

11/05/05

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 36/2003

BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE MCCALLA, J.A.

BETWEEN PETER HADDAD APPELLANT/DEFENDANT
AND ARLENE BEVERLEY HADDAD RESPONDENT/PLAINTIFF

Miss Hilary Phillips, Q.C. and Kipcho West instructed by Grant, Stewart, Phillips & Company for the appellant.

Gordon Steer instructed by Chambers, Bunny and Steer for the respondent.

20th, 21st, 25th, and 26th October, 2005, and 20th April, 2007

FORTE, P.

I have read in draft the judgment of McCalla, J.A. I agree with the reasons and conclusions therein and have nothing further to add.

PANTON, J.A.:

I too agree with the reasons and conclusions of McCalla J.A. and have nothing to add.

McCALLA, J.A.:

1. This is an appeal by Peter Haddad (the husband) from an order made by Harrison, J (as he then was) on an application by Arlene Haddad (the wife) by originating summons.

By her summons the wife sought a declaration as to their respective interest in premises known as Hampstead in the parish of St. Mary and other ancillary reliefs related thereto.

2. Both parties presented evidence by affidavits, oral evidence elicited in cross-examination as well as documentary evidence. At the conclusion of the trial Harrison J made the following orders:

"It is hereby ordered as follows:

Both the applicant and the respondent are beneficial owners to the extent of 50% each in premises known as Hampstead in the parish of St. Mary registered at Vol. 1090 Folio 214 of the Register Book of Titles.

The applicant and respondent are joint owners of Bally Farms Limited.

A valuation of the property and farm be done by a reputable firm of valuers to be agreed upon by the parties.

The cost of the valuation be borne equally by the parties.

The property and farm be sold thereafter and the proceeds therefrom be divided equally between the parties.

The Registrar of the Supreme Court is empowered to sign any and all documents to effect a registrable transfer if either of the parties is unable or unwilling to do so.

The applicant is the sole owner of the bank accounts held in Florida and Canada.

The respondent is called upon to account to the applicant with regards the funds held in the Canadian foreign account.

The parties are joint owners of the bank account held at the Bank of Nova Scotia in Highgate, St. Mary and the funds in this account be divided equally between the parties.

Each party is responsible for his or her own costs.

There shall be liberty to apply. "

3. In or about 1973 the husband who was a travelling salesman aged 19 years met the wife, then aged 24 years in the parish of St. Mary. She was working full-time in her family's business and was the person in charge of it. They developed a friendship which blossomed into marriage in 1976. Prior to their marriage they had embarked on a search for a matrimonial home.

4. They identified the Hampstead premises as being suitable and the husband attended an auction and made a deposit on the house which is situated on 45 acres of land. The purchase price was \$40,000.00 The deposit came from the business of the wife's family. The husband obtained a mortgage of \$35,000.00 from his employer and the conveyance of the premises was taken in his sole name. The husband paid the monthly mortgage by way of salary deductions. Repairs were carried out on the home to make it habitable. The wife continued to work in her family business throughout the marriage and during the course of

the marriage on numerous occasions the wife advanced monies to him, which she took from her family's business, for various projects in relation to the Hampstead property. In 1981 at the wife's suggestion the balance of \$21,000.00 that was owing on the mortgage was paid off, also with monies which the wife took from her family's business. These monies were repaid by the husband in some cases over several years and were all interest free as there had been no discussion of interest payable. From the family business operated by the wife, she supplied all the grocery requirements of the home. She bought furniture and also paid for the husband's clothing. In or around 1985 the husband left his regular employment and worked solely on the farm which had been established on the property. They separated in 1992 and in 1994 they were divorced.

Subsequent to the departure of the wife, the husband carried out extensive improvements to the property.

4. In the Court below and in written and oral submissions before us the husband, through his counsel, maintained the position that he wanted to obtain a home for himself and his wife to reside in and he also wished to fulfill his dream of becoming a farmer. The sums advanced by his wife through her family's business were loans which have been repaid. There had been no discussion of interest at the time the monies were advanced and none was paid. He has contributed to household expenses

throughout the marriage. There was no common intention at the time of acquisition of the property, for the wife to have a beneficial interest. Save for monies advanced which have been repaid, the wife has made no contribution and the repairs done to the house and the development and improvement of the property was his sole endeavour as the wife continued to work in her family's business daily.

