NMLJ

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 67 OF 1997

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	VIVIA GREEN	DEFENDANT/APPELLANT
A N D	ROY GREEN	PLAINTIFF/RESPONDENT

Dr. Lloyd Barnett and Miss Leila Parker for the appellant

Raphael Codlin for the respondent

June16, 17, 1999, and July 31, 2000

HARRISON, J.A.:

This is an appeal from the judgment of Orr (Chester), J. on 15th May 1997 whereby he ordered:

1. That an account be taken of all sums receivec by the Defendant pursuant to the sale of the undermentioned properties:

   (a) Donmair Drive

   (b) Wiltshire Avenue

   (c) Governor's Pen

   (d) Stony Hill

2. That the plaintiff is entitled to one-third (1/3) of the equity in the abovementioned properties and those at Oakland Court;

3. That the defendant do pay to the plaintiff one-third (1/3) of the proceeds of sale of the abovementioned, except those at Oakland Court;

4. That the plaintiff is entitled to one-third of the amounts in the accounts at Jamaica Citizens Bank, 17 Dominica Drive, Kingston 5;

5. ...

6. Liberty to apply;

7. Costs of seven (7) days to the Plaintiff to be agreed or taxed;

8. Leave to appeal granted against order for costs.

The facts reveal that the parties had met and formed an intimate relationship in 1972, whilst each was married to another. In 1973 a supermarket business was acquired at the corner of Carpenter and East Roads, Kingston. The appellant stated that she acquired the business with an initial deposit of Seven Thousand Dollars ($7,000) and paid a balance of Six Thousand and Forty Seven Dollars Thirty Six Cents ($6,047.36) by means of her own savings, a loan from the bank and a re-paid loan from her brother and that the respondent made no contribution to the acquisition of the business. The respondent claimed that he contributed the sum of Two Thousand Five Hundred Dollars ($2,500) from the proceeds of sale of his motor car, and the appellant "... contributed an approximate amount ..." in order to acquire the said business jointly. Orr, J. found:

> "On a balance of probabilities, I find that the plaintiff did not make an initial contribution of Two Thousand Five Hundred Dollars ($2,500) to the acquisition of the business at Carpenters Road and East Road."

The appellant operated this business full time. The respondent, employed then as a supervising foreman to a housing development company full time, visited work sites during the day. He would assist the appellant by buying some of the goods for the supermarket business, transporting them in the company's pick-up. He also assisted in the business after work in the evenings, and in the nights, after closing. Whatever goods he purchased for the business, the appellant would refund him the cost of such goods.

In 1975, the respondent purchased property in Marine Park. However, the mortgage payments fell into arrears. The appellant paid off the mortgage of Eighteen Thousand Dollars ($18,000). In the same year the appellant bought premises at 27 Donmair Drive, St. Andrew in her name for Thirty One Thousand Dollars ($31,000) by way of Eleven Thousand Dollars ($11,000) from her savings and Twenty Thousand Dollars ($20,000) on mortgage.

In 1980, the premises at 27 Wiltshire Avenue, St. Andrew was bought in the name of Vivia Kong, the appellant's maiden name. The purchase money was obtained from the business. This became the matrimonial home. The premises was sold in 1992.

In the said 1980, a property was bought at Governor's Pen St. Mary, in the names of both parties. The purchase money came from the business. That same year, another business was bought at Stony Hill, St. Andrew, and was purchased with money from the business.

The appellant contended that the purchase of the various properties and businesses were effected by monies from "my personal savings", (presumably, in part from the business), from loans from the bank and her mother and brother, and by way of mortgages. The respondent's case rested on the acquisition of the said properties, all by way of money generated by the businesses, except for the Marine Park premises, although the sum of $18,000 to pay off the mortgage arrears came from the business.

In 1984 the appellant purchased two apartments at Oakland Court in her name. The purchase price was $175,000 each. She paid the deposits of $35,000 and $36,000 respectively, on each apartment, and the balance by way of mortgages. The deposit sums were provided by her mother. This property, according to the respondent, was purchased with "...money from our business."

Dr. Barnett for the appellant argued that the learned tric judge erred in finding that the respondent was entitled to the respective shares in the matrimonial properties, because the properties, which were vested in the name of the appellant, did not give rise to any presumption of interest on behalf of the respondent. There was no evidence of any common intention between the parties that the respondent would have a share in the said properties, nor did he act to his detriment on the basis of any such intention. The respondent's evidence that he made an initial capital contribution to the acquisition of the properties was rejected by the learned trial judge and therefore there was no basis to ground a common intention.

Mr. Codlin for the respondent argued that there was ample evidence before the learned trial judge from the respondent and his witnesses, of contributions made

by him towards the acquisition of the properties, based on which the court found that the respondent had an interest. There was no factor to say that the learned trial judge was clearly wrong, therefore an appellate court should not disturb his findings.

