JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 76/87

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	THELMA GORDON	APPELLANT
AND	DURRANT GORDON	RESPONDENT

Mrs. M.E. Forte for appellant

Mr. Richard Small for the respondent

Heard June 26, 27, and July 31, 1989

CAMPBELL, J.A.

By Originating Summons under Section 16 of the Married Woman's Property Act, the appellant as applicant sought relief so far as is relevant, as hereunder:-

1. An order for the immediate transfer of premises 162 Brunswick Avenue, Spanish Town in the parish of St. Catherine to the applicant as sole owner of the Legal Estate in fee simple of the said premises.

2. (a) A declaration that the respondent and the applicant are jointly entitled to the beneficial interest in premises No. 12 Grants Crescent, Spanish Town in equal shares; and

   (b) An order for the immediate transfer by the respondent of premises No. 12 Grants Crescent, Spanish Town in the parish of St. Catherine to the respondent and the applicant as tenants-in-common.

3. An order that the respondent do pay to the applicant the sum of $350,000.00 or such sums as this court shall seem appropriate on enquiry.

4. A declaration that the applicant and the respondent are jointly entitled to the beneficial interest in the premises and assets mentioned in paragraphs 37, 38 and 39 of the affidavit attached.

Sections 37, 38 and 39 of the affidavit referred to above read as follows:

"37 That he (respondent) owns extensive property and in particular the following:-

(1) 10 King Street, Spanish Town.

(2) 162 Brunswick Avenue, Spanish Town.

(3) 12 Grants Crescent, Spanish Town.

(4) 24 Stillwell Road, Kingston, 8, St. Andrew.

" (5) Property in St. John's Garden, St. John's Road, Spanish Town.

(6) Property at Horizon Park, Westminster Avenue, Spanish Town.

(7) Lot 76 Marine Park, St. Catherine.

(8) Property at Naggo Head, St. Catherine, registered at Volume 969 Folio 377.

(9) Villa in Ocho Rios.

" (10) Lots at St. Jago Heights, Spanish Town.

" (11) Lots at Hellshire, St. Catherine, and to the best of my knowledge and belief, property in other places.

"38 That my husband owns a fleet of private motor cars for his own use, in particular: one Mercedes Benz; Cortina motor car and sports Datsun for his private use and enjoyment purchased by recourse to his said business establishment and receipts from his various properties.

"39 That the said respondent is the landlord of the National Water Authority by premises rented to this authority at No. 10 King Street, Spanish Town (where his business is currently located as well) and enjoys substantial receipts therefrom."

In relation to No. 12 Grants Crescent mentioned in paragraphs 2 (a) and (b) of the Originating Summons, the learned trial judge concluded that the appellant was not entitled to have the premises transferred into her and the respondent's name as tenants-in-common because on her own admission in paragraph 8 of her affidavit and under cross-examination, the title to the premises on which the matrimonial home was built, was, at the time of the marriage, jointly owned by the respondent and his mother. However the learned trial judge found as a fact that the appellant made financial contribution to the construction of the house on the premises which house the respondent himself admitted was intended to be used as the matrimonial home. The respondent further admitted that the appellant did make a financial contribution albeit a miniscule one. The learned trial judge did not accept the respondent's evidence on the quantum of the contribution of the appellant and declared that she had an interest in the house, based on her contribution, to the extent of one-quarter of its value. There has been no appeal against this determination by either party.

The relief claimed by the appellant in paragraph 1 of the Originating Summons, is that she is entitled to a transfer to her of the entirety of the legal estate in No. 162 Brunswick Avenue on the ground, as deposed in her affidavit, that not only did she provide the deposit but she, in effect, paid the balance of the purchase price therefor, by repaying to the Bank of Nova Scotia, Spanish Town, a loan which the respondent had obtained to pay off and which in fact he used to pay off the balance of the aforesaid purchase price but which he subsequently was unable to repay to the bank owing to the financial demands of their newly established business. The respondent by his affidavit, stoutly repudiated

the appellant's assertion. He deposed that even though the title is in the name of himself and the appellant, the entire purchase money of $3,000.00 came from his savings and "partner drawing." He borrowed no money whatsoever from the Bank of Nova Scotia and the appellant in consequence repaid no loans for him. Under cross-examination of the appellant, she was asked if she had any documents in respect of the loan to the respondent. She admitted she had none. She was unable to produce any document or any other tangible evidence in proof of the circumstance under which she came to repay the loan which she says was given to the respondent. She did not state in her affidavit nor in evidence what the purchase price of No. 162 Brunswick Avenue was, what was the amount of the deposit paid by her, and what was the amount of the loan to the respondent.