5. The wife contends through counsel, that prior to the marriage both parties had embarked on a search for a suitable matrimonial home and together had viewed several properties. At the time of acquisition of the Hampstead property her then fiancé said that since they were not married, it would be easier for the transaction to be in his name alone. Throughout the marriage she has supplied groceries, paid household bills, performed duties in connection with the farm as well as provide clothing for the husband. The funds which she took from her family's business to pay the deposit was for the benefit of both parties as it was a common understanding that the property would be the matrimonial home owned by them jointly. In making the further advances of money in connection with the farm as well as the repayment of the mortgage without interest, she had acted to her detriment, based on their common understanding. This secured a great advantage to the husband. Her continued employment in her family's business had enabled her to make those monetary loans as the business of which she was in charge made far

more money than he did and she had far more to offer him. In light of all these factors the learned judge was correct in granting her joint ownership of the property.

6. The grounds of appeal are as follows:

"(a) The learned trial Judge erred in law in that he erroneously held that the Appellant and the Respondent are beneficial owners to the extent of fifty percent (50%) each in premises known as Hampstead in the parish of Saint Mary registered at Volume 1090 Folio 214 of the Register Book of Titles without sufficiently analyzing the affidavit evidence before the Court and failed to properly assess the oral evidence of the Appellant and Respondent.

(b) The learned Judge erred in law in that he made a finding that the Appellant and the Respondent are joint owners of Bally Farms.

(c) The learned Judge erred in fact, in that he did not sufficiently address the inconsistencies in the Respondent's *viva voce* and affidavit evidence.

(d) The learned Judge erred in law in the treatment of the evidence of the Appellant.

(e) The learned Judge erred in law in that he failed to perform the declaratory function required under Section 17 of the Married Women's Property Act.

(f) The learned Judge misdirected himself when he found that there was common intention.

(g) The learned Judge misdirected himself in the law in finding that the Respondent's conduct should be seen as acting to her detriment. "

7. Miss Hilary Phillips, Q.C., counsel for the appellant contended that the learned trial judge erred in finding that the evidence established that there was a common understanding between the wife and the husband that the property was bought for both of them since they were planning to marry. She urged that the repayment of sums advanced by the husband is consistent with a recognition that he was the sole owner of the property and cannot support a claim to contribution to purchase price in order to secure a beneficial interest in the property. The respondent had minimal input in the operations of the farm and the husband has expended large sums of money on the improvement and enhancement of the property. She argued that the wife's action is not consistent with her having any beneficial interest in the property and even if she did, the learned trial judge erred in not making a finding that the husband had an enlarged share in keeping with the substantial improvements made by him.

Counsel for the husband relied on the case of **Lloyd's Bank PLC v Rossett** [1990] 1 All ER. 111. This is a case where property was acquired in the husband's sole name. The wife participated in effecting repairs and improvements to make the building more

habitable. The court rejected her claim to a beneficial interest in the property as her contribution was found not to be in accordance with a common intention to have a beneficial interest in the property.

8. Miss Phillips Q.C. also relied on the case of **Davis v Vale** (1971) 2 All E R 1021 in support of her submission that the wife not having made any contribution to the substantial improvements effected to the property after her departure, could not properly be entitled to a one half share. She said that the learned judge did not sufficiently address the evidence and the law relating thereto and thereby fell into error.

Counsel referred to inconsistencies in the evidence of the wife. One example to which she referred was the wife's evidence in her affidavit that she had paid all the bills in connection with the home but she admitted in cross examination that the husband had paid utility bills. She adverted to the wife's failure to state in her first affidavit filed in support of the originating summons that the monies advanced were repaid, although she sought to rely on the fact that the loans were interest free. She submitted that the learned judge

erred in finding that the interest free loans had formed a substantial contribution towards the acquisition, improvement and maintenance of the property and pointed to the evidence that there had been no discussion of interest payable. Further, she said the evidence does not support any agreement implied or expressed by words or conduct for the wife to acquire a beneficial interest as it shows that the husband had focused his time, effort and money on the farm while the wife had focused her efforts on developing her family's business.

9. She adverted to the learned judge's findings that the wife had acted to her detriment and submitted that he was in error in so finding. He ought to have found in keeping with the decision in **Cobb v Cobb** (1955) 2 ALL E.R 696 that where the original rights to the property have been established and have not been varied, in the absence of a common intention for the wife to acquire a beneficial interest and evidence that she has acted to her detriment, the Court has no power to alter those rights.

