

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 384 OF 1992

BETWEEN

ROY GREEN

PLAINTIFF

A N D

VIVIA GREEN

DEFENDANT

R. Codlin and Miss. Joyce Bennett for Plaintiff

Dr. Lloyd Barnett and Mrs. Leila Parker for Defendant

Heard: November 20 & 23, 1995, March 4, 5, 6, 7,
8, 11, October 8, 9, 1996 & May 15, 1997.

CHESTER ORR J.

This is an unusual case in which the plaintiff, the husband seeks a declaration that he is entitled to one-half the equity in the properties acquired by the parties before and during their marriage.

The parties met in 1972 when each was married to another partner. They formed an intimate relationship which produced two children born in 1973 and 1975 respectively. The parties married each other in 1984 and separated in 1986 or 1987 when the plaintiff left the matrimonial home. There is no evidence that they have been divorced. During the period between 1973 and the separation three (3) business enterprises and seven (7) properties were acquired. The wife appears as the registered owner of five, both are joint owners of one, Governor's Pen, St. Mary and no Title was produced for one at Marine Park, St. Catherine. The business enterprises have been closed and all the properties sold save and except for two Apartments at Oakland Court, St. Andrew.

In 1973 a business, a supermarket situate at Carpenters Road and East Road was acquired. This was the genesis for the acquisition of all the assets. The wife was responsible for the daily operation of the business and handled all the finances. This was a common feature of all the dealings. The husband describes the situation thus: "She was the

finance Minister, I had nothing to do with cash, I only produced." The role of the husband and his contribution to the acquisition of the assets are matters of controversy.

PLAINTIFF'S CASE

The husband is a Supervisor employed in the Construction Industry. He met the defendant in 1972 when he was employed as a Foreman. She was then married to Vivian Coley. Her maiden name was Kong. They formed an intimate relationship. In 1973 they acquired the business at Carpenters Road and East Road by their joint contributions. He contributed the sum of \$2,500.00 from the proceeds of the sale of his motor car. The wife contributed an approximate amount and a loan was obtained from a bank after they had started the business. He assisted in the operation by purchasing goods and collecting goods from suppliers. By virtue of his position as foreman, he was permitted to use the Company's vehicle for his own purposes. He used this vehicle to transport goods for the business. At the close of his working day he assisted in the operation of the business also at nights and on week-ends. He purchased goods with his own funds at an average of \$500, \$1000.00 to a maximum of \$3,000.00 weekly. He received a refund of this expenditure from the business but at times he did not. Their child, Tanya was born in 1973.

In 1975 he purchased the property at Marine Park, St. Catherine with funds from the business. No Title was produced. The premises were rented from acquisition to the time of trial of this action. When the payments fell into arrears the defendant paid the sum of \$18,000.00 from proceeds of the business.

In 1975 they purchased premises at Donmair Drive. The Title, Exhibit 6 is in the name of Vivia Kong, the maiden name of the defendant. They were not then married and she (the defendant) was afraid that his family would take everything from her if anything should happen to him. He gave her the privilege to purchase in whatever name she chose during that period. He did extensive additions to and refurbishing of the premises. He hired and supervised the workmen. The total cost of the work done was in the region of \$65,000.00 of which he contributed about 4%. The remainder was obtained from the business. They resided at these premises and their second child Theresa was born in 1975. The premises were sold in 1984. The business was operated for about three years when it

was sold and a larger one acquired at Pembroke Hall. He performed similar duties here to those he had undertaken in respect of the previous business.

They desired a larger house and bought premises at 27 Wiltshire Avenue, Barbican in 1980. Title is Exhibit 3 in the name of Vivia Kong. Purchase money was obtained from the business and they obtained a mortgage. He did extensive repairs and additions to the premises. His input was at a cost of about \$120,000.00. This became the matrimonial home. He left there in 1987. Premises were sold in 1992.

