Privy Council Appeal No. 4 of 2002

Roy Green *Appellant*

v.

Vivia Green *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 20th May 2003

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hope of Craighead
Lord Millett
Lord Rodger of Earlsferry

*[Delivered by **Lord Hope of Craighead**]*

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1. When the appellant, Roy Green, and the respondent, Vivia Green, first met in 1972 they were each married to someone else. They formed a relationship and in 1973 decided to live together as man and wife. It was not until some years later that they were free to marry each other. The respondent was divorced from her first husband in 1980, but it was not until 1983 that the appellant was divorced from his first wife. In the meantime they had two daughters, Tanya and Teresa, who were born in 1973 and 1975. They were married in 1984, but not long afterwards things changed and their relationship started to deteriorate. In 1987 the appellant left the matrimonial home, and in 1990 the respondent left Jamaica and went to live in the United States of America. Two years later, in November 1992, the appellant commenced proceedings against the respondent in which he sought a declaration that he was entitled to one-half of the equity in the property which had been acquired by the parties during the period of their relationship.

2. The case went to trial before Orr J in November 1995. It lasted for eleven days, during which evidence was led from both parties and several other witnesses. On 15 May 1997 the judge gave judgment in the appellant's favour, although he assessed the respective interests of the parties in their various assets at one-third to the appellant and two-thirds to the respondent. He also restricted his order to the assets of the parties in Jamaica, as he excluded property which the respondent has purchased in the United States of America. The appellant was content with that result, but the respondent was not. She appealed against the judge's order, and on 31 July 2000 the Court of Appeal (Downer, Harrison and Panton JJA) allowed her appeal. The judgment of Orr J was set aside. It was declared that the appellant was entitled to a one-third interest in one property only (Governor's Pen, St Mary) and that he had no interest in any of the remaining properties. It is against that judgment that the appellant has now appealed to their Lordships Board.

3. During the period from 1973 to the date of the separation the parties acquired three business enterprises and seven business and residential properties. Of the seven properties, the titles to five of them were registered in the name of the respondent, one was registered in joint names (Governor's Pen, St Mary) and no title was produced for another (Marine Park, St Catherine). The businesses have all now been closed and all the residential properties sold, except for two apartments (at Oakland Court, St Andrew). The following summary provides a brief inventory of these various assets.

4. In 1973 the parties purchased a small supermarket business at Carpenters Road and East Road, St Andrew. This was, as the judge held, the genesis for the acquisition of all the other assets. In 1975 two dwelling houses were purchased. One was a three bedroom house at Marine Park, St Catherine. The other was a two bedroom house at Donmair Drive, St Andrew. The house at Donmair Drive was later improved by adding two further bedrooms and a car porte. The appellant said that the title to the house at Marine Park was registered in his name, but the title was not produced. The title to the house at Donmair Drive was registered in the name of the respondent. In 1977 the business at Carpenters Road and East Road was sold. A supermarket and garment store at Pembroke Hall, St Andrew was bought with the proceeds. The title to this property was registered in the name of the respondent. In 1980 a larger dwelling house at 27 Wiltshire Avenue, Barbican was

purchased. It too was registered in the respondent's name. It became the family home, and the parties lived there together until they separated. In the same year an area of land was bought at Governor's Pen, St Mary, the title to which was taken in joint names. In 1981 a self-service supermarket was purchased at Papine, but everything there was lost in 1988 when the business was looted after the building was destroyed in a hurricane. In 1984 a supermarket and wholesale business at Stony Hill, St Andrew was purchased. The title to this property was registered in the respondent's name. In the same year two apartments at Oakland Court, Constant Spring Road, St Andrew were purchased. They too were registered in the name of the respondent.

5. Throughout the parties' relationship the appellant was employed full-time as a supervisor in the construction industry. The respondent handled their finances and was responsible for the day to day operation of the various business enterprises. As so often happens in cases of this kind, they got on with their busy lives without much thought for the future. No agreement was made as to how the beneficial interests in the various properties were to be divided up between them. This is the background against which the judge was asked to decide what part the appellant played in the acquisition of the assets in which he was claiming a share of the equity.