She urged that the husband is the sole beneficial owner and in failing so to declare the learned judge was plainly wrong and therefore this Court is entitled to interfere in accordance with the principles

enunciated in *Thomas v Thomas* [1947] A.C. 484 and *Industrial Chemical Company (Jamaica) Ltd v Ellis* [1986] 35 WIR 303.

10. Mr. Gordon Steer, counsel for the wife, submitted that the learned trial judge correctly accepted the evidence that money was taken from the business of the wife's family and advanced to the husband to pay the deposit and this was done for the benefit of both parties. These and other monies advanced were repaid from the profits of the business which was operated on the premises. The learned judge accepted the evidence that that enabled the husband to make substantial savings in interest not paid. Further, money which the husband borrowed in foreign currency was repaid in Jamaican dollars without taking into account the fact that the rate of exchange had increased between the date of lending and the date of repayment. He made specific reference to US\$22,750.00 that was borrowed in 1981 and repaid in 1987.

Mr. Steer relied on the case of *Jones v Jones* 27 JLR 67 in support of his submission that an interest free loan or a preferential rate of interest would be a benefit and contribution of a substantial nature as the difference between a preferential loan at a low rate of interest and a normal loan would be large. The wife had acted in pursuance of a common intention to own a home and she had acted to her detriment. He argued that on the evidence adduced the learned trial judge's

findings of facts were correct and cited the case of **Eldemire v Eldemire** (1990) 27 J.L.R. 316 in support of his submissions that this Court should not interfere with those findings.

11. It is now necessary for me to address the merits of the complaints of Miss Phillips Q.C. as catalogued in the grounds of appeal and her written and oral submissions.

In the instant case the property was acquired prior to the marriage of the parties. Both were seeking to identify suitable premises for the matrimonial home. After the acquisition of the premises, both settled down as man and wife performing differing roles in the development and improvement of the property until the marriage broke down.

Since the legal estate is vested in the sole name of the husband the wife will only be entitled to a beneficial interest if the law of trust can assist her.

12. In **Gissing v Gissing** [1970] 2 All ER 780 the learned jurist Lord Diplock made the following statement of law:

“Any claim to a beneficial interest in land by a person whether spouse or stranger in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as **cestui que** trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes

before the courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts.'... A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust — is created by a transaction between the trustee and the **cestui que** trust in connection with the acquisition by the trustee of a legal estate in land..."

In **Grant v Edwards** [1986] 2 All ER 427 the question for determination was whether or not a trust had been created in favour of the wife, whose name was not on the title. Sir Nicholas Brown-Wilkinson V.C. at p 437 stated:

"If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated:

- (a) That there was a common intention that both should have a beneficial interest; and
- (b) That the claimant has acted to his or her detriment on the basis of that common intention."

Making reference to passages from Lord Diplock's speech in **Gissing**, he states with clarity that even where parties have not used express words to communicate their intentions (and therefore there is no direct evidence) the court can infer from their actions an intention that they shall both have an interest in the house. He continued :

"... Once it has been established that the parties had a common intention that both should have a beneficial interest and that the claimant had acted to his detriment, the question may still remain: what is the extent of the claimant's beneficial interest...contributions made by the claimant may be relevant for four different purposes, viz: (1) in the absence of direct evidence of intention, as evidence from which the parties' intention may be inferred; (2) as corroboration of direct evidence of intention;(3) to show that the claimant has acted to his or her detriment in reliance on the common intention; ...(4) to quantify the extent of the beneficial interest..."

In the words of Lord Denning in **Gissing v Gissing** (supra) at 789:

"... 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 recollection 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."

The principles referred to in **Grant v Edwards** and **Gissing v Gissing** were considered and applied in this Court in the case of **Azan v Azan** (1985) 25

J.L.R. 301. Forte J.A. (as he then was) expressed himself as follows:

"The determination of the beneficial interest in property of one party to a marriage where that property is registered in the name of the other party, is in most cases difficult to resolve because of the relationship of husband and wife, which in

the days when the property was acquired usually enjoys a degree of trust which results in the acceptance of verbal or implied premises (sic) made without any consideration of any possible dispute arising thereafter. In spite of this, the law does not make any presumption of beneficial interest because of the marital relationships, and therefore, the parties in whom the legal estate is not vested must resort to the law of trust to establish such a beneficial interest."

