JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 71/08

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE MORRISON J.A.

BETWEEN	**GLENFORD GREENLAND**	**APPELLANT**
A N D	**CAMILLE GREENLAND**	**RESPONDENT**

Mesdames Audré Reynolds and **Christine Johnson** instructed by **Patrick Bailey & Company** for the appellant.

Mr. Dale Staples instructed by **Kinghorn and Kinghorn** for the respondent

January 19 and 20, 2009

ORAL JUDGMENT

MORRISON, J.A.

This is an appeal from a judgment of Gayle J (Ag) given on the 20th of June, 2008 whereby he refused an application by the appellant who was the defendant in the court below for summary judgment. The application was made pursuant to Rule 15.2 of the Civil Procedure Rules 2002, which permits the court to give summary judgment on a claim or a particular issue to either the claimant or defendant, in this case the defendant, on the ground that the claimant has no real prospect of succeeding in the claim or on the particular issue.

The appellant and the respondent were married on the 22nd of June, 1991 and divorced on the 1st February, 2007. On the 12th July, 2007 the respondent filed suit in the Supreme Court seeking an order that certain premises situated at lot 10 Deeside, Linstead in the parish of St. Catherine be sold and the proceeds of sale be divided equally between the parties.

By her amended Particulars of Claim, the respondent pleaded that the decision to acquire the property was jointly taken, the property having been identified by them together, and that an existing structure on it was demolished by them in order to build their house. She pleaded that the initial purchase price of $50,000 was paid by the appellant solely, but that a subsequent payment of $13,000 on account of the purchase was made by her. Construction of a house on the property commenced in 1992 and "in or around 1993" the parties commenced living together in the only section of the building which was by that time habitable. They lived there with six of the appellant's children from a previous marriage. As construction of the house progressed, the respondent pleaded that she assisted physically by breaking stones, mixing mortar etc. and financially as well as by assuming responsibility for the appellant's children. She also paid for utilities out of her own funds and also contributed to the cost of groceries for the household. The marriage fell into difficulties for reasons which are not now relevant. On

23rd of May, 1999, the respondent left the property permanently. The respondent pleads that the appellant had just recently acquired a title for the premises and has placed the names of two (2) of his children on it.

In the premises the respondent stated her claim at paragraph 21 of her amended particulars of claim as follows:

> "The Claimant is now desirous of claiming a half share in the matrimonial home from the Defendant pursuant to section 6 of the Family Property (Rights of Spouses) Act 2004 or pursuant to common law principles of constructive and/or resulting trust."

The appellant filed a defence, the main thrust of which is a denial of the respondent's claim that there was ever any intention that the property should be acquired by both jointly. According to the appellant, his plans to acquire the property in fact pre-dated marriage to the respondent and, to the knowledge of respondent, it was always his intention that the property was to be jointly owned by himself and his children. He strenuously denied that the respondent made any contribution whether by physical labour, by payment of money or by assisting to defray any of the household expenses. The defence took issue in particular with the respondent's claim to have made a direct contribution of $13,000 to the purchase price, insisting that this payment was made wholly by him from his own resources.

It is on this state of the pleadings that the appellant applied for summary judgment on the basis that the respondent's claim "must fail as

the said property is not subject to" the Property (Rights of Spouses) Act 2004. In an affidavit filed in support of the application, the appellant referred to the pleadings, in particular to the defence, and asserted that "Based on the circumstances of the acquisition of the property... which I have outlined... the said property is not within the definition of a 'family home' " within the meaning of the Act.

During the hearing before Gayle J (Ag), it is common ground that a copy of a duplicate Certificate of Title registered at Volume 1385 Folio 950 issued on the 9th January, 2006 was produced and shown to the judge. This title showed the registered proprietors of the property to be appellant and two of his children as joint tenants. Gayle J (Ag) refused the application, basing himself on the judgment of the Court of Appeal in England in ***Swain v Hillman and Another*** [2001] 1 ALL ER 91. On the facts as pleaded, he found that in the light of the disputed facts as to financial contribution, "the circumstances surrounding the acquisition of the family home are such that give rise to the need for investigation at trial and ultimately the exercise of the discretion of the court within the context of the Act."