The parties wanted a house in the country and bought a property at Governor's Pen, St. Mary in 1980 from the business as an investment and were rented. That same year they purchased premises at Stony Hill. Title, Exhibit 5 is in the name of Vivia Green. At his request Mr. Warmington a senior member of the company at which he was employed had inspected and approved of the building before purchase. He did extensive repairs and refurbishing of the premises including the installation of a cold storage room at a cost of approximately \$500,000.00. His physical input was about \$75,000.00. This was paid from the business and a little from his pocket money. They operated a supermarket, Dry Goods and Liquor Store and he purchased goods and assisted in operating the business. The premises were sold in 1987 after he had left the matrimonial home. He had been continuously employed from the time he met his wife and gave her the greater portion of his salary and kept the balance for pocket money. In 1973 he earned about \$4,500.00 per month. Accounts were kept for the business in banks in both their names. He has not received any of the proceeds of sale of the properties nor the stock in the various businesses. In cross-examination he stated that he did jobs apart from his employment. In 1973 he supported his then wife and four children who attended school. He did not partake in any of the negotiations for acquiring the business enterprises because his wife was capable of so doing.

Witnesses supported his evidence that he transported goods to the business places and assisted in the operation thereof. Workmen stated that they had been paid by both parties. Mr. Warmington stated that he inspected the building at Stony Hill at the request of the plaintiff and advised that they should purchase it.

DEFENDANT'S CASE

It was the case for the defendant that all the business enterprises and properties were acquired with funds from her own resources except for the property at Marine Park.

In 1962 she operated a restaurant from which she acquired a van which she used to sell haberdashery Islandwide. She was married to Solan Coley in 1965. They operated a barber saloon at East Queen Street, Kingston. In 1966 she left for the United States of America where she worked and accumulated her savings. She returned to Jamaica in 1968 and resumed at the barber saloon. From the profits and her savings Coley and herself acquired premises at 14 McLaughlin Drive, Mountain View Terrace. In 1981 Coley transferred his interest therein to her - see Title Exhibit 9. She met the plaintiff in 1972 or 1973 and they became friends. In 1973 she purchased the business at Carpenters Road and East Road. She paid a deposit of \$7,000.00 and the balance was obtained as to \$1,100.00 from her savings, a repaid loan of \$1,900.00 from her brother Vivian Kong and a loan of \$4,047.36 from a bank - see Exhibit 10. The plaintiff made no contribution to the acquisition of the business. Her mother and two of her brothers assisted her in operating the business. She obtained a loan of \$5,000.00 from her mother in order to extend the business and an overdraft from the bank to increase the stock - see Exhibit 10. The business progressed and in 1975 she purchased the premises at 27 Donmair Drive. The purchase price was \$31,000.00 of which she paid \$11,000.00 from her savings and the business and obtained a mortgage for \$20,000.00 - see Title Exhibit 6. She repaid the mortgage loan in 1977. In 1975 the plaintiff purchased a house at Marine Park. He made a deposit and paid the instalments on a mortgage for about two years when he complained about the additional cost of these payments. As a consequence she gave him the sum of \$18,000.00 from her savings which he used to pay the arrears. The premises were rented and she collected the rental at the request of the plaintiff and used it to maintain the house in which they then resided. She maintained the premises at Marine Park and paid for repairs from the business.

In 1977 she purchased the stock in trade of a business at Pembroke Hall for \$48,000.00. She obtained a loan from a bank and mortgaged the premises at Donmair

Drive for \$60,000.00 - see Title Exhibit 6. She became ill in 1979 and for approximately one year there was no one to carry on the business and she was forced to sell it in 1980 for \$111,000.00.

In June 1980 she purchased premises 27 Wiltshire Avenue for \$66,500.00. Title Exhibit 3 is in her maiden name. The plaintiff made additions to the premises for which she paid him. She sold the premises in 1992 for \$1.1. million.

In August 1980 she acquired Governor's Pen, St. Mary a property of 74 acres. Title in both names Exhibit 4. The plaintiff had expressed dissatisfaction with his job and she had hoped that he would leave the job and do farming. However he displayed no interest in the farm. The plaintiff and his workmen constructed the buildings but she provided the money with which to pay them. The property was sold in 1983.

In 1981 she purchased the business at Papine for \$80,000.00. She paid \$20,000.00 from her savings and obtained a loan from a bank. The business was looted after the hurricane in 1988 and she lost everything.