Where a party to a marriage and whose name is not on the Title seeks to establish a claim to matrimonial property, in the absence of an express agreement, he must rely on the law of trust, ***Gissing v. Gissing*** [1970] 2 All E.R. 780. In order to establish such an interest he has to show that there was a common intention that both spouses should have a beneficial interest in the property in question and relying on that common intention the claimant spouse acted to his detriment: ***Grant v. Edwards*** [1986] 2 All E.R. 426.

The contribution of money or money's worth is some evidence from which it might be inferred that that common intention existed between the parties. Where that evidence exists, a court will not, in equity, allow the party in whose name the property is, to defeat the interest of the other party who contributed on the understanding that he would have a share in the property. Equity will, in those circumstances, hold that the former holds the property in trust for them both.

In ***Gissing v. Gissing*** (supra), the headnote on page 780 reads:

> "Where (a) both spouses contributed towards the purchase of the matrimonial home which was conveyed into the name of one spouse only, (b) there was no discussion, agreement or understanding between the spouses as to sharing the beneficial interest in the matrimonial home, and (c) the spouse in whose name the matrimonial home was purchased evinced no intention that the contributing spouse should have a beneficial interest therein, the question whether the contributing spouse is entitled to a beneficial interest in

> the matrimonial home is a matter dependent on the law of trust."

In that case, the purchase price of the matrimonial home was provided by the husband by way of a mortgage, a loan and his own money and the property was conveyed into his sole name. The wife made no initic or subsequent contribution to its acquisition. However, she spent some money to provide some furniture and improve the lawn. She also bought her own and her son's clothing. This contribution by the wife to establish a basis for her claim to a beneficial share in the house was held to be insufficient.

In the instant case, the learned trial judge rejected the respondent's evidence of his initial monetary contribution but said that:

> "...he contributed directly and indirectly to the operc tion of the business. I find that he overstated the extent c: his contribution having regard to his earnings and his o'her commitments to his family. I accept his evidence tha' he was able to work for reward outside of his employmer't 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 comm'on 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 ar d in all subsequent acquisitions."

One, therefore, has to look at the evidence of the conduct of the parties and in particular the nature of the contributions by the respondent which were relied on to base this finding of the learned trial judge.

The type of contribution and the nature of the contribution necessary to qualify as sufficient to give rise to an interest in the spouse whose name is not included on the Title to property can be ascertained from an examination of the cases to see how the courts have viewed the conduct of the claimant spouse.

Work done by a husband whose name is not on the Title, but who claims an interest in matrimonial property based on such work to establish a common intention may be deemed insufficient, if such work amounts to no more than that which a husband normally does around the house. In ***Pettitt v. Pettitt*** [1969] 2 All E.R. 385, the husband claimed an interest in a house which had been bought solely by and was in the name of his wife. He based his claim on his labour and expenditure in that he did internal decorative work to the interior of the house, including the building of a wardrobe, and also laid out a lawn, constructed an ornamental well and built a side wall. It was held, in the House of Lords, that he acquired no interest in his wife's property because there was no agreement between them that he should. He made no initial contribution to its acquisition, and the work he did was no more than what husbands normally do in their leisure time. Lord Reid said, at page 391:

> "In whatever way the general question as to improvements is decided I think that the claim in the present case must fail for two reasons. These improvements are nearly all of an ephemeral character. Redecoration will only last for a few years and it would be unreasonable that a spouse should obtain a permanent interest in the house in return for making improvements of this character. And secondly I agree with the view of Lord Denning, M.R., expressed in ***Button v. Button*** [1968] 1 All E.R. 1064. He said with regard to the husband at p. 1066 'He should not be entitled to a share in the house simply by doing the "do-it-yourself jobs" which husbands often do': and with regard to the wife at p. 1067:

> 'The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in, the property'."

However, extensive and substantial work by a spouse, which work is referrable to the acquisition of the matrimonial property will amount to contribution by that spouse, whose name is not on the Title, in reliance on a common intention that that spouse will have a share in the said property.

In ***Nixon vs. Nixon*** [1969] 3 All E.R. 1134, a wife operated for three market days weekly a market stall owned and run for 10 years previously by her husband. She received no wages besides money for housekeeping. The husband bought a house, in his own name without any contribution from his wife, from his own resources and by means of a mortgage. By their joint efforts, the mortgage was paid off, due to the success of the business. The husband thereafter sold the house, buying subsequently another house and shop, then a cottage and finally a farm with a house, the latter purchase being in their joint names. The wife had continued helping in a shop, six days per week, and also helped in another market stall both owned by the husband at successive periods, whilst he went out to acquire produce for the stall. She also helped on the farm. They eventually separated. It was held that the wife was entitled to a half share in the beneficial interest in the matrimonial property, the house and farm where they lived, because by working in the business full time and for no wages, she acquired an interest in the business assets, out of which the said property was bought.

