NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 37 of 2003

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

BETWEEN	SYLVIA LOVINA GREEN	APPELLANT
A N D	WILLIAM JOSEPH GREEN	RESPONDENT

Mr. Leroy Equiano for the Appellant.

Mr. Rudolph L. Francis instructed by Rudolph L. Francis & Co. for the Respondent.

November 10 and December 19, 2008

PANTON, P.

I have read the reasons for judgment written by Smith, J.A. I agree with them and have nothing to add.

SMITH, J.A.:

By an Originating Summons dated March 22, 2002 the appellant/applicant sought the following reliefs:

"1. A declaration that she is entitled to the full value of premises known as 1431 Ambleside Way, Cumberland, Gregory Park P.O. in the parish of Saint Catherine registered at Volume 1212 Folio 825 of the Register Book of Titles and that she is further entitled to be registered on the

said Certificate of Title as the sole proprietor in fee simple of the said premises.

2. An order that the Respondent do transfer to the Applicant his one undivided half share in the said premises and/or cause the Applicant to be registered on the said Certificate of Title as the sole proprietor thereof in fee simple, failing which the Registrar of the Supreme Court shall be empowered to sign all relevant documents to effect this said transfer and registration of the Applicant's said interest on the said Certificate of Title as aforesaid."

The Originating Summons was heard by Jones, J on the 9th and 17th of October, 2002. The learned trial judge dismissed the Appellant's claim and made the following order:

"(1) The Respondent is entitled to a beneficial interest of 50% in the property known as 1431 Ambleside Way, Gregory Park in the parish of Saint Catherine, Vol. 1212 Folio 825.

(2) There shall be judgment for the respondent.

(3) No order as to costs.

This appeal is against the order of Jones, J.

Two grounds of appeal were filed:

"(1) The learned judge erred in law in making an Order in the Respondent's favour.

(2) That the facts presented before the court do not support the learned trial judge's ruling."

These grounds were argued together by Mr. Equiano, Counsel for the appellant.

The background facts:

The parties were married on the 18th of December, 1983. The appellant is school teacher and the respondent a tailor. They resided in rented accommodation up until the property in question was purchased. The parties are at variance as to who paid the rental during this period. According to the appellant, she alone paid the rental. The respondent claims that both of them paid.

The property was purchased and conveyed in the joint names of the parties as joint tenants.

The Appellant's Case

The appellant, Mrs. Sylvia Green, in her affidavit dated March 22, 2002 swore that:

"1...

2....on the 18th day of December, 1983, I married the Respondent herein and thereafter we resided in rented accommodation which was obtained and the rental paid by your Deponent Until sometime during the year 1991, when the Respondent and I moved into the premises, the subject matter of this application, situate at and known as 1431 Ambleside Way, Cumberland, Gregory Park P.O. in the Parish of Saint Catherine, and I exhibit hereto marked 'S.L.G. 6 a copy of my Marriage Certificate and copy Duplicate Certificate of Title registered at Volume 1212 Folio 825 of the Register Book of Titles, respectively, and which speak for themselves.

3. That the said premises was acquired by your Deponent by way of a mortgage loan I obtained from the National Housing Trust (N.H.T.), through the auspices of the Jamaica Teachers' Association Co-op Credit Union Limited (J.T.C.C.U.), and after I had made an application for the same, and I exhibit hereto marked "S.L.G. 2: copy letter dated August 28,1988 from the N.H.T. which speaks for itself.

4. That part of the money that was used to purchase the said premises was obtained solely by your Deponent by way of loans I received from the said J.T.C.C.U; so also was the money that was used to make subsequent improvements to the said premises, and I exhibit hereto marked 'S.L.G.3' copy letter dated December 27, 2001 from the said J.T.C.C.U which speaks for itself.

5. That the remainder of the money that was used to purchase the said premises was paid by your Deponent from my personal savings, and the repayment of the said mortgage loan and the said loans I received from the J.T.C.C.U have been and continue to be made by your Deponent, the former loan initially by direct

payments and subsequently by way of monthly deductions from my salary as was always the arrangement in respect to the latter loan, and I exhibit hereto marked 'S.L.G.4' copies of my Pay Advices dated August 31, November 30 and December 31, 2001, respectively, and which speak for themselves.

6. That prior to the acquisition of the said premises, I consented to have the Respondent joined on the said Certificate of Title as a Joint Tenant, in the event I predeceased him he would have had the responsibility of raising our first child who was then 4 years old; but it (sic) always agreed and understood by the Respondent and I that the Respondent would not acquire a beneficial interest in the said premises during my lifetime, and that he would hold his legal interest in the same as my trustee, and I exhibit hereto marked 'S.L.G.5' copy undated memorandum which speaks for itself.