In 1984 she purchased two apartment buildings at Oakland Court, the Titles Exhibits 7 and 8 are in her name. The purchase price for each was \$175,000.00 of which her mother gave her \$36,000.00 and \$35,000.00 respectively which she paid as deposits and obtained the balance by mortgage which are shown on the titles.

In 1984 she purchased premises at Stony Hill for 150,000.00. Title Exhibit 5 is in her name. The building was refurbished for use as business premises. She requested the plaintiff to obtain workmen to instal shelves which he did and for which she paid. The plaintiff assisted in cleaning the premises. She had a cold storage room built by one Leslie Walker for which she paid. She operated both business at Papine and Stony Hill. She sold premises at Stony Hill in 1987 for \$500,000.00.

She left for the United States of America in 1990 and purchased a house there. She sold this home and purchased another with assistance from her children. The plaintiff gave her \$200.00 per month which was increased to \$400.00. He had not received any of the proceeds from the sale of the properties as he was not entitled so to do.

Her brother Vincent Kong gave evidence that the plaintiff did not work in the business at Carpenters Road. He also contradicted the plaintiff as to the time he sold his

car. Leslie Walker testified that he installed the cold storage room at Stony Hill for which he was paid by the defendant.

Findings

I now address the question of the beneficial interest of the parties. I will deal firstly with the properties at Marine Park and Governor's Pen.

Marine Park

The title was not produced. It is common ground that the plaintiff paid the deposit and mortgage payments. When these fell into arrears the defendant paid the amount due. She also collected the rent which she states was used to maintain their home. From the evidence I find that the beneficial interest is held in equal shares by both parties.

Governor's Pen

The title, Exhibit 4 is in the names of both parties. It appears that there was a common intention that the property should be purchased for the benefit of both parties. The plaintiff states it was intended to be a weekend residence and the defendant that it was for the plaintiff to change his vocation to farming. Despite the conflict as to the respective contributions to the costs of erection of the buildings I hold that the beneficial interest is held by both parties in equal shares.

I now consider the business enterprises and other properties. The title for the properties are in the name of the defendant. On a balance of probabilities I find that the plaintiff did not make an initial contribution of \$2,500.00 to the acquisition of the business at Carpenters Road and East Road. Dr. Barnett submitted that this finding would disentitle him to any beneficial interest in these assets. Mr. Codlin submitted that there was a common intention in the parties to acquire the assets jointly.

In **Gissing v Gissing [1970] 2 All E.R. 780** Lord Diplock said at 790 -

“ An express agreement between spouses as to their respective beneficial interests in land conveyed into the name of one of them obviates the need for showing that the conduct of the spouse into whose name the land was conveyed was intended to induce the other spouse to act to his or her detriment on the faith of the promise of a specified beneficial interest in the land and that the other spouse so acted with the intention of acquiring that beneficial interest. The agreement itself discloses the common intention required to create a resulting, implied or constructive trust. But parties to a transaction in connection with the acquisition of land may well

have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case a common one where the parties are spouses whose marriage has broken down it may be possible to infer their common intention from their conduct.”

In this case there is no evidence of any express agreement between the parties as to their respective beneficial interest. Their common intention will have to be inferred from their conduct.

The acquisition of the business occurred at the early part of the relationship between the parties. Both were then married to other partners and it was their hope that the relationship would lead to marriage to each other. Against this background I find that although the plaintiff made no initial contribution to the acquisition he contributed directly and indirectly to the operation of the business. I find that he overstated the extent of his contribution having regard to his earnings and his other commitments to his family. I accept his evidence that he was able to work for reward outside of his employment by virtue of his position as a supervisor. I find that he was not a mere purveyor of goods for the various businesses nor a handyman and a mere supervisor of repairs and refurbishing of the houses. I find that he was a partner in the acquisitions, that he left the handling of the finances to the defendant and this was not due to an acceptance of her role as the sole owner but because of her capability in this regard. I infer that there was a common intention between the parties from the outset for the acquisition of the business at Carpenters Road and East Road that both should share the beneficial interest and in all subsequent acquisitions.

