IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E410 OF 1992

BETWEEN	OWEN ATKINSON	APPLICANT
A N D	MAXINE ATKINSON	RESPONDENT

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT.

AND

IN THE MATTER OF QUESTIONS BETWEEN OWEN ATKINSON AND MAXINE ATKINSON CONCERNING OWNERSHIP OF PROPERTY

Gordon Steer instructed by Chambers, Bunny & Steer for Applicant

Miss Hillary Phillips and Mrs. C. Beecher-Bravo instructed by Playfair, Junor, Pearson & Company for Respondent.

Heard: November 3 & 4, 1993
January 11, 12, 13, 14, & April 27, 1994

LANGRIN, J.

By an Originating Summons dated 13th November, 1992 the applicant Owen Atkinson sought orders of the Court under the Married Women's Property Act declaring the respective interests of the parties as under:

1. What is the respective interest of the applicant and the Respondent in premises known as Keel Cottage Lot 2, Maryland, Jacks Hill in the parish of St. Andrew?
2. What is the respective interest of the applicant and the Respondent in Combined Industrial Associates Limited and Atkinson Manufacturing Limited?
3. What is the respective interest of the Respondent in respect of the Leyland truck licensed No.cc.442A.

On the 23rd April, 1993 the Respondent by a similar Originating Summons sought the following orders:-

1. That the Respondent Maxine Atkinson is entitled to 100% interest in the company known as Combined Industrial Associates Limited inclusive of the company's interest

in 78 3/4 Hagley Park Road, and Siddon Atkinson Truck.

2. That the 150 shares in Combined Industrial held by the Applicant are held in trust for the Respondent.

3. That the Respondent Maxine Atkinson is entitled to 100% interest in 2½ acres of land on Skyline Drive in the parish of St. Andrew registered at Volume 1102 Folio 890 of the Register Book of Titles.

4. That the Respondent Maxine Atkinson is entitled to 100% interest in Subaru motor car registration No.6323 AT.

5. That the Respondent Maxine Atkinson is entitled to 50% interest in property known as Keel Cottage Lot 2, Maryland, Jacks Hill, St. Andrew registered at Volume 1122 Folio 995 of the Register Book of Titles.

6. That the Respondent Maxine Atkinson is entitled to 50% interest in Apt.4 Chelsea Apartment 6 - 10 Chelsea Avenue, Kingston 10 in the parish of St. Andrew.

7. That the Respondent Maxine Atkinson is entitled to a Sony Trinitron Television set removed from the matrimonial home.

8. That a valuation report of the premises referred to in clauses 1, 3, 5 and 6 be taken, or alternatively that a valuation agreed upon by the Applicant and the Respondent be taken and that 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.

I will deal first with the relevant law relating to the issues and then with the facts.

The scope of the application being procedural only is limited.

In this case I am concerned with what the respective shares of each party in the property <u>is</u> and not what it <u>ought to be</u>. I am not concerned with any question whether it is fair that the property should be wholly owned by one or the other or what the fair shares would be.

In situations where property is transferred into the joint names of husband and wife two propositions of law are generally applicable. The first is clearly stated in Cobb v. Cobb 1955 2 AER 696 that prima facie the parties are to be treated as beneficially entitled in equal shares. Lord Denning M.R. in delivering the judgment of the Court had this to say at p.698:

> "..... when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them during their joint lives, the Court lean towards the view that the property belongs to them both jointly in equal shares. This is so even where the conveyance is taken in the name of one of them only and their contributions to the costs are unequal, and all the more so when the property is taken, as here, in their joint names and was intended to be owned by them in equal shares. The legal title is in them both jointly and the beneficial interest is in them both as equitable tenants in common in equal shares."

The second is that where there is a common intention as to whom the property is to belong or in what definite shares each should hold is ascertainable, effect should be given to that intention.

Lord Upjohn's observation in Pettit v. Pettit 1970 AC. 77 at p.813 are pertinent:

> "But the document maybe silent as to the beneficial title. The property maybe conveyed into the name 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 maybe able to draw an inference as to their conduct. If there is no such available evidence then, what are called the presumptionscome into play."

Where the evidence shows substantial contribution whether in moneys or services or both, the maxim 'Equality is Equity' is applicable.

In Jones v. Jones (1990) S.C.C.A. 19/88 Judgment March 8, 1990. Rowe P. in delivering the judgment of the Court had this to say:

> "The law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal, the law leans towards the view that the beneficial interest is held in equal shares."

In Nixon v. Nixon (1969) 3 AER. 1133 Lord Denning M.R. in his judgment had this to say:

> "..... If they acquire the shop and business after they marry - and acquire it by their joint efforts - then it is their joint property no matter that it is taken in the husband's name. In such a case when she works in the business afterwards, she becomes virtually a partner in it - so far as the two of them are concerned, and she is entitled, prima facie, to an equal share in it."

In Joseph v. Joseph C.A. 13/84 Judgment delivered October 30, 1985. Carey J.A. in delivering the judgment of the Court had this to say:

> "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 the share can be precisely ascertained or the contribution is trifling."