7. That at the time when the Respondent and I became registered proprietors of the premises aforesaid, I did not have the Respondent execute and file a Declaration of Trust in respect to his legal interest in the said premises, as I did not believe at the time that it was necessary to do so.

8. That the Respondent has never contributed any money or made any contribution at all, either directly or indirectly, to the acquisition, maintenance or improvement of the said premises; indeed, all utility bills were paid by your Deponent until recently when I was obliged to have the telephone service disconnected to force the Respondent to contribute a portion of the said expense, as he operates a business from the said premises and requires the use of a telephone.

9. That the only money I receive from the Respondent have been modest sums, about

> $5,000.00 average each month, to assist me with the purchase of groceries and the educational expenses, upkeep and maintenance of our two children, who are now 17 and 13 years old, respectively.
>
> 10...".

The Respondent's Case

The respondent, her husband, in his affidavit stated that:

> "1...
> 2...
> 3. The subject premises was acquired by both the Applicant and myself through mortgage loan we obtained from the National Housing Trust for the sum of one hundred three thousand sixty dollars and fifty five cents. Exhibited and marked 'WJG1' for identity is a certified copy of the National Housing Trust's mortgage agreement regarding the said premises. I also contributed sums from my personal savings to meet the closing costs of the said premises.
>
> 4. I also contributed to the subsequent improvement to the subject premises from my personal savings and from a loan I received from the Churches Cooperative Credit Union Limited in 1990 in the amount of ten thousand one hundred and thirty dollars to purchase materials to build the fence for the subject premises. Exhibited hereto and marked 'WJG2' for identity is a copy of the application form approved loan from the Churches Co-operative Credit Union Limited which I completed and which speaks for itself.
>
> 5. The Applicant's payment of the mortgage on the loan from the National Housing Trust and other loans obtained regarding the subject premises is pursuant to an agreement between us to allow for the convenient and timely payment of same by way of direct salary

deductions from the Applicant's salary but without any termination of my liability for these loans. This course of action was agreed on by us so as not to subject the payment of the mortgage to the vagaries of my cyclical income as a self-employed Taylor (sic). As part of this agreement I was to contribute to all our other expenses as I received my income.

6. At no time was there any agreement or understanding between the Applicant and myself that I would not acquire a beneficial interest in the premises during my lifetime, or that I was a trustee merely holding my legal interest for the beneficial interest of the Applicant. We both agreed that we would acquire the premises jointly as joint tenants with both the legal and beneficial interest therein and it was on that understanding that I agreed to be liable for the mortgage from the National Housing Trust regarding the said premises.

7. I have always contributed to the maintenance and improvement of the said premises. The Applicant pays most of the Jamaica Public Service (J.P.S.) bills, we both pay the water bills, and I have always paid the telephone bills from the time telephone service was obtained at the premises until November, 2001 when the applicant told me not to use the telephone because she wants me to leave her house, that is the subject premises. Since then I have been using a cellular phone which I acquired for myself and have made no contribution to telephone service since I no longer use said telephone.

8. I give the respondent an average of $10,000 average each month for purchase of groceries, educational expenses and the upkeep and maintenance of our children. In addition, I solely provide the children's lunch money and bus fares for school each morning of school."

The learned judge stated that "the main question for the court was to ascertain in retrospect, what was the intention of the parties at the time of acquisition of the property". From the evidence before him he made the following findings. (p. 5 of judgment):

> "1. The applicant and the respondent were married in 1983 and lived together in rented accommodation until 1991 when they bought a house together.
>
> 2. Both the applicant and the respondent are legal joint tenants. There was no express declaration as to the beneficial interest in the property.
>
> 3. The amount of $103,060.55, borrowed from the National Housing Trust was provided equally by the parties. This sum was lent to them jointly on terms which made both of them liable for the repayment of the loan. The deposit was paid by the applicant, but the respondent and the applicant both contributed to the closing cost.
>
> 4. The claim by the applicant that she alone paid for the improvements to the property was

obviously misconceived. There was undisputed evidence that the respondent borrowed $10,130.00 from the Churches Co-op Credit Union Ltd. for the purpose of improvements to the home. (See application form attached as an exhibit to respondent's affidavit).

5. The applicant borrowed $323,000.00 from Jamaica Teacher's Assoc. Co-op Credit Union for the purpose of improvements to the home.

6. The applicant paid the mortgage payments. The parties arranged that as the applicant had a stable job, she would pay the mortgage on the property and as the respondent was self employed, with a fluctuating income, he would contribute to the other expenses of running the home.

Mr. Equiano did not seek to challenge findings 1, 2, 5 and 6. His concern was with findings 3 and 4.

Counsel for the appellant submitted that the learned judge erred in finding that the sum of $103,060.55 borrowed from the NHT "was provided

equally by the parties" and that "this sum was lent to them jointly on terms which made both of them liable for the repayment of the loan." It is the contention of the appellant's counsel that the judge had no evidence before him to logically reach that conclusion.

