[2023] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CIVIL APPEAL NO 87/2015

BETWEEN	**RAYMOND LINCOLN OLIVER JOHNSON**	**APPELLANT**
AND	**ANGELLA EUNICE JOHNSON**	**RESPONDENT**

Ms Marjorie Shaw instructed by Brown & Shaw for the appellant

Michael Williams for the respondent

6, 7 and 10 March 2023

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] The appellant, Mr Raymond Lincoln Oliver Johnson ('Mr Johnson'), and the respondent, Mrs Angela Eunice Johnson ('Mrs Johnson'), married each other in Jamaica in 1989. There is one child born to the union.

[2] In or around 1994, Mr and Mrs Johnson commenced taking steps to acquire property registered as lot numbered 322, part of Reids Pen, known as West Aintree, Greater Portmore, in the parish of Saint Catherine. In 1995, they paid the deposit and moved into the property. The sale was completed in 1998 and the property transferred to them as joint tenants.

[3] The property was acquired with the assistance of a loan secured jointly by the parties from the Palisadoes Credit Union to cover the deposit and a mortgage from the Caribbean Housing Finance Corporation Limited (later named the National Housing Development Corporation Limited) to cover the balance of the purchase price. The mortgage was registered in 1998.

[4] Shortly after the acquisition of the property, the marriage irretrievably broke down and the parties separated in 1999. The marriage was subsequently dissolved in 2003. Mrs Johnson remained in the property until it was rented in 2006. She received the rental income without sharing it with Mr Johnson.

[5] On 26 January 2012, Mr Johnson initiated a claim in the Supreme Court against Mrs Johnson pursuant to the Partition Act. By way of fixed date claim form filed on that date, Mr Johnson broadly contended that he is entitled to the severance of the joint tenancy and one-half of the legal and/or beneficial interest in the property and applied for:

(a) a declaration that he is entitled to one-half interest in the property;

(b) severance of the joint tenancy;

(c) the property to be valued;

(d) the property to be sold, and the net proceeds of sale shared between Mrs Johnson and him in accordance with their respective interests in the property; and

(e) other consequential orders relating to the carriage of sale, and accounting of the rental income.

[6] The fixed date claim form was supported by a brief affidavit of Mr Johnson of even date. He deposed, among other things, that the property had been rented by Mrs Johnson who benefitted exclusively from the rental income and that she had neglected, failed

and/or refused to account for the monies collected from or expended in relation to the property.

[7] Mrs Johnson defended the claim. She filed a fixed date claim form with supporting affidavit on 26 March 2012 and a further affidavit on 19 April 2013, in response to Mr Johnson's affidavit, in which she sought, most importantly:

(a) A declaration that she had acquired the property by adverse possession;

(b) A declaration that Mr Johnson is not entitled to share in the property because he had abandoned it;

(c) A declaration that she is legally and beneficially entitled to all the interest in the property;

(d) Alternatively, a declaration that she is entitled to a 95% legal interest in the property and Mr Johnson is entitled to 5%;

(e) An order that the property be transferred in her sole name as owner and that she bore the costs of the transfer; and

(f) Severance of the joint tenancy.

[8] Essentially, her response was that Mr Johnson had abandoned her during her pregnancy and shortly after their marriage. She solely acquired the property and carried out significant improvements and repairs on it. She also averred that Mr Johnson after moving out of the family home in 1999, had no further dealing with the property and as such had abandoned his interest.

[9] Mr Johnson responded to Mrs Johnson's further affidavit by filing a second and more detailed affidavit on 2 July 2013, in which he denied Mrs Johnson's assertions that she solely acquired the property and had undertaken all improvements, maintenance and

repairs. He also denied abandoning her and the property and averred that shortly after the property was acquired, he left to work overseas but would stay on the property whenever he returned home. He said he and Mrs Johnson maintained a loving relationship and that she relied on him for maintenance of herself and their daughter. After moving from the property, he continued to discharge the mortgage obligations, maintain the family and pay utility bills. He advised Mrs Johnson to rent the property and utilise the rental income to pay the mortgage and apply the balance towards the maintenance of herself and their daughter. This income was supplemented by direct maintenance contributions from him. Mr Johnson relied on copious documentary evidence in support of his case.