I now turn to examine the facts, applying the relevant principles of law.

In addition to the usual affidavit evidence adduced by both parties they have subjected themselves to cross-examination. Apart from this there was very little independent evidence to illuminate the diametrically opposed evidence presented by the parties themselves.

What has been established is that the applicant and the Respondent both attended Glenmuir High School and had been intimate friends since 1974. The applicant attended the University of the West Indies and pursued a Natural Science degree where he graduated in 1978 and then went to work with Alcan Bauxite Company Limited. The respondent left school in 1975 and was employed as a Secretary with Mutual Life Insurance Company. She later became an Underwriter with a basic salary of $14,000. By 1979 she was earning $16,000 per annum plus allowances and then went on to greater heights in the

Insurance Industry by joining the million dollar round table.

From the outset the Respondent had developed a very obvious inclination to the business world while the applicant had demonstrated an intention of pursuing an academic career. In 1981 the Respondent purchased a Leyland truck at a cost of $65,000 by obtaining a loan from Bank of Nova Scotia in addition to her personal savings. The applicant contends that this was their first joint venture from their joint savings. The respondent remains adamant that the purchase of the truck marked the beginning of a personal successful business career.

The parties were married in March 1983 and the decree absolute was granted in July 1993. The marriage lasted for 10 years.

KEEL COTTAGE - VOL.1122 FOLIO 995

Keel Cottage was purchased in the joint names of both parties. A deposit of $16000 was paid to the Attorneys by the Respondent in respect of this property while the applicant paid the monthly mortgage payments of $2500 as a salary deduction. Neither party has contested the issue concerning the beneficial ownership of the Keel Cottage property. Accordingly, I hold that the beneficial interests be apportioned between them in equal shares.

2½ ACRES OF LAND ON SKYLINE DRIVE - ST. ANDREW VOLUME 1102 FOLIO 890

The Respondent deposed in her affidavit that in 1987 she purchased from National Commercial Bank 2½ acres of land in Skyline Drive, St. Andrew for $15,000. She paid the price in fifteen equal monthly installments after which the title was transferred to their joint names because she intended to use the title as security for the investment by Combined Industrial Company Limited. The Applicant made no contribution towards the purchase of the land but she believed it would be more convenient if the title was in the joint names of the applicant and herself to facilitate the company's investment.

The cross-examination of the applicant revealed very little, if any knowledge by him of the whereabouts of the property although he signed the agreement and transfer. It is indeed, of some significance that the applicant made no reference to this property in his

application to the Court. The inference is clear that the Applicant made no contribution to the acquisition of this property and hence there was no common intention that the Applicant should have a proprietory interest.

In Lynch v. Lynch 36/89 (unreported) Carey JA. in his judgment at page 10 stated:

> "It is now a fact of modern economic reality that many building societies require as a matter of policy the names of husband and wife to be joined as parties to the mortgage loan."

I hold that this property was purchased solely by the Respondent and the Applicant's name was placed on the title for convenience only. There is therefore a resulting trust in favour of the Respondent which has not been rebutted.

CHELSEA APARTMENT (NO.4) 6 - 10 CHELSEA AVENUE, KINGSTON 10, ST. ANDREW.

The applicant purchased this property at a cost of $320,000 in January 1991 when the marriage had broken down. A deposit of 10% was made with the rest of purchase price secured on a mortgage from Mutual Life Insurance Company Limited. The Respondent's name was never put on the title and there is no evidence that she made any contribution to the purchase. It appears that the Applicant's mother was asssociated with the purchase.

The Respondent contends that the sum which was paid as the deposit came from the business and so she is entitled to a 50% share in the property. I cannot accept this submission when there is no evidence to support it.

I hold that the Respondent has no beneficial interest in this property.

COMBINED INDUSTRIAL ASSOCIATES LIMITED

The evidence was clear, in my view, that both parties were in a joint venture to secure family assets for the joint benefit of themselves and their three children. Both were involved in the negotiations and financing as well as the management of the company. There was obviously conduct from which their intention could be ascertained such as that the assets were intended as a continuing provision for them during their joint lives.

Trucks were acquired to haul gasoline pursuant to a lease agreement, as well as other businesses conducted under the umbrella of Combined Industries. While the dominant business partner appears to be the Respondent, the ventures undertaken by the company all appear to be joint. In the furniture and lubricating enterprises the Applicant made significant contributions.

By 1985 there were 3 children of the marriage and the company was incorporated on the 21st March, 1985. Both parties signed the Articles of Association and each of them was issued with 150 shares. It appears that they were the only shareholders but there is no evidence as to what were the assets of the company or its value.

The applicant in this case contends that he is entitled to one half the interest in the assets of the company on two bases:

(1) His direct contribution

(2) His unpaid assistance in the business.

The Respondent claims that she owns the whole beneficial interest or some lesser portion. For the Respondent's claim to be valid it must be on the basis that by virtue of contributions made by her towards the purchase of the shares there was and is a resulting trust in her favour. Because there was no evidence relating to the purchase of the shares save that the respondent was advised by the then Girod Bank to form a company I am unable to determine what direct contribution, if any, was made by the shareholders in this company. In these circumstances the maxim 'equality is equity' is applied.