6. The appellant's case was that neither of the parties had much in the way of money in 1973 when they started up in business in a small way, and that among the assets used for this purpose was a sum which he contributed from the proceeds of the sale of his motor car. He said that the subsequent purchases were made as a result of their joint efforts in the business, to whose success they had each in their different ways contributed. The respondent remained on the premises and supervised the operations there. He had enough time off during the day from his employment in the construction industry to search for, collect and deliver to the premises goods which were to be offered for sale in the supermarket, and he was able to work there each day from about 4.00 pm until closing time. Their intended marriage was their number one priority, and everything they did was directed to that aim. The respondent's case was that all the business enterprises and properties were acquired from her own savings and her own efforts except for the house at Marine Park, for which the appellant paid the deposit and the instalments due on the mortgage. But he was unable to maintain these payments, so she gave him a substantial sum from her own savings

to pay off all the arrears. She said that she was assisted in the running of the businesses by her mother and her brothers, and that she maintained the premises at Marine Park, paid for the additions which the appellant made to the house at Wiltshire Avenue and provided the money for the construction of buildings at Governor's Pen all from her own resources including the assets generated as result of her own efforts by the various businesses.

7. The judge held that the beneficial interest in the house at Marine Park was held in equal shares by both parties and that this was the case too at Governor's Pen. There was a conflict of evidence as to whether the appellant contributed to the acquisition of the business at Carpenters Road and East Road from the proceeds of the sale of his motor car. The judge held on a balance of probabilities that he did not do so. But he found that, although the appellant made no initial contribution, he did contribute directly and indirectly to the operation of the various businesses. He said that the appellant had overstated the extent of his contribution having regard to his earnings and his other commitments to his family. But he held that he was able to work for reward outside his employment by virtue of his position as a supervisor. He summed the matter up in these words:

> "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 that this was not due to an acceptance of her role as the sole owner but because of her capacity 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."

8. The judge also accepted the appellant's explanation for the fact that the title to so many of the properties was taken in the respondent's name. He said that when the house at Donmair Drive was purchased she was concerned that, as they were not married, if anything was to happen to him his family would deprive her of everything. So he allowed her to purchase in whatever name she chose. He said that he knew that they would be getting married and that "everything would be Green and Green as she wanted", so he told her she could do all the signing. The judge's conclusion was

that the respondent was ingenuous. He found 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.

9. The judge ordered an account to be taken of all the sums received by the respondent pursuant to the sale of the properties at Donmair Drive, Wiltshire Avenue, Governor's Pen and Stony Hill, and he declared that the appellant was entitled to payment of one-third of the proceeds of the sale of those properties, to one third of the equity at Oakland Court and to the payment of one-third of the amounts in the names of the respondent and others in various bank accounts.

10. The judgment of the Court of Appeal was delivered by Harrison JA. He referred to the judge's finding that there was a common intention between the parties from the outset that they should both share the beneficial interest in the business at Carpenters Road and East Road and in all subsequent acquisitions. In his view, on the evidence available, it was not open to the trial judge to find that the appellant's contribution was sufficient to indicate that there was such a common intention relying on which he acted to his detriment. He referred to the fact that the appellant was employed full-time in his job as a supervisor on construction sites. He said that he was able to assist in the business only after 4.30 pm in the evenings, and that his transport of goods to the business was no more than intermittent as the evidence showed that there were other suppliers of goods. He noted that the appellant had accepted that the business was the source of the financing of the acquisition of the various properties, and that he had no specific knowledge of the details of how they had been purchased or paid for as he took no part in these transactions. This, in his view, confirmed that he had not established a claim to a beneficial interest in the premises. He agreed with the judge that the appellant had a beneficial interest in Governor's Pen and that there was evidence on which he could find that the appellant was entitled to a one-third interest in that property. But he held that he had no interest in the remaining properties nor did he have any interest in the sums held on the bank accounts.