The appellant through her counsel seems to have capitulated from her position in the Originating Summons when faced with this lack of evidence, because the record shows counsel on her behalf making final submission as follows:-

> " Re: 162 Brunswick Avenue
>
> Property bought in joint names. Even if applicant made no contribution, there is the presumption of advancement. The presumption has not been adquately rebutted. Respondent has given only a convenient explanation. However, applicant did contribute to the deposit. Inference is that property is owned as stated on the title. So, she would be entitled to one-half interest in the property."

It is not without significance that quite inconsistently with the relief claimed by the appellant in paragraph 1 of her Originating Summons, she claims a joint beneficial interest in the same property as having been acquired in the course of the business which she and the respondent jointly carried on.

The learned trial judge concluded the matter thus:-

> " In relation to para. 1, the premises are in the names of the parties. The respondent claims that this was to facilitate his children getting the benefit if he died. I don't accept that, to my mind, that does not rebut the presumption (of advancement) that arises when the husband buys property in names of himself and his wife.
>
> This is obviously held as joint tenants. Immediate transfer to the applicant as sole owner is out."

This determination is not the subject of an appeal before us. But inasmuch as it is capable of incorporating a finding that the appellant made no financial contribution to the purchase price of 162 Brunswick Avenue, and inasmuch as such a finding can have a material bearing on whether financial contribution to the business had been made, learned counsel for the appellant has submitted that the conclusion of the learned trial judge namely that the presumption of advancement has not been rebutted and that the property "is obviously held as joint tenants" does not necessarily or inevitably imply that he has found that the appellant made no financial contribution to the purchase of that property.

I am of the view that there was absolutely no credible evidence before the learned trial judge from which he could find that the appellant contributed financially to the purchase of No. 162 Brunswick Avenue in the manner stated by her or in any other way. Unlike the claim in respect of No. 12 Grants Crescent where she gave an estimate of her contribution she gave no such evidence in respect of this purchase.

The conclusion of the learned trial judge that "immediate transfer to the applicant as sole owner is out" is a clear finding that she has failed to substantiate her claim

in paragraph 1 of her Originating Summons. The only other relief to which she was entitled which fairly arises from the evidence is derived from the fact that her name appears on the title as joint tenant. Thus even though there is no evidence of financial contribution by her, there being no sufficient explanation from the respondent in rebuttal of the presumption of advancement which in equity enures in favour of the appellant, she was entitled to a half share in the property not arising from contribution but rather arising in equity.

The final conclusion of the learned trial judge is that the appellant was not entitled to receive $350,000.00 or any other sum as claimed in paragraph 3 of the Originating Summons nor to any joint beneficial interest in the properties and assets referred to in paragraph 4 of the Originating Summons and enumerated in paragraphs 37, 38 and 39 of the supporting affidavit.

The learned trial judge concluded the matter thus:-

> " Paragraph 3 is refused.
>
> Apparently this claim arises from the conduct of the business. This relates solely to the operations of the respondent. I reject the evidence of the applicant that she was company secretary, typist, accountant, telephone operator etc.
>
> " Paragraph 4 is refused.
>
> Purchases from the profits of the business are not part of the assets for distribution or sharing."

Against these conclusions the appellant appeals on the grounds that:-

(a) The learned trial judge was in error in failing to make any finding on whether the appellant made any monetary contribution to the business carried on by the parties.

(b) The learned trial judge erred when he failed to find whether the appellant obtained loans and used part of the proceeds of same on behalf of the business.

(c) The learned trial judge erred when he failed to find that there was an agreement between the parties that the profits from the business were for the long term benefits of the parties.

(d) The learned trial judge erred when he found that purchases from the profits of the business are not part of the assets for distribution or sharing.