On appeal, Miss Reynolds for the appellant contends with much force that the judge erred in that the property unquestionably "did not come within the definition of 'family home', " and that, to the extent that the claim is based on the provisions of the Act, it must necessarily fail. She

relied on the provisions of section 2, 4 and 6 of the Act in particular and submitted that this was plainly a case in which the respondent had no real prospect of success. She too relied on ***Swain v Hillman*** (supra).

Mr. Staple for the respondent contended that the circumstances of the acquisition of the property, if found in favour of the respondent, would qualify the property as the 'family home' irrespective of the issue of the title, which was a subsequent event. But even if it is not the family home, then the respondent is nevertheless, entitled to have her rights in the property adjudicated in light of the provisions of section 14 of the Act.

We were referred to, and considered during the course of the hearing, a number of sections of the Act. Section 2 defines the 'family home' as the "dwelling house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence." We were also referred in particular by Miss Reynolds to section 4 which provides that:

> "The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property, and, in cases for which provision is made by this Act, between spouses and each of them, and third parties."

We were also referred to Section 6 which provides that: "each spouse is entitled to one half of the family home, subject to exceptions which are

not now relevant. We were referred particularly by Mr. Staple to section 13 of the Act which makes provision for an application to the Court for a division of property and section 14, which empowers the court to make an order for the division of the family home in accordance with section 6 and, if the property is not the family home, it gives the court power to make an order for division of property based on factors which are actually listed in subsection 2 of section 14. Those factors are:

(1) the contribution, financial or otherwise directly or indirectly made, by one or the other party to the acquisition, conservation or improvement of any property ;

(2) that there is no family home,

(3) the duration of the marriage, or the period of co-habitation;

(4) that there is an agreement with respect to the ownership and division of property; and

(5) such other fact or circumstance as the court thinks the justice of the case requires to be taken into account.

It will be seen immediately that although section 4 of the Act speaks to the former presumptions of the common-law and equity having no effect in respect of property that comes within the Act, what section 14 (2) does is in effect to import the same things that would have been of significance in determining the legal position when the property was owned jointly before the Act, which is to say contribution, agreement between the parties, duration of the marriage and other relevant factors.

It seems to us that although the Act intends itself to be a complete code for the division of matrimonial property, it does not entirely rule out **a consideration of the earlier approach under the common law** because the factors mentioned in section 14 (2) to some extent replicate what was the former law. The question therefore arises whether it can be said that the respondent has no real prospect of success in the claim. A large part of her claim can only be determined by the determination of the disputed facts between herself and the appellant, which is to say what were the circumstances of the acquisition of the property in Linstead: was it, as she said, acquired on the basis of a joint decision taken by the parties together, or was it, as the appellant said acquired as a result of a pre-existing plan, a plan in which he said the respondent played no part, to acquire the property for the benefit of his children.

The other disputed fact is that the respondent said that she made a financial contribution. She said she made a direct contribution of $13,000, took more than a fair share of the payment of household expenses as her contribution to the acquisition and she pleaded that she physically contributed by mixing mortar and carrying bricks. Or is it, as the appellant, said that no such thing happened, the $13,000 came out of his own funds and that in fact the respondent for most of the time was too ill to undertake any kind of manual labour. Those are very sharp disputes as to fact and in our view the judge quite correctly took the view

that in order to make a determination as to whether this was in fact the family home the matter needed to go to trial.

The matter does not end there, because, even if Miss Reynolds is right and it turns out that this cannot be treated as the family home, the Act provides a mechanism in sections 13 and section 14 to determine the rights of spouses to property other than the family home, so that the respondent can therefore establish at trial either that it was the family home in which case she was entitled to a 50% share or that it was property jointly owned in that or some other proportion between herself and the appellant.

In those circumstances, therefore, it appears to us that it cannot be said that the respondent has no real prospect of success and we are therefore of the view, in agreement with the view taken by the learned judge, that the application for summary judgment was correctly dismissed and that the matter should go to trial. We note in fact that case management orders were made by the learned judge and that the matter is now set for trial in March 2009, so that the parties can be assured of an early determination of their rights in this matter.

In all the circumstances therefore the appeal is dismissed with costs to the respondent to be taxed if not sooner agreed.