11. There is no dispute in this case about the principles which are to be applied in determining whether, in the absence of an express agreement, the appellant has a beneficial interest in properties which were registered in the respondent's name only and to which she alone has the legal title. They were explained in *Gissing v Gissing* [1971] AC 886, 904-910 by Lord Diplock; see also *Grant v*

Edwards [1986] Ch 638. The question in *Gissing v Gissing* was whether the wife had a beneficial interest in the matrimonial home which had been purchased during the marriage in the name of the husband only. But the principles which that case identified are not confined to situations where the parties were married to each other when the property was acquired. As Lord Diplock explained at p 904H, they are of general application and can be applied to any case where a beneficial interest in land is claimed by a person, whether spouse or stranger, in whom the land is not vested. The question in all these cases is whether a common intention can be inferred from the parties' conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable person would draw from the parties' words or conduct. It is for the court to determine what inferences can reasonably be drawn, and each case must depend on its own facts. Where the most likely inference from the parties' conduct is that the beneficial interest was not to belong solely to the party in whom the legal title is vested, the court must determine what in all the circumstances is a fair share.

12. Further guidance is to be found in the judgments of the Court of Appeal in *Grant v Edwards* [1986] Ch 638. The dispute in that case was between a couple who were not married to each other but had been living together in a house in which the plaintiff claimed she had a beneficial interest when the parties separated. The title was in the defendants' names and there was no direct evidence of any agreement that she was to have a beneficial interest in it. In that situation she had to establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she could do that, equity would not allow the defendant to deny that interest and would construct a trust to give effect to it. It was made clear in that case that two matters need to be demonstrated to establish a constructive trust. They were described in all three judgments, but the analysis by Sir Nicolas Browne-Wilkinson V-C at pp 654C-655G is especially helpful. The first is that it must be shown that there was a common intention that both parties should have a beneficial interest in the property. Where parties have not used express words to communicate their intention with the result that there is no direct evidence of it, their intention can be inferred from their actings or from other circumstances. The second is that it must be shown that the claimant has acted to his or her detriment on the basis of that common intention. There must be a sufficient link between the common intention and the conduct which is relied upon to show that the claimant has acted on the common intention to his detriment. As

Nourse LJ put it at p 648G-H this requires there to have been conduct on which the claimant could not reasonably have been expected to embark unless he was to have an interest in the property.

13. There is another principle which must be taken into account in this case. It applies where the decision of the judge at first instance is taken to appeal and the appellate court is asked to consider whether the judge's decision was justified by the evidence. In *Watt v Thomas* [1947] AC 484, 487-488 Lord Thankerton said that where a question of fact has been tried by a judge without a jury, and there is no question of his having misdirected himself, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that the decision of the judge cannot be explained by any advantage which he enjoyed by reason of having seen and heard the witnesses. Lord Macmillan developed the same point at pp 490-491. He said that the printed record was only part of the evidence. What was lacking was evidence of the demeanour of the witnesses and all the incidental elements which make up the atmosphere of an actual trial. He added these words at p 491:

> "So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone plainly wrong."

14. The appellate court must bear in mind too the observations of Lord Fraser of Tullybelton in *Chow Yee Wah v Choo Ah Pat* [1978] 2 MJL 41, 42. He said that when Lord Thankerton referred in *Watt v Thomas* to "the printed evidence" (and this applies also to the passage which their Lordships have quoted from Lord Macmillan's speech in that case) he was referring to a transcript of the verbatim shorthand record of the evidence, and that it was obvious that the disadvantage under which an appellate court labours in weighing

evidence is even greater where all it has before it is the judge's notes of the evidence and has to rely on such an incomplete record. In this case there is no verbatim transcript. The only record of the evidence is contained in the notes of the proceedings which were taken during the trial by the trial judge.

15. There is no doubt that the trial judge had the advantage in this case of seeing and hearing the witnesses. But it is matter for regret that he did not make full use of that advantage when he came to prepare his judgment. It lacks a carefully reasoned analysis of the evidence. Only a brief explanation is given of the basis upon which he felt able to infer that there was a common intention that the beneficial interest in the properties was to be shared. He rejected some parts of the appellant's evidence and accepted other parts. But there is no discussion of the reasons why he felt able to reach these conclusions or of any competing versions given in evidence by the other witnesses. Taken overall, his judgment is much less helpful than it ought to have been. But their Lordships are not confident the judges in the Court of Appeal, in their turn, did full justice to the material which was available to them. In some significant respects it too is unsatisfactory.