Mrs. Forte submitted that the appellant's case rested on four bases, namely:

(a) she worked physically in the business, (b) she repaid a loan made to the respondent by Bank of Nova Scotia, Spanish Town (c) she borrowed money from her Insurance Company which was put in the business also she borrowed money from Bank of Nova Scotia, Spanish Town and gave 50% of the proceeds to the respondent to be put into the business and (d) agreement between her and the respondent that she would meet the expenses of the children and the family so that the respondent could use his money to develop the business.

She readily conceded that the learned trial judge did make an express finding that the appellant did not personally work in the business and that this effectively disposed of the first basis of her claim. She however contended that the learned trial judge made no finding in relation to the other three bases of the claim and that, had he done so, he would have found in favour of the appellant especially as the respondent had admitted or must be taken to have admitted part of the third basis and also the fourth basis on which her claim rested.

I have earlier concluded that, in respect of the second basis of the appellant's claim, the learned trial judge could not possibly have found in the appellant's favour because apart from her general assertions in her affidavit

she did not condescend to such particulars as (a) purchase price of No. 162 Brunswick Avenue, (b) amount of the loan made by Bank of Nova Scotia, Spanish Town, to the respondent which she repaid and (c) the amount of the deposit which she herself paid.

With regard to the third basis of the appellant's claim Mrs. Forte submits that the appellant deposed in paragraph 25 of her affidavit that "I borrowed money from the Bank of Nova Scotia, Spanish Town for our mutual concerns, and disbursed to him at least 50% of this money to put into the said business." This paragraph Mrs. Forte submits, has not been challenged by the respondent and accordingly amounts to an admission of the truth of its content, thereby providing evidence of financial contribution.

To the contrary, Mr. Small submits that paragraph 11 of the respondent's affidavit by one broad sweep denied paragraph 23 of the appellant's affidavit which deposed that she gave financial support to him. It was therefore not fatal for him not to have expressly denied paragraph 25 of her said affidavit which merely particularised the source of funding, peculiarly within her knowledge, from which her contribution was made. To appreciate the force of Mr. Small's submission, the relevant paragraphs of the appellant's affidavit are here set out:-

> " 23 That I assisted the respondent financially in the formative years of the operation of the said business at No. 162 Brunswick Avenue, Spanish Town.
>
> 24 That in particular, I borrowed money from my Insurance Company, the Empire Life Insurance Company and put it into the business.

" 25 That I borrowed money from the Bank of Nova Scotia, Spanish Town for our mutual concerns, and disbursed to him at least 50% of this money to put into the said business."

Paragraph 11 of the respondent's affidavit states:-

" 11 In reply to paragraphs 22, 23, and 24 it is not true that the applicant gave me any financial support and it is not true that she borrowed money from her Insurance Company to put into my business."

Mr. Small further submits that not only does the above paragraph show that issue was joined with her claim of having made financial contribution whatever the source of funding, but it also operated together with paragraph 8 to join issue with paragraph 16 of her said affidavit which reads thus:-

" 16 That I assisted the respondent in operating this business, physically, financially and by providing good-will and moral support, on the understanding between us that as his wife and together with our children I would share in the rewards of the success of this enterprise."

The claim of the appellant relevant to direct financial contribution, as contained in paragraphs 14, 15, 16, 17, 23, 24, 25 and 26 of her affidavit, succinctly stated, is that in the early years of the marriage, two mini buses were operated and maintained through the joint effort of her and the respondent. In 1969/1970 the mini buses were sold and a spare parts business was started by them at No. 162 Brunswick Avenue. They jointly bought No. 162 Brunswick Avenue and operated the business there. She borrowed money from Empire Life Insurance and put the same in the business. She borrowed money from Bank of Nova Scotia, Spanish Town, and used 50% thereof for the business. She made other ad hoc financial contributions as her means could provide.