13. In the instant case there is no direct evidence of the intention of the parties to share in the beneficial interest of the property and for that interest to be held equally. The wife therefore had the burden of establishing such intention by words or conduct from which such common intention could reasonably be inferred.

I must therefore consider whether or not there was evidence to support the finding of the learned judge that at the time of the acquisition of the property there was a common intention that the wife should have a beneficial interest and his finding that the property was held jointly.

The evidence of the wife that the property was to be their matrimonial home and that it was their "little heaven" in my view would not without more, be demonstrative of a common intention to own the property jointly.

The learned judge considered that the following issues arose for his determination:

- "1. Who had provided the deposit and closing costs in order that the property could be purchased?
2. Was the deposit and closing costs loaned to the respondent for the benefit of the parties?
3. What was the intention of the parties when the property was purchased?
4. Did the property develop as a result of the joint effort of the parties?
5. What if any effect did the interest free loans given by the applicant's family to the respondent to clear the deposit and mortgage loans have on the acquisition and improvement of the property?
6. How was the mortgage serviced?
7. Was there improvement to the property and who was responsible for it?"

14. In making his determination on the question of the intention of the parties at the time of acquisition of the property the learned judge accepted the wife's evidence that there was a common understanding between them that the property was bought for both of them since they were planning to get married.

In considering the conduct of the parties subsequent to the acquisition of the property, he considered that the fact that the husband had repaid the initial loan and the mortgage must be balanced against the indirect contributions of the wife, her assistance in securing materials

for farm buildings, the employment of all the workers, ordering whatever he needed and drawing cheques on her family's business in order to purchase cows, vehicles and equipment for the farm. He found that this conduct by the wife was in reliance on their common intention. He believed the wife's evidence that she had been spending money on the property for over 16 years and accepted her evidence that she had been actively engaged in doing work on the property. The learned judge found it difficult to accept that she would have done all that she had done, except in pursuance of some expressed or implied undertaking or arrangement that she had a beneficial interest. He found that in those circumstances there was "sufficient detrimental reliance to support the imposition of a constructive trust."

15. I must also deal with the issue raised by Miss Phillips Q.C on the learned judge's findings that the wife's contributions included "the employment of all the workers and was responsible for all expenses incurred in the home and her evidence in this regard was never challenged."

In cross examination the wife had stated that she had "sourced" workers for employment on the farm and she also admitted that the husband had paid utility bills for the home and farm. However, the learned judge was well aware of the wife's evidence on that point as in

assessing the evidence he said: "she also covered grocery bills while her husband paid the utility bills for the farm and house."

16. The wife gave evidence that at the time the property was acquired she had made an enquiry of the husband as to why her name was not on the title and he had told her that as they were not married his employer would not allow the mortgage to be taken out in their joint names.

The learned judge accepted the wife's evidence of that conversation and the husband's response as being an excuse for not putting her name on the title.

In **Grant v Edwards** (supra) the defendant told the plaintiff that he was not putting her name on the title because of the possibility of prejudice in matrimonial proceedings which were contemplated. The Court found that there was evidence of a common intention otherwise it would not have been necessary for the defendant to give an excuse.

In **Eves v Eves** [1975] 1 W.L.R. 1338 the conveyance of a house was taken in the name of the man. At the time of acquisition he told the woman that if she had been 21 years old he would have put the house in their joint names. In evidence, he admitted that it was an excuse for not putting the house in their joint names. The court inferred that there was an understanding between them or a common intention that the woman

was to have some sort of proprietary interest otherwise no excuse would have been needed.

17. In this case the husband had testified that the wife's name could not have been put on the title as the parties were not married and the company to which he was employed would not permit the mortgage to be taken in their joint names. In cross-examination the husband testified that he could not recall the conversation to which the wife referred.

Miss Phillips submitted that unlike the cases referred to above, in the instant case it has not been established that the husband was being untruthful.

The learned judge had the advantage of seeing and hearing the parties being cross examined on their respective affidavits. He therefore had an opportunity to assess their demeanour. He accepted the wife as a credible witness. He found that she had acted to her detriment in advancing interest free loans for purchases in connection with the farm and repayment of the mortgage. When asked if all monies advanced by her had been repaid, she responded that she did not keep a rigid account "for he was my husband and I was doing this for us. I wanted to get out of the family business and be on our own." As Nourse L.J. observed in **Grant v Edwards** (supra):

"If the work had not been done, the common intention would not have been enough. If the common intention had not been orally made plain, the work would not have been conduct from which it could be inferred."