[10] This prompted Mrs Johnson to reply by affidavits filed 16 September 2013 and 17 March 2014, denying the main aspects of Mr Johnson's case. She insisted that she was responsible for acquiring the property and paying the mortgage instalments. She deposed that Mr Johnson would only pay the mortgage when she asked him to do so as a favour to her. He had no obligation to pay. She was not aware of any contribution made by him and that the receipts he had exhibited came to be in his possession because when he removed his belongings from the property, he took them with him and it was not because the payments came from his resources. Mr Johnson did not maintain her and he was ordered by the court to maintain his daughter. Therefore, the documents he had exhibited, purportedly as proof of maintaining her, were for payments made for the benefit of their daughter as ordered by the court. He spent no money on improving the property as he has averred.

[11] Interestingly, despite what seemed, at first glance, to have been a serious dispute as to facts, the matter was considered on paper by a judge of the Supreme Court due to the prolonged illness of Mrs Johnson and her inability to attend court. By a pre-hearing order made by the court, the right of cross-examination was waived in the circumstances.

[12] The court notes the absence of cross-examination in the light of the Privy Council's observation in **Chin v Chin** [2001] UKPC 7 but found, in the end, that the lack of cross-

examination would not hamper the court in properly considering the issues, which arose for determination, despite the disputed areas of fact. Given what has been disclosed to the court regarding Mrs Johnson's health status, it seems hardly unlikely that cross-examination of her could ever be done. Therefore, this court had no option but to try to do its best, in the circumstances, to review the decision of the learned judge against the background that her decision was arrived at without the benefit of cross-examination of the parties. For that reason, the incidence of the burden of proof has assumed great significance in the resolution of the appeal. The learned judge's findings will now be examined.

[13] On 15 June 2015, having considered the evidence and the submissions of counsel, the learned judge, in a written judgment bearing neutral citation number [2015] JMSC Civ 112 ('the judgment') concluded and ordered that:

> "1. [Mr Johnson] did not make an application for extension of time for the claim to be brought under PROSA and as such [Mr Johnson] is barred by Section 13 of the said Act.
>
> 2. [Mr Johnson] has not been dispossessed of a portion of the property. [Mr Johnson] has proven that he made contributions towards the property up to 2003 and the present Claim was filed in 2012. The time for dispossession according to Section 14 the [sic] Limitation of Actions Act is 12 years and as such [Mr Johnson] has not been dispossessed.
>
> 3. The claim is for a declaration that [Mr Johnson] is entitled to 50% of the property. Based on the affidavit evidence and the documents in support I do not find that [Mr Johnson] is so entitled. [Mr Johnson] is declared to be entitled to 25% of the property.
>
> 4. That the joint tenancy be severed.
>
> 5. That the property be valued by a valuator to be agreed upon by the parties and the cost of the valuator be shared between the parties within 90 days of this order.

6. That [Mrs Johnson] has first option to purchase [Mr Johnson's] 25% of the property within 90 days of the valuation report.

7. That the property be sold on the open market and the proceeds divided between the parties if [Mrs Johnson] do [sic] not purchase [Mr Johnson's] 25%.

8. That the Registrar of the Supreme Court be empowered to sign any and all documents to effect a transfer of the property in the event that either party is unwilling or unable to do so.

9. Each Party to bear their own cost."

[14] Mr Johnson is aggrieved by some aspects of the decision and reasoning of the learned judge. Consequently, on 31 July 2015, he filed his notice and grounds of appeal challenging several findings, conclusions and the orders of the learned judge. The details of the order appealed against are that:

"a. [Mr Johnson] is declared to be entitled to 25% of the property;

b. Mrs Johnson has first option to purchase [Mr Johnson's] 25% of the property within 90 days of the Valuation Report;

c. The property be sold on the open market and the proceeds divided between the parties if [Mrs Johnson] does not purchase [Mr Johnson's] 25%."