The respondent denies the appellant's claim. He said the appellant gave no financial or physical assistance in the operation and maintenance of his mini buses business. He sold no mini bus in 1969/70. He still owned them. In 1970 he acquired two trucks which he hired out. In 1971 he requisitioned for truck parts from his brother who was then in England. On receipt of these he sold some, and realising the great demand for truck spare parts he established a spare parts business in 1972. He operated this business as a sole proprietorship business at No. 162 Brunswick Avenue which premises he had earlier bought in 1970 for $3,000.00. In 1974 he incorporated this business under the name of JB'S Auto Spares and Transport Limited with him and his younger brother as the sole share holders. He borrowed no money from Bank of Nova Scotia, Spanish Town. The appellant made no physical or financial contribution to the business. Whatever success he achieved in business has been through his own efforts and sacrifices and not through any contribution or effort of the appellant as claimed by her.

Under cross-examination, the appellant said, in relation to the acquisition of 162 Brunswick Avenue for the business venture, that her bank book which she claimed would evidence the deductions by Bank of Nova Scotia of the balance of the purchase price originally lent to the respondent, was available, and was in the possession of her former attorneys-at-law, yet she did not call them or otherwise subpoena them, if unwilling, to attend and produce the book despite the abundant time available to her to do so.

She denied that monies which she said she borrowed from the Insurance Company had been used to pay off a debt of her deceased father, but she made no effort to call anyone from

her Insurance Company to support her as to the fact that she did obtain a loan, the time of the loan, and the amount of the loan, from which an inference, however tenuous, could be drawn that the destination of the loan was the business carried on at 162 Brunswick Avenue, in a case where such destination was not independently identifiable. She was not specifically cross-examined on her loan from Bank of Nova Scotia, Spanish Town, fifty percent, of which she deposed, was used by her for the business. It is this fact which represents the high point of Mrs. Forte's submission which as earlier stated, is that the paragraph of the appellant's affidavit wherein she deposed to this fact had not been denied, and as the respondent gave no evidence relative thereto that fact must be taken as admitted. I think Mrs. Forte's submission on this point is not well founded. The affidavit supporting a summons is not a pleading such that the strict rule of pleading apply namely, that a fact which is not specifically denied must be taken as admitted. The totality of the statements deposed by the respondent in his affidavit unambiguously demonstrates that he was denying any contribution whatsoever irrespective of how the appellant was enabled to fund such contribution. Insofar as it came from the bank it would be a matter on which the appellant alone would be expected to adduce evidence.

The learned trial judge did not find the appellant a wholly reliable witness nor did he find her affidavit sufficiently supported by tangible evidence, this is made clear when he delivered himself thus:-

> " I have formed the firm view that I ought to be careful about her testimony in view of my assessment of her as she gave her

> " evidence. She seems to be prone to mental flights of fancy and exaggeration. It is strange that she has been unable or reluctant to support any of the challenged paragraphs in her affidavit with any tangible proof. Of course, I am aware that the defendant has also been lacking with documentary evidence. However, for someone who claims she has paid off so many loans and borne so many expenses for the defendant, I should have thought that the court would have been provided with documentary assistance in arriving at the true position in this case."

Thus, what the learned trial judge was saying is that in the absence of documentary or other tangible evidence which would have assisted him in arriving at his decision he had to rely solely on his view of the credibility of the appellant and on such facts as, being relevant to the issue, are admitted wholly or in part by either side.

The appellant was, in the view of the learned trial judge not an overly credible witness. None-the-less she was accepted as a financial contributor to the house built on No. 12 Grants Crescent. No doubt this was because the respondent did admit a contribution even though he disputed the quantum thereof.

In the case of financial contributions to 162 Brunswick Avenue, and to the business there was nothing but her assertion which was disputed by the respondent. She admitted that the respondent was in business at the time of the marriage in that he owned a mini bus and prior to that he owned a Morris Traveller Station Waggon which he used for commercial purposes. Thus the genesis of the respondent's business, on her own admission, did not lie in the joint effort of her and him. She was also unable to satisfy the learned trial judge by credible evidence aliunde (since she herself was not overly credible) of any financial contribution

she made to the acquisition of No. 162 Brunswick Avenue or to the business carried on there, even though on the hypothesis that she was truthful, some such evidence would be expected to be available.

