JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S (FAMILY COURT)
MISCELLANEOUS APPEAL NO. 1/03

BEFORE: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.(Ag.)

BETWEEN	**ERIC CLARKE**	**APPELLANT**
A N D	**SONIA DALEY-CLARKE**	**RESPONDENT**

Canute Brown instructed by **Brown Godfrey & Morgan**
for the appellant

Mrs. Margarette Macaulay instructed by **Gifford Thompson & Bright**
for the Respondent

14th and 15TH October, 2003

SMITH, J.A.:

The appellant is a businessman. The respondent, his wife, was at the relevant time the Managing Director of Lex Investments Company. The parties met in July 1990 and were married on the 3rd November, 1991. In July 1996 property at 10 Roosevelt Avenue registered at Volume 1137 Folio 350 of the Register Book of Titles was purchased. The purchase price was Two Million Dollars. The parties separated in September, 1997 and have lived separate and apart since. On October 3, 1997 the respondent

commenced proceedings under the Married Women's Property Act in the St. James Family Court.

In those proceedings the respondent sought declarations that she had a 50% beneficial interest in the following assets:

(1) The land situate at 10 Roosevelt Avenue which is described in the Title Deed as Pear Tree Piece, Montego Bay;

(2) A Ford Laser motor car, 1988 model Reg. No.7615AX;

(3) A 40ft trailer (now sold) which was on land at 10 Roosevelt Avenue and housed as an Auto Shop;

(4) A shop built on the land at 10 Roosevelt Avenue and used as a Meat Shop to sell fish etc. called Payless Meat Shop.

The appellant denied that the respondent had any interest in any of the above assets. The judge of the Family Court found that:

(1) The car was jointly owned and that each party had 50% beneficial interest. She also found that both parties obtained a loan from Self Start to assist in the business and that the car was used as a security for that loan.

(2) Both parties have a beneficial interest in the property situate at 10 Roosevelt Avenue. But that the appellant paid the majority of the deposit and therefore found that their beneficial interests were 40% respondent and 60% appellant.

(3) The petitioner/respondent is entitled to 50% share in both the Trailer and the Meat Shop.

The appellant has appealed this decision.

Three grounds of appeal were filed. However, Mr. Canute Brown for the appellant told the Court that he would be pursuing only one issue viz; the judge's finding of a common intention that the beneficial interest in the land at 10 Roosevelt Avenue should be shared. This issue is formulated in ground 3:

> "The learned judge of the Family Court erred in her findings that the parties had a common intention to confer a beneficial interest in the land on the Respondent."

The other grounds he said are really factors in support of ground 3. He intimated that he would not be challenging the judge's findings in respect of the other assets.

The Law

The land in question is registered in the name of the appellant alone. Accordingly, the appellant starts with the legal advantage of a registered title in his name. The legal estate prima facie carries with it the whole beneficial interest.

In the absence of an express trust the respondent will not be entitled to a proprietary interest unless she can establish the existence of a resulting, implied or constructive trust. This settled principle is illustrated by the leading case of ***Gissing v Gissing*** [1971] A.C. 886 The main issue

therefore is whether the respondent has, on a balance of probabilities, discharged the onus of establishing an implied, resulting or constructive trust. Put another way – was there sufficient evidence to support the judge's finding that the appellant holds the legal estate in the property as trustee to give effect to the respondent's beneficial interest. The applicable principles of law are set out in ***Gissing v Gissing*** (supra) and ***Grant v Edwards***[1986] 2 All ER 426 to which the trial judge referred.

In this regard the appellant is contending that there is no evidence from which the judge was entitled to draw the inference that from the outset the common intention was that the beneficial interest in the property should be shared and that the respondent acted to her detriment in the belief that she had such an interest. Counsel for the appellant complained that the judge treated the Contract of Guarantee as evidence of a common intention to create a beneficial interest for the respondent in the land. He relied on ***Kumar v Dunning*** [1987] 2 All ER 801.

Further, counsel for appellant submitted that the judge erred in making the declaration in favour of the respondent in that there was no evidence that the appellant made any representation to the respondent on which she acted to her detriment.

Mrs. Macaulay for the respondent submitted that there was ample evidence before the trial judge entitling her to draw the inference that from the outset the parties intended that they both should have a

beneficial interest in the property. There is also she argued, evidence that she acted to her detriment on the basis of that common intention.

Although the judge's findings as regards the car, the trailer and the meat shop are not challenged it is necessary to refer briefly to them as the parties' pattern of conduct in dealing with these assets is important. The following outline is gleaned from the judge's notes.