In Grant v. Edwards [1986] 2 All E.R. 426 Sir Nicolas Browne - Wilkinson V.C. as he then was, analysed the speech of Lord Diplock in Gissing v. Gissing supra. At 438 he said:-

“ But as Lord Diplock’s speech ([1970] 2 All R.E. 780 at 790, [1971] AC 886 at 905) and the decision in Midland Bank plc v Dobson and Dobson make clear, mere common intention by itself is not enough; the claimant has also to prove that she has acted to her detriment in the reasonable belief that by so acting she was acquiring a beneficial interest. There is little guidance in the authorities on constructive trusts as to what is necessary to prove that the claimant so acted to her detriment. What ‘link’ has to be shown

between the common intention and the actions relied on?
 Does there have to be positive evidence that the claimant did the acts in conscious reliance on the common intention?
 Does the court have to be satisfied that she would not have done the acts relied on but for the common intention, eg would not the claimant have contributed to household expenses out of affection for the legal owner and as part of their joint life together even if she had no interest in the house? Do the acts relied on as a detriment have to be inherently referable to the house, eg contribution to the purchase or physical labour on the house?
 I do not think it is necessary to express any concluded view on these questions in order to decide this case. *Eves v Eves* indicates that there has to be some 'link' between the common intention and the acts relied on as a detriment."

Did the plaintiff act to his detriment in the reasonable belief that by so acting he was acquiring a beneficial interest?

The plaintiff stated early in his evidence in relation to the title for premises at Donmair Drive that the defendant was concerned that because they were not married if anything should happen to him his family would deprive her of everything. He, therefore, gave her the privilege to purchase in whatever name she chose.

At the end of his evidence in re-examination in relation to the Accounts for the business he repeated this statement and added "I told her she could buy in her name to comfort her. I knew we would be getting married early and everything would be Green and Green as she wanted. I did not restrict her buying. I told her she could do all the signing because I was on the road every day not knowing that things would turn out as they did."

He was ingenuous but I find that he refrained from having his name placed on the relevant documents because he acted in the belief that everything belonged to both of them.

What is the extent of the beneficial interests?

It is clear that the defendant made greater contributions. In all the circumstances I assess the respective interests as follows:-

Plaintiff 1/3

Defendant 2/3.

This applies to the assets in Jamaica. The plaintiff seeks a declaration in respect of property owned by the defendant in the United States of America. No evidence was led to elicit the source of the funds by which the property was acquired. It is a notorious fact of which I take judicial notice that Jamaican currency is not legal tender in the United States of

America. No nexus has been established between the sale of assets and profits made in Jamaica and the acquisition of this property. This declaration is not granted.

The order of the Courts is -

- (a) That an account be taken of all sums received by the defendant pursuant to the sale of the undermentioned properties.
 1. Donmair Drive
 2. 27 Wiltshire Avenue
 3. Governor's Pen
 4. Stony Hill
- (b) A declaration that the plaintiff is entitled to one-third the equity in the abovementioned properties and those at Oakland Court.
- (c) That the defendant do pay to the plaintiff one-third of the proceeds of sale of the abovementioned properties save and except those at Oakland Court.
- (d) That the plaintiff is entitled to one-third of the amounts in the following Accounts in Jamaica Citizens Bank, 17 Dominica Drive, Kingston 5 -
 - (a) Approximately 2.5 million dollars in the names of Tanya Green Vivia Green, or either of them.
 - (b) Another sum in the names of Viva Green and Theresa Green or either of them.
 - (c) Another sum of about 2 million dollars in the names of Janice Mullings and Viva Green-Kong or either or them.
- (e) That one-third of the sums standing in the Accounts or any of them in Jamaica Citizens Bank, 17 Dominica Drive, Kingston 5 be paid to the plaintiff and the other two-thirds be paid to the defendant on settlement of the Accounts. Payment to the plaintiff not to be made before the expiration of six (6) weeks from the date hereof.

Liberty to apply.

Costs of 7 days to the plaintiff to be agreed or taxed.

Leave to appeal granted against Order for Costs.