18. In my opinion there was ample evidence before the learned judge to support his finding that the conduct of the wife was not such that she could reasonably be expected to have embarked upon unless she was to have an interest in the property. On the question of the money admittedly loaned by the wife's family as a deposit on the purchase price, in his oral testimony the husband had contradicted evidence given in his affidavit that the loan had been given "to us". I am unable to agree with submissions made on behalf of the husband that there was no evidence to establish that there was a common intention that the wife was to acquire a beneficial interest in the property or that the learned trial judge was plainly wrong in so finding.

19. The learned judge found that the loans made from the family business conducted by the wife was for the benefit of both parties. The words attributed to the husband by the wife as to the reason why the mortgage was not taken out in their joint names even if not untruthful, could not, without more be indicative of a common intention as it is always open to a husband to do so by way of advancement to his wife. However, taken together with the initial payment and their joint search to identify a matrimonial home it was open to the learned judge to find that

the conversation to which the wife testified had occurred and that it was indeed indicative of a common intention that husband and wife would own the property. He had the advantage of seeing and hearing the parties being cross-examined on their respective affidavits and he had the opportunity of assessing their demeanor. He found the credibility of the husband to be in serious doubt and preferred the evidence of the wife. Having considered the complaints of counsel for the husband I am of the view that the learned judge was not in error in making a finding that there was a common intention of the parties to own the property and the wife had acted to her detriment.

The next issue is the question of the beneficial interest to which the parties are entitled. In seeking to make that determination, the learned judge weighed up the evidence of the contending parties. He had regard to the principles enunciated in the case of **Nixon v Nixon** [1969] 3 ALL E.R. 1133 a case which dealt with the rights of spouses where the title is held in the name of one spouse only. In the case of **Josephs v Josephs** R.M.C.A 13/84, unreported, delivered on October 13, 1985 Ross J.A. made reference to those principles which are as follows:

"... when husband and wife, by their joint efforts, acquire property which is intended to be a continuing provision for them both for their future, such as the matrimonial home or the furniture in it, the proper inference is that it belongs to them both jointly, no matter that it stands in the name

of one only. It is sometimes a question of what is the extent of their respective interests, but if there is no other appropriate division, the proper inference is that they hold in equal shares."

The Court considered that by virtue of the wife's contribution the family business flourished thereby enabling the husband to make significant improvements to the property and in those circumstances the maxim "equality is equity" ought to apply.

21. In the case under consideration there is no evidence of the salary being earned by the husband from his regular employment or from other part time work that he undertook at the time the property was acquired. He paid the mortgage by salary deductions. At page 10 of his affidavit dated July 19, 1884 he states:

"That as regards paragraph 13, it is true that large amounts of money were spent on the farm. The sole regular source of this money was the income from my employment at Grace Kennedy, and my job on Saturdays with an uncle VERNON ALFORD. When this was not enough I borrowed money on several occasions from Highgate Peoples Co-operative Bank; Bank of Nova Scotia, Port Maria; National Commercial Bank, Port Maria; the HoSue's business, and friends."

Lord Reid in the case of **Gissing** (supra) makes it clear that in evaluating a spouse's equity in property there will be cases in which a half share is a reasonable entitlement and many others where a fair entitlement is less. In the instant case the wife was employed fulltime in her

family's business. The learned judge found that that was what enabled her to make the interest free loans admittedly made during the course of the marriage. He accepted her evidence that for 16 years she had been spending monies on the property, had been actively engaged in doing work on the property as well as buying groceries and clothes for the husband. Indeed her evidence was that the farming venture had commenced with the acquisition of two calves and she did everything "except cutting the grass".

Romer L.J. in ***Rimmer v Rimmer*** [1952] 2 All ER 883 expressed himself

thus:

"... cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of the property, and the old established doctrine that equity leans towards equity is peculiarly applicable to disputes of the character of the present one, where the facts as a whole permit of its application."

22. Further submissions advanced in respect of the husband's complaint were with regard to the unchallenged evidence of the husband that after the wife left the home in 1993, he carried out further substantial work to the property. This work included the construction of a

new molasses tank, the installation of a refrigeration container, and remodeling and expansion of the house.