[15] Essentially, the impugned reasoning and findings of the learned judge are to be found at paras. [36] and [37] of the judgment, where she states:

"[36] The fact that the property was conveyed into joint names, that Mr. Johnson was jointly and severally liable under the mortgage, that he was occupying the property at the time of the acquisition and that he contributed to the mortgage **lead me to the conclusion that it was intended by the parties that Mr. Johnson should have a beneficial interest in the property. However this common intention changed when Mr. Johnson moved out of the**

> **home in 1999. Mrs. Johnson has since then and before expended monies towards the improvement and maintenance of the home. Mr. Johnson was not living at the house and made little or no contributions**.
>
> [37] **It is plain that Mr. Johnson's financial contributions were significantly less than Mrs. Johnson. Mrs. Johnson paid most of the mortgage over the years and made improvements to the property. Taking all the facts into consideration, all the facts that I have found above, in the circumstances, the court has decided that Mr. Johnson should have a 25% beneficial interest in the property**." (Emphasis added)

[16] The kernel of the challenge to the learned judge's reasoning and decision is sufficiently captured in the solitary ground of appeal, which is that for reasons grounded in fact and law, as set out at sub-paragraphs 3(a)(i) – (xi) of the notice and grounds of appeal, the learned judge erred in concluding and ruling that Mr Johnson was entitled to a beneficial interest of 25% in the property and not 50% as claimed by him.

[17] The bases on which the ground of appeal stands are extensively expanded on in the appellant's comprehensive written submissions. It is not necessary to recite them for present purposes. It suffices to say that they have been duly considered.

[18] The central issue for determination, as gleaned from a consideration of the learned judge's reasons for judgment, the grounds of appeal and the submissions of counsel, is a narrow one. It is whether the learned judge erred in holding that Mr Johnson was not entitled to a one-half share in the beneficial interest of the property as claimed because there was a change in the common intention that he should have a beneficial interest in the property when he moved from the property in 1999 (para. [37] of the judgment).

[19] Mr Johnson contends that the learned judge arrived at an erroneous conclusion that the common intention of the parties had changed regarding the ownership of the property because she wrongly accepted aspects of Mrs Johnson's evidence with little or no justification, and arrived at conclusions contrary to the evidence.

[20] Mr Williams, counsel for Mrs Johnson, after an initial strident effort to defend the learned judge's decision, ultimately found it necessary to concede that the learned judge erred in her reasoning and conclusion that the common intention that Mr Johnson should share in the beneficial interest had changed in 1999 when he left the property.

[21] Ms Shaw's contention that the learned judge erred in law is accepted and, accordingly, the concession of Mr Williams was rightly made. The reasons the learned judge gave for coming to her decision to declare a 25% entitlement to Mr Johnson are unsustainable as her findings are not only unsupported by the evidence but also insupportable in law. The reasons for this conclusion will now be outlined.

Reasoning

[22] It is apposite to begin with the parties' registered interest in the property. They hold the legal interest as joint tenants, which means an undivided share in the property with the attendant benefit of the rule of survivorship and all that is entailed in that concept. There is no express declaration of how the beneficial interest in the property should vest.

[23] In the absence of express agreement and declarations by the parties as to how the beneficial interest should vest, the court in treating with the question of the apportionment of the beneficial interest has had regard to some relevant and oft-cited authorities. We note, in particular, the firm guidance provided in the pronouncements of the courts in the cases cited by counsel for Mr Johnson: **Stack v Dowden** [2007] 2 AC 432; **Whitter v Whitter** (1989) 26 JLR 185; **Jones v Kernott** [2012] AC 776; and other well-known authorities such as **Gissing v Gissing** [1971] AC 886; **Murdock v Murdock** (1981) 18 JLR 215; and **Nixon v Nixon** [1969] 3 All ER 1133. The principles distilled from those authorities have been applied to the facts of this case in which there is no express declaration of how the beneficial interest should be held. These are the salient principles:

1) The starting point, where there is joint legal ownership, is joint beneficial ownership.