16. Harrison JA said that there was no reason to disturb the judge's finding that the appellant was entitled to a one-third beneficial interest in the Governor's Pen property. But what the judge found was that the beneficial interest in this property, which was in joint names, was held by both parties in equal shares. His decision to reduce the appellant's beneficial interest in it to one-third was the result of his assessment of the extent of the respective beneficial interests of both parties in all the properties in Jamaica which he had been asked to consider, including those which were registered in the respondent's name only. The appellant was willing to accept this assessment of the position so long as it was applied to all the properties. But there was no good reason for reducing his beneficial interest in Governor's Pen from one-half to one-third if, as the Court of Appeal held, he had no interest in any of the remaining properties. The judge's reasons for giving the respondent a two-thirds share in Governor's Pen and not one-half were that there was a common intention that both parties should share the beneficial interest in the business at Carpenters Road and East Road and in all subsequent acquisitions and this was his assessment of what was a fair share. Having found that these findings were not open to him on the evidence, the Court of Appeal should have applied the judge's earlier finding that, as the property was

registered in joint names, the beneficial interest in Governor's Pen was shared by both parties equally. The fact that it did not do so suggests that the court did not fully understand the significance of the findings which the trial judge made after considering the evidence.

17. Harrison JA also said that the appellant was able to assist in the business only after 4.30 pm in the evenings and that his transportation of goods to the business was no more than intermittent. This was his explanation for the Court of Appeal's decision that it was not open to the trial judge to find that the appellant's contribution was sufficient to give rise to a common intention that the beneficial interest should be shared. But these observations do not do justice to the judge's notes of the evidence. According to his notes, the appellant said that he left work at 4.00 or 4.30 pm and went to the business in the supermarket where he worked until it closed at 7.00 or 7.30 pm. He said that he and the respondent worked on after closing time wrapping up goods for the following day. He said that goods were delivered by some companies, but he also said that from about 4.00 pm during the early days when goods were scarce he too would collect things to ensure that they were on the shelves for the next day. He used a pick-up which his employer had assigned to him. In the 1980s things improved and most of the goods were delivered. But he collected goods during this period by means of hired transport. Support for what he said came from Rudolph Jacobs, a haulage contractor who was employed by the appellant to transport goods to the supermarket, and Victor Higgins, who did electrical work on the premises. The respondent did not contradict these statements in her evidence. The trial judge said that the appellant overstated the extent of his contribution to the business, but he was able nevertheless to accept his evidence that he was able to work for reward outside of his employment by virtue of his position as a supervisor and that he was not a mere purveyor of goods for the various businesses.

18. In this situation their Lordships must return to the reasons which were given for his decision by the trial judge. As Lord Macmillan said in *Watt v Thomas* [1947] AC 484, 491, where a decision either way may seem equally open (as may be thought to be the position in this case) the decision of the trial judge is of paramount importance. The question is whether it has been shown that his judgment on the facts was affected by material

inconsistencies or inaccuracies or that he failed to appreciate the weight of the evidence or otherwise went plainly wrong.

19. Dr Barnett submitted that the inferences which the judge drew were inconsistent with or not justified by his assessment of the witnesses or by the evidence, and that the inferences which he drew were plainly the wrong inferences. He said that the appellant's case collapsed when he was not able to prove that he made an initial contribution from the proceeds of the sale of his motor car. Once this stage was reached all that were left were the subsequent acquisitions with which the appellant had had nothing to do, as he left it to the respondent to deal with all the paperwork and she obtained all the help she needed from her mother and her relatives. He said that Governor's Pen, which was in joint names, had been acquired on a completely different basis. In all the other cases there was no evidence of a similar common intention that the beneficial interest in them was to be shared. The principles in *Gissing v Gissing* [1971] AC 886 had been correctly applied by the Court of Appeal, as it had not been shown that the other properties were acquired on the basis that the beneficial interest was to be shared.

20. The question whether the appellant's contribution to the operation of the business was sufficiently substantial to justify the inference of a common intention that the beneficial interests should be shared and that he acted on the basis of that common intention to his detriment is, of course, one of fact. It has not been suggested that the conclusions reached by the trial judge were based on erroneous findings or inaccuracies. Were they plainly wrong because, as Dr Barnett submitted, they were against the weight of the evidence?