Miss Phillips Q.C. maintained that even if the wife had an interest, the court below was in error in not making a finding that an enlarged share should be accorded the husband in keeping with the substantial improvements made by him to the premises. She sought to distinguish the case of **Daris v Vale** (supra) where the court found joint ownership with the wife on the basis of trust. She contended that in that case the wife had made a contribution to the initial deposit on the purchase price and indirectly to the mortgage installments and then had further contributed substantially to the improvement of the property.

23. Mr. Steer in his response alluded to the findings of the learned judge in relation to the initial acquisition and subsequent conduct of the wife and argued that the learned judge was correct in not according the husband an increased share. Whatever improvements the husband effected on the property were from the profits of the business. The evidence shows that the farm was fully operational at the time the wife left the home. The husband had continued in fulltime employment until 1985. Mr. Steer sought support for his position from the case of **Jones v Jones** [1990] 27 JLR 65. He referred to the judgment of Rowe P at page 67 where he said:

"The law applicable to a case of this nature is well settled. Where husband and wife purchased property in their joint names intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are irregular the law leans towards the view that the beneficial interest is held in equal shares."

24. In ***Aubrey Forrest v Dorothy Forest*** [1995] 32 JLR 128 the appellant and the respondent were husband and wife who had purchased a home in Jamaica while they resided abroad. They intended to return to Jamaica to reside in the home. The parties later divorced and were subsequently served with a notice that the house would be auctioned because of arrears of mortgage payments.

The respondent later claimed an enlarged interest in the house. On proceedings brought by the wife the trial judge granted her a 60% beneficial interest in the house.

On appeal the Court held that in the absence of evidence as to an agreement either expressed or implied between the parties to vary the original beneficial interest where the evidence demonstrated that the parties had a common intention at the time of the acquisition to share the beneficial interest equally, the court must give effect to that common intention.

25. It is abundantly clear that the Court has no power to vary the beneficial interest of the parties where the evidence demonstrates that the common intention at the date of acquisition was for the parties to share equally. I am in agreement with Counsel for the wife that in the instant case there was ample evidence for the learned judge to have arrived at his conclusions. His findings were not plainly wrong and his decision should stand.

I will now consider the question as to whether or not in the case before us the learned judge ought to have made an order taking into account the improvements carried out by the husband subsequent to the wife's departure.

26. With regard to these improvements, the learned judge held that:

"The improvements carried out by the respondent to the property and farm after they separated would not alter the beneficial interest that both held."

In **Worrell George Patten v Florence Edwards** SCCA No. 29/95 an unreported decision of this Court Patterson J.A. states that:

"Any amount expended by the appellant to improve the property must be regarded as an accretion to the property as a whole. It cannot be regarded as an accretion to the appellant's individual share alone with the resultant diminution in that of the respondent. If that was the position, then one tenant in common could

effectively acquire the entire interest in the property by making improvements without the consent of the other tenant in common."

In ***Meutzel v Meutzel*** [1970] 1 ALL E.R. 443 where improvements were done to a house occupied by both parties as man and wife and the court held that the wife had a beneficial interest in the house, the court also held that if the wife has an interest in the original house she had the selfsame interest in the extension to it.

27. In the instant case the improvements carried out by the husband were done after the wife had left the house and without any express or implied agreement by her. Admittedly, they were financed from the profits of the farm and by way of a loan of Two Million Dollars (\$2,000,000). The improvements cannot therefore redound to the sole benefit of the husband by according to him any enlarged share in the property. In my view the learned judge was correct in not granting to the husband an increased share having regard to his finding that the parties held the beneficial interest in equal shares and the admission of the husband that the improvements were partially financed by the profits from the farm.

The profitability of the farming venture was no doubt achieved in large measure by the contribution of the wife through her daily work in her family's business. However, in as much as the husband's unchallenged evidence was that the improvements were financed in part by a Two

Million Dollars (\$2,000,000) loan which has not been repaid, it is my view that it would be fair and reasonable for the husband to recover that sum from any proceeds of sale before the division of such proceeds.

28. For the above reasons, I would allow the appeal in part and vary the orders made below so as to make provision for the sum of Two Million Dollars (\$2,000,000) to be deducted from the proceeds of sale on behalf of the husband. I would also make no order as to costs.

ORDER:

FORTE, P.

Appeal allowed in part. The order of Harrison J is varied to allow for the deduction of the sum of Two Million Dollars (\$2,000,000) in favour of the appellant (such sum being for repayment of loan obtained by him for improvements) prior to the division of the proceeds of sale. There shall be no order as to costs.