2) Equity follows the law and, therefore, the parties are joint tenants both in law and equity.

3) Where a family home is bought in the joint names of a cohabiting couple, both parties are responsible for the mortgage payments.

4) Where the parties are in a position of joint ownership but the quantum of their respective contributions cannot precisely be ascertained, the interests of justice may be best served by awarding the parties equal shares in the property on the principle equality is equity

5) That presumption of equality can be displaced by showing either: (a) that the parties had a different common intention at the time when they acquired the home; or (b) that the parties later formed the common intention that their respective shares would change.

6) "[T]he relevant intention is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party": per Lord Diplock in **Gissing v Gissing** at page 906. Therefore, the common intention is to be deduced objectively from the parties' conduct.

7) In determining the parties' intention, the court may consider a wide range of factors. Many more factors than financial contributions

may be relevant to deciding the parties' true intention. Context is everything and each case will turn on its own facts.

8) When a couple are joint owners of a home, and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be different from the inferences to be drawn when one is the only owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important.

9) Cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

10) There may also be reason to conclude that whatever the parties' intentions at the outset, they have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property so that what they have now is significantly different from what they had then.

11) The onus of proof is upon the joint owner who claims to have other than a joint beneficial interest.

[24] In accordance with the law, there is a presumption in favour of Mr Johnson that he has an equal share in the beneficial interest. Therefore, the burden of proof was on Mrs Johnson to prove that the beneficial interest did not follow the legal interest, thereby rebutting the presumption that Mr Johnson was entitled to an equal share in the property.

[25] The learned judge found as a fact that there was a common intention that both would share at the time of acquisition. That finding is incontrovertible and has not been counter-appealed by Mrs Johnson. Therefore, both parties are taken to have accepted that they both intended, at the time of the acquisition of the property, that Mr Johnson would have had a beneficial interest in it. There is nothing to indicate that the common

intention, that was formed at the time of acquisition of the property, had changed up to the date of their separation in 1999. Therefore, the common intention that they both shared the beneficial interest in the property would have continued up to the date the parties separated. According to the law, the date of separation would have been the operative date for determining the parties' interest in the property. Based on the presumption of equality, the parties would have shared equally up to that date.

[26] The learned judge, however, went beyond the date of separation and found a change in the common intention after Mr Johnson left the property in 1999. This approach by her was improper given the absence of any express agreement between the parties regarding a change in their respective interests at the time of separation or after. The learned judge's finding that there was a change in intention after the parties separated rested on two factual planks: (a) unequal mortgage contribution; and (b) unequal expenditure on improvement and maintenance of the property. These are what she described in para. [29] of the judgment as "many factors indicated by Mrs. Johnson that can indicate that the parties have a different intention subsequent to acquiring the property".

[27] However, a close review of the evidence reveals that the learned judge erred in her evaluation of the evidence, which served to undermine her conclusion that there was a subsequent change in the common intention of the parties after the property was acquired and particularly after the parties' separation in 1999. The finding concerning the mortgage contributions has been considered first.

(a) Mortgage contributions

[28] The receipts presented by Mr Johnson as proof of his mortgage payments, show the names of both parties as the names on the mortgage accounts. The receipts do not indicate who made the payments. For that reason, the learned judge found that she could not determine the source of the payments and so would hold that both parties shared in paying the mortgage. She was not minded to accept that the receipts were proof of payments by Mr Johnson solely. The learned judge failed to recognise that Mr Johnson

had no burden of proof and so it would have meant that on a balance of probabilities, Mrs Johnson had failed to establish that she paid the mortgage. The inability of the learned judge to say definitively who paid the mortgage should not have been used against Mr Johnson because of the benefit of the presumption in his favour and the incidence of the burden of proof being on Mrs Johnson. Instead, the learned judge gave Mrs Johnson the benefit of the doubt to say she shared in the mortgage payments based on the receipts presented by Mr Johnson when Mrs Johnson presented no receipt to show that she paid the mortgage.