According to the respondent, in 1993 the Laser car was bought from the Lex Investments Company and transferred into the joint names of the parties. She obtained a loan from her employer and repayment was made by salary deductions. The respondent paid the insurance premiums. The appellant reimbursed her for two of the loan repayments. The car was for the use of the appellant.

The appellant on the other hand claimed that he bought the car and it belonged to him alone. His wife's name, he said, had to appear on the title for them to get a good price. He agreed that the loan for the purchase of the car was obtained from his wife's company. However, under cross examination he admitted that his name did not appear on any loan agreement. He claimed he paid the insurance premiums but did not know how much. The car which was used as security for a loan was repossessed by Self Start Fund.

The trailer was bought by the appellant for $48,000.00. However, the respondent said she spent a considerable sum of money to refurbish it

–a toilet, shelves, lights and flooring were installed, the doors and windows were grilled and the trailer painted. The auto supply business was established in the trailer. The respondent was responsible for the operation of the business. She spent considerable sums of money to purchase supplies. The appellant claimed that the refurbishing of the trailer was done by the Rockway Co. Ltd in which his wife had a 20% interest which he had given to her.

In respect of the Meat Shop the respondent said that she built a board structure and purchased the materials at a cost of $242,470 and the stock amounting to $313,416.70. Her mother and the appellant, she said, assisted in this enterprise. At times, she said, she gave him cash to pay the workmen. The Meat Shop, she claimed, was her idea and they agreed to call the shop "Payless Meats". She denied that the auto shop and the Meat Shop were run by Rockway Company as the appellant claimed.

10 Roosevelt Avenue

The submission made before this Court mainly concerned the judge's decision in respect of the parties' beneficial interests in 10 Roosevelt Avenue.

A summary of the respondent's evidence.

Her husband asked for her assistance in acquiring the property and made her understand that she would have a 50% share. She negotiated

with the vendor of the property and was instrumental in his accepting the sum offered by the appellant for the purchase price. She assisted in paying the legal fees. She paid the commitment fee of $53,750.00. The greater part of the deposit was paid from the proceeds of the sale of the appellant's property at Barnett Heights. The respondent paid $150,000.00 towards the deposit. She signed as a guarantor for the mortgage to secure the balance of the purchase price. When the mortgage was in arrears she paid the arrears and saved the property from being sold to satisfy the debt. In all she paid $266,493.32 for mortgage installments. She also paid the penalty for late payment.

In pursuance of their plans to erect a commercial building on the property, she paid for the architectural drawings and plan and for the fees when these were submitted to the Parish Council. These payments amount to $29,703.00. The plans to erect the commercial building failed because of a lack of funds. Instead two separate businesses were established on the land. She had half of the land chipped and tarred at a cost of $41,000.00. She paid for fencing and advertising signs. The appellant's version is different.

He said that he found out that 10 Roosevelt Avenue was for sale and he alone negotiated the purchase price of Two Million Dollars. He said he sold his property in Barnett Heights for $820,000.00. However, the document he exhibited showed that it was sold for $500,000.00. He alone signed the Sales Agreement. He alone went to Victoria Mutual Building Society to apply for the loan. Because of his age, he said, he

needed a younger person to stand as guarantor of the loan. His wife signed as guarantor. He claimed that the property was intended for himself and his children and not for his wife. The $150,000.00 paid by his wife was a loan. So were the commitment fee and payment she made for the mortgage arrears.

The learned trial judge accepted the evidence of the respondent who produced documents to support her claims. She rejected the appellant's claim that the moneys which the respondent said she paid for commitment fee, as part of deposit and as mortgage arrears were loans. The decision of the trial judge who enjoyed the advantages of having seen and heard the witnesses ought not to be disturbed unless it can be shown to be obviously and palpably wrong.

In her evidence the respondent said that when she first realized that the property was conveyed into the appellant's name alone she spoke to him about it. She said he made an unkind remark. At one stage according to her, he promised that he would put the property in their company's name. In order to foster good relation and develop a bond of trust, she allowed the property to be registered in the appellant's sole name. The learned judge accepted this, we see no reason to disagree with her - see ***Watt v Thomas*** [1947] A.C. 484 which was approved by the Privy Council in ***Roy Green v Vivia Green*** Privy Council Appeal No. 4/2002 (unreported) 20th May, 2003.

The respondent also testified that the property was bought for the purpose of erecting a commercial building thereon to do business. In this regard the course of conduct of the parties is also of importance in ascertaining the common intention. The acquisition of the land and the businesses carried on thereon cannot be separated. The appellant has not challenged the judge's finding that the car was jointly owned by the parties and that the respondent is entitled to 50% beneficial interest in the trailer (the Auto Shop) and the Meat Shop. The subsequent conduct of the parties in respect of their interests in the businesses is important to shed light on the manner in which the parties conducted their affairs and as to their intention as a general sharing of assets.