The evidence of the respondent is that the property was acquired by himself and the appellant through a loan which they obtained from the National Housing Trust. He made reference to a certified copy of the National Housing Trust's mortgage agreement. This important document does not form part of the Record of Appeal. It is not known whether or not this document was exhibited at the trial. Mr. Equiano told the court that it was not produced, but he was not the appellant's counsel at the trial. Further he argued that there is no evidence that the respondent, a self employed tailor, was a contributor to the National Housing Trust and was eligible to receive benefits from the Trust.

The only documentary evidence adduced in this regard established beyond peradventure that the appellant was a contributor to the National Housing Trust that she was selected "to receive a benefit from the National Housing Trust - See letter dated 28th August 1988 addressed to the appellant from National Housing Trust and pay advice slips (exhibits S.L.G.2 and S.L.G.4 respectively). In addition to the above, a memorandum (exhibit S.L.G.5) indicates that the appellant was required

by the National Housing Trust to furnish the trust with her consent in writing to the joining of the respondent on the Certificate of Title with her as joint tenants. However, the undisputed evidence is that the transfer endorsed on the Certificate of Title was in favour of both the appellant and the respondent thereby giving effect to her direction referred to above. Thereafter the Certificate of Title evidences a mortgage of the jointly owned property to the NHT, a result that I think, could not be achieved without both parties actually subscribing to the mortgage itself. It must be on this basis that Jones J concluded that the amount borrowed from NHT "was lent to them jointly on terms which made both of them liable for the repayment of the loan."

In ***Abbott v Abbott*** 70 W.I.R 183, the Privy Council agreed with the trial judge that this was very relevant, Baroness Hale pointing out that this "has always been regarded as a significant factor." (paragraph 18).

Counsel for the appellant also complained that the judge erred in finding that the respondent contributed to the closing cost. The learned judge came to that conclusion on the basis of the respondent's evidence at para. 3 (supra) that he "contributed sums from my personal savings to meet the closing costs..." Mr. Equiano pointed out that the respondent did not give any details as to the extent of his contribution. On the other hand he said, the appellant produced documentary evidence (exhibit S.L.G. 3) which shows that she received a loan of $5,000.00 from the

Jamaica Teachers' Association Co-op Credit Union Limited on the 22nd November 1988 to cover the closing cost of a National Housing Trust unit. However, the fact that the loan was obtained by the appellant and that she paid the closing cost does not mean that the respondent has no beneficial interest in this property. What is important is the intention of the parties at the time of the purchase. In consenting to the respondent's name being put on the title as a joint tenant, the appellant probably led him to believe that he had a beneficial interest in the property. The question is, did he act on that representation to his detriment?

Mr. Equiano also complained that the judge erred in finding that there was "undisputed evidence that the respondent borrowed $10,130.00 from the Churches Cooperative Credit Union Limited for the purpose of improvements to the home. Counsel submitted that there was no evidential basis for this finding.

In my view there is merit in this complaint. The appellant stated in her affidavit that the respondent did not make any contribution at all to the acquisition, maintenance or improvement of the premises - See paragraph 8 of her affidavit. The learned judge referred to an application form attached as an exhibit to the respondent's affidavit. Regrettably, this form does not form part of the Record of Appeal. However, as Mr. Equiano argued, if a loan had been granted, why submit the application form instead of proof that the loan was in fact granted.

However even if the application form by itself does not constitute proof that the loan was in fact granted, it does show an attempt by the respondent to source funds with a view to making a contribution to the improvement of the house.

At para. 6 of her affidavit the appellant stated that it was agreed and understood by the respondent and herself that the respondent would not acquire a beneficial interest in the said premises during her lifetime and that he would hold his interest in the property in trust for her. In this regard she referred to her written consent (Exhibit S.L.G 5) which according to her "speaks for itself." However, this document does not speak to any such agreement or understanding between the parties. The respondent at para. 6 of his affidavit denied the existence of any such agreement or understanding. He asserted that they both agreed that they would acquire the property jointly as joint tenants with both legal and beneficial interests therein and that it was on that understanding that he agreed to be liable for the mortgage from the National Housing Trust.

After examining the evidence of the parties in this regard, the learned judge said :

> "In this case, the parties gave conflicting evidence as to whether there was an agreement between them as to how the beneficial interest in the property was to be shared. However, looking at the behaviour of the parties; at the

> time of the acquisition of the property and subsequently; in particular, the contribution of the respondent to the improvement to the property; on balance, it cannot be said that the respondent intended to hold any of his interest in the property in trust for the applicant. I find as a fact that from their conduct the parties intended at the time of the acquisition of the property to share the beneficial interest equally."

Was the learned judge entitled, on the evidence before him to conclude that the parties intended that each should have a beneficial interest in the property? In this regard two recent decisions of the highest authority are instructive.