The appellant next complains that there was an agreement that the profits of the business were for the long term benefit of her and the respondent. This she says was asserted by her in paragraph 2 of her supplemental affidavit dated April 29, 1986. The said paragraph reads thus:-

> " 2 That the business at 162 Brunswick Avenue, Spanish Town always operated at a profit which the respondent never shared with me and it was understood that it would be ploughed back into the business for greater expansion and development and for future long term pension benefits for both myself, the respondent and the children."

Mrs. Forte submitted that in paragraph 27 of her original affidavit the appellant had deposed that she assisted substantially in maintaining the two children of the marriage and in paragraph 33 that she paid the school fees for several years, thus relieving the respondent of financial burden and thereby enabling him to develop the business. The reason for her doing so is expressed in paragraph 2 of the supplemental affidavit. She submitted that not only did the respondent fail to deny this paragraph which amounted to an implied admission but he positively admitted in viva voce evidence that she paid school fees.

I have already expressed the opinion that the non-denial of a specific paragraph in an affidavit does not per se, or necessarily operate as an admission of any fact stated therein. The affidavit constitutes the evidence which the deponent is adducing in support of the motion or summons.

His opponent may contradict that evidence by affidavit or viva voce evidence or both, but whichever method he adopts he is not required as in the rules governing pleadings to deny specifically each fact stated by his apponent. He may deny by asserting a set of facts which is so diametrically different from his opponents' affidavit that it shows unmistakebly that he is challenging all relevant facts in the affidavit of the former.

The respondent in his affidavit deposed that from his earnings as a mini bus and taxi operator he was able to and did support his family fully. With reference to paragraph 33 of the appellant's affidavit, he deposed thus:-

> " 14 It is untrue that the applicant paid any school fees while the children were going to Secondary School. I paid all the fees. Before that they were attending free Primary School."

The respondent in my view was by his affidavit denying that the appellant "assisted substantially" in maintaining the children, or that "she loyally paid school fees for several years." Thus he was denying the basis of the understanding deposed in paragraph 2 of the appellant's supplementary affidavit. In his viva voce evidence he said they never had any discussion about the setting up of the business for auto car parts, nor did they ever sit down and discuss business as she was never available. He admitted that the appellant paid the school fees for the children when they attended preparatory school but that they were removed from preparatory school to primary school. He was not thereby admitting that she paid school fees for several years.

In this state of the evidence before the learned trial judge it would be sheer speculation on how much was paid in preparatory school fees, whether it was so substantial in amount as prima facie to indicate that the intention in making payment was indirectly as an investment and not merely an

arrangement to meet her share of the expenses of the domestic establishment.

The learned trial judge it must be conceded did not expressly state that the appellant failed to satisfy him that she made financial contributions direct and indirect to the respondent's business. Equally he did not expressly find that she failed to satisfy him on the existence of an agreement or understanding on who should share in the profits of the business, but in refusing paragraphs 3 and 4 of the orders sought in the Originating Summons and in further stating that "purchases from the profits of the business are not part of the assets for distribution or sharing" he undoubtedly found albeit impliedly that the appellant had failed on each of the heads on which her claim to a share in the business and the profits therefrom was based. On the evidence before him the conclusion would inevitably have been the same even if he had expressly made a finding on each head of claim because no finding other than one adverse to the appellant would have been reasonably justified.

I would dismiss the appeal and confirm the judgment of the court below with costs to the respondent to be taxed if not agreed.

WRIGHT, J.A.

I have read the draft judgment of Campbell, J.A.. and agree with his reasoning and conclusion.

It is manifest that the appellant's claims which have not been upheld by the learned trial judge lack the requisite evidential support. The claim for $350,000.00 can, in the circumstances, be no more than imaginary. What asset was to be taxed with this or any other payment? It certainly could not be the assets of the company and without proof of her contribution to the respondent's share in the company (which share has not been disclosed), how could his share become liable to make any payment to her?

Of note is the fact that the appellant is not a helpless person. It is in evidence that in 1977 she built herself a home of some considerable value so that she cannot be credited with having no business acumen. The point is that if the truth were on her side about the contributions she alleges she made then she must have been able to make a better presentation of her case to the court. Her effort is more akin to a fishing expedition.

MORGAN, J.A.

I agree that the appeal should be dismissed and for the reasons as set out in the draft judgment which I have had the opportunity to read.