as accretion to the respective shares of each and not as affecting the distribution of the beneficial interest."

The respondent has asserted that the mortgage has been fully discharged by him since 1998. Counsel submitted on his behalf that the respondent having paid off the outstanding balance, he would be entitled to be repaid one half of that amount by the applicant. The judgment of Bingham J.A in **Prestwidge v Prestwidge** (supra) deals with this issue. He stated:

> "..In any event, as the decided cases show, unequal contributions towards meeting the mortgage instalments would not alter the beneficial interest of the parties where the common intention of the parties at the acquisition of the property establishes that it was intended to be a continuing provision for them during their joint lives."

Conclusion

I hold that the applicant had contributed to the purchase of the property situate at Greenwich Park, St. Ann, registered at Volume 1201 Folio 316 of the Register book of titles. I hold further, that the joint tenancy led to a joint liability that the applicant willingly embraced. Its foundation in my view lay in a common intention that she should have a beneficial interest in the given property. The applicant is therefore entitled to a 50% interest in the disputed property.

It is hereby ordered as follows:

1. The applicant is beneficially entitled to fifty percent (50%) interest in the property known as Greenwich Park in the Parish of St. Ann registered at Volume 1201 Folio 316 of the Register Book of Titles.

2. A valuation of the said property be taken by a reputable firm of Valuators or alternatively that a valuation be agreed upon by the parties.

3. That the property be sold on the open market and the proceeds of sale be divided in accordance with the respective interest of the parties and that the applicant be granted the right of first refusal.

4. The Registrar of the Supreme Court be empowered to sign any or all documents to effect a registrable transfer if either party refuses or is unable to do so.

5. There shall be no order as to costs.