In ***Cooke v. Head*** [1972] 2 All E.R. 38, a woman living with a man as his mistress assisted him in the building of a house on a piece of land bought by him in his own name. She made no initial monetary contribution. She assisted in the construction and did a lot of heavy physical work "much more than most women do." She used a sledge-hammer to demolish old buildings on the site, operated a cement mixture, moved rubble and heavy material in a wheelbarrow up a slope, dug the foundation with other men and did painting. They saved money from their earnings jointly in a money box, from which the mortgage was paid. They later separated. It was held that because of their joint efforts, their physical and cash contributions, although the man's was more, a constructive trust arose, and the man was obliged to hold the property in trust to give effect to her share.

In the instant case, having rejected the contention of the respondent that from the proceeds of the sale of his motor car he made a cash contribution of $2,500, to the acquisition of the business, that was a finding that he made no initial contribution to the acquisition of the business. However, the learned trial judge went on to find that:

> "...he contributed directly and indirectly to the operation of the business. ...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."

On the evidence available, it is my view that it was not open to the learned trial judge to find that this was a contribution by the respondent, sufficient to indicate that there was a common intention so understood by the parties, and relying on which the respondent acted to his detriment. The respondent was then

employed full-time in his job as a supervisor on construction sites, and was therefore able to assist in the business only after 4:30 p.m. in the evenings. His transportation of goods to the business was no more than intermittent. The evidence showed clearly that there were other regular suppliers of goods. His activities in that respect, therefore, did not amount to the heavy physical work of the appellant in ***Cooke v. Head*** (supra), nor the full-time employment without wages of the wife in ***Nixon v. Nixon*** (supra). Even the money he spent to purchase "scarce goods" was at times refunded to him. The "...nights we sat up until 12 or 1 o'clock wrapping..." goods, is not unlike what an anxious man would do to lessen the nightly work burden of his intimate partner.

I am of the view that the learned trial judge misdirected himself in finding that this evidence amounted to contribution sufficient to give rise to a common intention and consequent interest in the beneficial interest. The respondent, in law, therefore, had no beneficial interest in the business commenced at Carpenters and East Roads. Because of the fact that he stated the source of the financing of the several premises, namely:

> "Donmair Drive (was by) ... money obtained from business";
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> "27 Wiltshire Avenue purchased (by) ... money obtained from business";
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> "Governor's Pen ... purchase money came from business";
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> "Stony Hill ...purchase money came from business" and
>
> "2 apartments at Oakland Court ...purchase money from our business",

and he has not established a basis for any claim to an interest in the said business, he has no beneficial interest in the said properties. In refusing the claim to a beneficial interest of the husband in ***Pettitt v. Pettitt*** (supra), Lord Hodson, at page 400, said:

> "...the husband does not become entitled to a share in the wife's property by occupying his leisure hours in the house or garden even though he enhances the value of the property. I, like my noble and learned friend, LORD REID, agree with the view expressed by LORD DENNING, M.R., in the recent case of ***Button v. Button*** [1968] 1 All E.R. 1064 at p. 1066; [1968] 1 W.L.R. 457 at p. 461 where he said with regard to a husband that he 'should not be entitled to a share in the house simply by doing the "do-it-yourself jobs" which husbands often do'."

In the instant case, the respondent was doing far less than the appellant husband in the ***Pettitt*** case.

The respondent admitted that he had no knowledge of the details of negotiations to purchase the properties - he took no part in them. He had no specific knowledge of the purchase price, payment schedules, nor mortgage details. This confirms that he had no valid concern, interest or financial claim in their acquisition. In respect of the Governor's Pen property, the Title to which was in their joint names, the respondent would be entitled to a beneficial interest. If a wife puts property into the joint names of her husband and herself, prima facie, a joint beneficial interest was intended: [***Pettitt v. Pettitt***, (supra)].

I agree with the learned trial judge that the respondent held a beneficial interest in the said Governor's Pen Property. There was evidence on which the learned trial judge could find as he did that the respondent was entitled to a one-third (1/3) interest. There is no reason to disturb that finding.

The purchase of the apartments at Oakland Court was financed by the appellant and her relatives solely. The respondent made no contribution to, and has no interest in them.

The joint accounts in the various banks in the names of the appellant and her daughters belong to them solely. The respondent made no deposit to these accounts, was not shown to have ever been a joint holder, nor had he any knowledge of the source of their funding. He, therefore, has no interest in the said accounts. The learned trial judge had no evidence to base a finding that he had an interest in the said accounts. This was a clear misdirection by the learned trial judge. In these circumstances, an appellate court has a duty to reject the findings of the learned trial judge and substitute its own.

Consequently, it is my view that the appeal should be allowed and the judgment of Orr, J. set aside. It is declared that the respondent owned a one-third interest in the property at Governor's Pen, St. Mary, and is, therefore, entitled to the said one-third interest in the net proceeds of sale. He has no interest in the remaining properties, nor any interest in the joint accounts.

There should be no order as to costs.

DOWNER, J.A.:

I concur.

PANTON, J.A.:

I agree.