It is also the respondent's evidence that the appellant led her to believe that if she assisted him she would have a substantial interest in the business. They were working as a team, she said, and her understanding was that the property would be shared equally. The appellant she said wanted and asked for her assistance and she gave assistance with that assurance.

In addressing the issue of common intention Lord Diplock in ***Gissing v Gissing*** [1971] A.C. 886 at 906 B-C said:

> "The relevant intention of each party 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 communicate to the other party".

The following aspects of the respondent's evidence not only support her contention that there was a common intention but also go to show that she acted to her detriment:

(1) She paid $51,750 mortgage commitment fee and also legal fees for over $8,000

(2) She signed as guarantor for the mortgage.

(3) She paid mortgage instalments and saved the property from being sold.

(4) She paid the penalty for late payment.

(5) She paid $150,000 towards the deposit.

(6) She paid for the architectural drawings and plan for the building

(7) She contributed significantly to the capitalization of the businesses and also devoted her time not only conceptually but in a practical manner.

It is true that during the respondent's cross-examination she said the appellant told her that he did not want any other partner. This statement of the appellant, as testified to by the respondent (see p. 43), while seemingly contradictory of the evidence of common intention must have been assessed by the learned judge in the light of the evidence of the respondent that the appellant had previously given her to believe that she would have a beneficial interest in the property and thereby causing her to act to her detriment.

It would not have escaped the attention of the judge that when the appellant used the term that he did not want a partner it was at a time when the respondent had already expended significant sums from her own resources towards the joint enterprise of the acquisition of the land etc.

We should state that the court will not be deterred by the difficulty of finding clear evidence of agreement. It will not refuse to decide a case on the ground that "the path to conclusion is not flood-lit by clear evidence." The judge is entitled to draw inferences which a reasonable man would draw from the parties' conduct at the time of acquisition or subsequently. The parties may have formed an intention to hold property jointly "without having used express words to communicate their intention to one another; or their recollections of the words used may be imperfect or conflicting by the time the dispute arises" per Lord Diplock in ***Gissing v Gissing*** (supra) at p.906. Therefore, the court must scrutinize all evidence placed before it in order to ascertain the parties' intention. This will involve a consideration of all the circumstances including the contributions made by each party in cash or in kind or in service.

Although the beneficial interests must crystallize at the moment of acquisition the court may look at all the evidence at least until the moment of separation in order to ascertain what intentions the parties originally had. It is only when the court has looked at how the parties

conducted themselves as they had always intended to do that it will be able to ascertain what were the intentions of the parties at the time of the acquisition.

The learned judge clearly applied these principles in arriving at her conclusion as to the common intention. It is in the light of the above that the guarantee signed by the respondent must also be seen. The fact that the respondent guaranteed the loan is merely one aspect of the evidence that the judge was entitled to take into consideration in an attempt to ascertain the common intention at the time of the acquisition. The appellant has not shown that the judge had misapplied some principle of law or had so misdirected herself on the facts as would entitle this court to intefere with her decision.

How should the equity be satisfied?

Counsel for the appellant, argued that bearing in mind the contributions of the parties that a more just approach would be 75%-25% in favour of the appellant.

As we have already stated the pattern of conduct of the parties over the years is important to the quest for the common intention of the parties. The fact that each party had 50% beneficial interest in the car, the trailer and the meat shop would indicate prima facie an intention that both parties should have equal shares in the property purchased for the purpose of their joint enterprise. Further the judge accepted the

evidence of the respondent that she gave assistance at the request of the appellant in the belief that she would be awarded 50% share in the business and that the property would be shared equally. It seems to us that whereas the respondent could have complained of the judge's award of 60%-40% the appellant cannot successfully do so.

For the above reasons the appeal is dismissed and we make the following orders:

(1) That a valuation be carried out on property situate at 10 Roosevelt Avenue, Catherine Hall called Pear Tree Piece in the parish of St. James registered at Volume 1137 Folio 350 of the Register Book of Titles by a valuator agreed by both parties.

(2) That such valuation be done within 30 days hereof and the costs to be shared equally by the parties.

(3) That the appellant be given the option to purchase the respondent's interest. Such option to be exercised within 60 days of the receipt of the valuator's report.

(4) Failing the exercise of such option that the said land be sold by private treaty within 60 days of the expiry of the time given to exercise option referred to above.

(5) Failing which that the said land be sold by public auction and the net proceeds of any such sale be divided in accordance with their respective shares as per judgment dated September 24, 1999.