The Applicant's employment at First Life Insurance Company was terminated in 1986 and he joined the company and managed the business. The Respondent deposed that the Applicant is a very good technical person to meet deadlines. Under cross-examination the Respondent said "I left the administration of the business to him and things like going to the bank was in his portfolio. We live out of the business, ran the home and support the children." There was an admission that the Applicant was not paid a salary. That being so was he therefore acting to his detriment?

78 3/4 Hagley Park Road which is the major asset of the Company was bought in 1987. One of the cars in the company's name was sold to pay the deposit. The construction of a plaza on the premises was started with financing which came from Girod Bank. Other loans in respect of the construction were received from George and Brandy, National Commercial Bank, Workers Bank and Century National Bank. The Applicant is a party to all those loans and both parties are responsible for the repayment of the loans. The matrimonial home which belongs to both parties was put up as a security for these premises. The construction of the plaza at Hagley Park Road appears to be wholly financed through loans undertaken by the parties.

The authorities clearly show that where husband and wife by their joint efforts acquire property which is intended to be a continuing provision for the whole family the proper inference is that it belongs to them jointly. Against the background that they both made contribution by the securities which they have put up the proper inference is that they hold in equal shares. What the respondent is overlooking in this case is that apart from any financial contribution and services rendered by the applicant, there is the personal financial obligation under a mortgage or loan security. If there is default in the repayments the Applicant could be sued at the option of the lender for the arrears. Such a situation could also arise under the powers of a mortgage where there is a shortfall in the outstanding loan due under a mortgage.

Harmony between the parties has been displaced by discord and so by January 1992 the applicant left the matrimonial home. By then the actual construction of the plaza appears to have been completed except for the fixtures. Further, an injunction was ordered against the applicant in September 1992 which restrained him from interferring with the business. There are now 24 shops in the Plaza with 14 shops being rented for a total of $82,000 per month. The Respondent occupies 3 shops and the rest of shops are unoccupied.

The Court is being asked to deprive the Applicant of any benefit from the improvements to the property after his departure from the matrimonial home in 1992. This I have declined to do. It would be unreasonable to divest him of any share in the property while at the same time retaining his liability under mortgage and other securities which have not been discharged.

The Respondent allotted 200 shares to her mother in trust for her in January 1993 in order for her to assist in conducting the business after the departure of the applicant. It was submitted that the articles provided that shares should not be issued before they are offered to the original shareholders. This was not done hence the original shares were wrongly issued. Against this background I hold that the additional 200 shares were unlawfully issued.

It appears that this company has incurred a considerable amount of debt, some of which are unsecured. I recommend that a proper auditing be done to ascertain the true financial state of the company.

In a letter written by the Respondent and sent to the Applicant's mother the Respondent asserted as follows: "Everything is 50 - 50 while Junior was in the business but he left it in a bankrupt state." Under cross-examination by Mr. Steer, the Applicant's Attorney, the Respondent boldly stated that the content of the letter was true. Hence I am fortified in holding that both parties own equal shares in the company, and by extension in 78 3/4 Hagley Park Road.

ATKINSON'S MANAGEMENT COMPANY

This company was incorporated in 1990 but ceased trading in 1991. There is no evidence of the respective shareholding in the company.

LEYLAND TRUCK

This truck was sold prior to commencement of the proceedings, presumably to offset some of the company's debt.

SONY TRINITRON TELEVISION

This evidence reveals that there were two television sets owned jointly by the parties and the applicant took one when he was

leaving the matrimonial home. In the circumstances he is entitled to keep it and I so hold.

SUBARU MOTOR CAR

The car was first purchased in the Respondent's name but subsequently re-financed in the names of both parties. The motor car was sold recently in a public auction. It is no longer an asset of either party.

For the reasons given I make the following declarations:

(1) That the beneficial interest in respect of Keel Cottage - Vol.1122 Folio 995 be apportioned between the Applicant and Respondent in equal shares.

(2) That there be a resulting trust in favour of the respondent, concerning the 2½ acres of land on Skyline Drive, St. Andrew registered at Volume 1102 Folio 890.

(3) That the respondent has no beneficial interest in respect of Chelsea Apartment; 6 - 10 Chelsea Avenue, Kingston 10, St. Andrew.

(4) Concerning Combined Industrial Associates Limited, I hold that both parties own equal shares in this company. Further the additional 200 shares issued to Respondent's mother in trust for her was unlawfully issued and I order its revocation.

(5) That in respect of declarations 1 and 4 the property be valued and that each party be at liberty to purchase the share of the other with the respondent/wife having the first option to purchase the shares of the Applicant.

Alternatively:

(6) That the property be sold at public auction and the net proceeds be divided as at (1+4) above.

(7) That in the event of sale at (1) above the Registrar be empowered to sign a transfer if the respondent fails or is unable to do so.

(8) That there be no order as to costs.

It now remains for me to thank Counsel on both sides for the invaluable assistance which they have given to the Court.