In response to the changing social and economic conditions, the modern approach to the resolution of property disputes is to embark on a "search to ascertain the parties shared intentions, actual, inferred or imputed with respect to the property in the light of their whole course of conduct in relation to it- See ***Lynn Anne Abbott v Dane Norman Abbott*** 70 W.LR.183, a decision of their Lordships' Board which followed the decision of the House in ***Stack v Dowden*** (2007) 2 All ER 929 H.L.

In the ***Stack v Dowden*** case, the House approved a passage from the Law Commission's discussion paper on Sharing Homes (2002, Law Commission No. 278 para 4.27):

> "If the question really is one of the parties' 'common intention', we believe that there is much to be said for adopting what has been

> called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all the conduct which throws light on the question what shares were intended".

The authorities show that a conveyance into joint names establishes a prima fade case of joint and equal beneficial interests unless and until the contrary is proved— See, for example, ***Stack v Dowden*** (2007) 2 All E R 929 H.L. The onus is on the party who contends that the beneficial interests are different from the legal interests to demonstrate this on the facts. The party wishing to show that the beneficial interests are divided otherwise, than as the title shows may point to such factors as:

> "(I) Any advice or discussions at the time of the transfer which cast light upon the parties' intention at that time;
>
> (ii) The reasons why the property was acquired in their joint names;
>
> (iii) The purpose for which the property was bought;
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> (iv) Whether they had children for whom they both had responsibility to - provide a home;
>
> (v) How the purchase was financed both initially and subsequently;
>
> (vi) How the parties arranged for their finances, whether separately or together or both.
>
> (vii) How they discharged their outgoings on the property and their household expenses.

The parties' individual characters and personalities can also be a factor in deciding where their true intentions lay. See ***Stack v Dowden*** (supra). After listing the above factors, the House went on to hold that:

> "When a couple were joint owners of the home and jointly liable for the mortgage the inferences to be drawn from who paid for what could be very different from the inferences to be drawn when only one was the owner of the home. The arithmetical calculation of how much was paid by each was also likely to be less important. It would be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally" – See p. 953 f and g.

The House was of the view that when all the factors are taken into account, cases in which the joint legal owners were taken to have intended that their beneficial interests should be different from their legal interests would be very unusual - p. 953 j.

The critical question then is whether or not the appellant has displaced the presumption that the common owners are entitled to share the value of the property equally.

As the learned trial judge pointed out, the parties gave divergent accounts as to their intention and understanding at the time of acquisition. The appellant, as I have just stated swore that: "... it was always agreed and understood by the Respondent and I (sic) that the

Respondent would not acquire a beneficial interest in the said premises during my lifetime..." (para 6 of her affidavit). On the other hand the respondent on solemn oath stated that "At no time was there any agreement or understanding between the Applicant and myself that I would not acquire a beneficial interest in the premises during my (sic) lifetime ... We both agreed that we would acquire the premises jointly as joint tenants with both legal and beneficial interests therein ..." (para. 6 of his affidavit).

It is not known whether the parties were invited to make themselves available for cross examination. This, in my view, would have been the proper course to adopt in the resolution of this controversy.

From the affidavit evidence of the parties, it may reasonably be inferred that the property was acquired for the purpose of building their matrimonial home. The property was conveyed in their joint names. This was a conscious decision. The reason the appellant gave as to why the property was acquired in their joint names was challenged by the respondent. The learned judge found that there was no express declaration as to the beneficial interests in the property. This finding was not challenged on appeal. The appellant stated that no Declaration of Trust was executed as she did not believe it was necessary but she did have a full understanding of her choice. There is no dispute that the parties have two children for whom they both have a responsibility to

provide a home. (see para. 9 of the appellants affidavit). As to the mortgage payments, the learned judge found that the parties arranged that as the appellant had a stable job, she would make the mortgage payments and as the respondent was self employed with a fluctuating income, he would contribute to the other expenses of running the home.

The only evidence before the learned trial judge was, as stated before, the affidavit evidence of the parties and the documents exhibited by the appellant. The appellant did not see it fit to reply to issues raised in the respondent's affidavit. The evidence as to the "parties course of conduct" was actually non-existent. In my view the appellant has not satisfactorily discharged the burden of showing that the parties had intended their beneficial interests to be different from their legal interests in the property. As Baroness Hale said in ***Stack vDowden*** (p 953 para 68):

> "This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly to reinterpret the past in self-exculpatory or vengeful terms".

The appellant has failed to displace the presumption that a conveyance into joint names creates joint and equal beneficial interests.

I would accordingly, dismiss the appeal. I would make no order as to costs.

MORRISON, J.A.

I fully agree with the judgment of Smith J.A and have nothing to add.

PANTON, P:

ORDER:

The appeal is dismissed. The order of Jones J is affirmed. No order as to costs.