21. There is no doubt that the appellant attached importance to the financial contribution which he claimed to have made to the purchase of the first business from the proceeds of the sale of his motor car. He failed to establish this part of his case on the evidence, and it was weakened as a result of this. But the judge did not regard this failure as a fatal defect. He did not say that the appellant was so untrustworthy that it affected his overall credibility. His version of events was the subject of contrary evidence as he was said to have been seen driving the car after the critical date by other witnesses. The judge said that the appellant's version had not been established on a balance of probabilities. So he left the door open for the other part of the appellant's case, which was that he had contributed to the operation of the businesses in

other ways. The judge said that the appellant had overstated the extent of his contribution, and in this respect too no doubt his case was weaker than he was making it out to be. But the judge was nevertheless satisfied that it was sufficiently substantial to show that there was a common intention that the beneficial interests in the business and all subsequent acquisitions of property should be shared and that the appellant had acted on that intention to his detriment.

22. It is plain that the trial judge based this discriminating approach to what the appellant said in his evidence on his assessment of the parties' credibility. This was pre-eminently a task for the judge who saw and heard their evidence. Their Lordships are not persuaded that the judge was not entitled to draw the inference that the appellant was, as he put it, a partner in the acquisition of the businesses and that there was a common intention from the outset that the beneficial interest in the properties was to be shared. The appellant's case would, of course, have been much assisted if he had been able to prove that he made a financial contribution from the proceeds of the sale of his motor car. But his case that both parties from the outset contributed their joint efforts to the success of the enterprise whose proceeds were laid out in the purchase of the various properties was made out. The judge was clearly satisfied that the appellant was not just helping out from time to time but that he did so on a regular and substantial basis and that it was indeed, as the appellant maintained, a joint enterprise. It cannot be said that there was no evidence from which the judge was entitled to draw the inference that this was the parties' common intention from the outset and that the appellant was acting in the belief that he had a beneficial interest in the business to whose success his efforts were contributing. The fact that it was left to the respondent to manage all the finances and to arrange for the acquisition of the various properties might have been taken to point in the opposite direction. But the judge accepted the explanations which the appellant gave for this, and this too was a matter for him as he was in a position to assess the evidence which both parties gave from the witness box.

23. Dr Barnett did not seek to challenge the judge's assessment as to how the beneficial interests were to be divided up if, as their Lordships consider was the case, he was entitled to hold it established that there was a common intention that they should be shared. He was right not to do so, as this is essentially a matter for the assessment of the judge at first instance. The judge said that it was clear that the respondent had made a great contribution, and it

is not surprising that he decided that the beneficial interests should be apportioned as to two-thirds in her favour and not equally as the appellant had suggested. But the fact that he divided the beneficial interests between the parties in this way tends to show, if further demonstration of this fact were needed, that he gave careful consideration to the difficult problem of doing justice between the parties in the unsatisfactory position in which they found themselves following the breakdown of their relationship.

24. There is however one defect in the order which was made by the trial judge which needs to be attended to. This relates to the property at Marine Park, St Catherine. The appellant said that it had been registered in his name but the title was not produced. It was mentioned in his statement of claim, in which he sought an order that an account be taken of all sums received pursuant to the sale of all the properties therein mentioned and a declaration that he was entitled to one-half of the equity in all such property. Mr Codlin submitted at the trial that, as it had been purchased in the appellant's name only, it should not be the subject of division in these proceedings. But the judge did not accept this argument. He found that the beneficial interest in it was held in equal shares by both parties, as he did in the case of the property at Governor's Pen. He then assessed the respective interests of the parties as to one-third to the appellant and as to two-thirds to the respondent and said that this applied to the assets in Jamaica. But when he came to make his order he omitted to mention Marine Park. No reason for this was given, so it appears to have been due to an oversight. The opportunity should now be taken to correct it.

25. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed, that the order of Orr J should be restored and that the list of properties mentioned in paragraph (a) of the judge's order should be amended by the inclusion in that list of the property at Marine Park. The respondent must pay the costs of the proceedings in the Court of Appeal and before their Lordships' Board.