[29] However, even though the learned judge might have improperly reversed the burden of proof she, nevertheless, found that the receipts were evidence of joint contribution to the mortgage repayments. Accordingly, Mr Johnson ought to have benefitted from that finding towards a conclusion that it manifested the common intention that he was to continue to share in the beneficial interest of the property.

[30] Even more interestingly, the receipts and other documents presented by Mr Johnson show mortgage payments after 1999, when he left the house. There are receipts for the years 1999, 2000, 2001, 2002 and 2003. There is evidence of salary deductions done by Mr Johnson's employers for mortgage payments up to 2003. In the light of that evidence, the learned judge correctly refused to accept Mrs Johnson's claim that Mr Johnson had abandoned the property after 1999. She used the evidence of payment by him to the mortgage institution, up to 2003, as evidence that he was associating himself with the property (para. [24] of the judgment).

[31] But having established that finding, the learned judge later reasoned at para. [30] of the judgment that the receipts provided by Mr Johnson of mortgage payments to the Palisadoes Credit Union did not go beyond January 1995. She then concluded that "this leaves another 17 years before the claim of Mr. Johnson and has not averted [sic] that he made outstanding payments on the loan". This finding was not only in conflict with the evidence and the learned judge's earlier finding of mortgage payments having been made by Mr Johnson up to 2003, but it was equally erroneous. The mortgage payments

were not to be made to the Palisadoes Credit Union but to the Caribbean Housing Finance Corporation Limited. Therefore, the payment made in 1995 to the Palisadoes Credit Union was not a mortgage payment. It would have been payments made with respect to the loan that was secured jointly by the parties from the Palisadoes Credit Union to cover the deposit for the purchase of the property. Accordingly, in finding that Mr Johnson made no mortgage payments for 17 years before the claim was brought, the learned judge fell into error.

[32] The learned judge also went as far as to find that she accepted the evidence of Mrs Johnson that Mr Johnson was only able to provide receipts of mortgage payments because he had "stolen" receipts from the home when he left in 1999 (para. [34] of the judgment). However, Mrs Johnson did not say Mr Johnson "stole" the receipts. She said he "took" them when he left. Furthermore, given that both names appear on the receipts, Mr Johnson would have been as much an owner of the receipts as Mrs Johnson would have been. It could not be said he was without a claim of right made in good faith. The learned judge's choice of words was, therefore, unfortunate as it was unjustifiable in the circumstances.

[33] But, even if Mrs Johnson had meant that Mr Johnson had stolen the receipts and that allegation was to be accepted as true, as the learned judge clearly found, that could only have been referable to receipts up to 1999. The evidence shows that Mr Johnson provided receipts, salary advice slips, and correspondence from his employers to the mortgage institution showing mortgage payments having been made after 1999. The averment that he took receipts from the house when he left in 1999, could not have explained his possession of receipts for the years after he left since the case for Mrs Johnson was that he never returned to the property after he left. Bearing in mind that the burden of proof was on Mrs Johnson and not Mr Johnson to displace the equal share presumption, the learned judge erred in accepting Mrs Johnson's evidence over that of Mr Johnson on this issue regarding the receipts presented by him. Mrs Johnson's case

was contradicted by indisputable documentary evidence, but the learned judge apparently failed to consider that fact.

[34] The learned judge's error in making findings against the weight of the evidence was further compounded by her failure to take account of the indisputable fact that at least between 2006 and 2012, and later in 2013 and after, the property was rented with Mrs Johnson being the co-owner in receipt of the rental income. Mr Johnson indicated that he had advised her to rent the house and use the income to pay the mortgage among other things. Mrs Johnson deposed that it was her idea to rent the house. However, whether it was Mr Johnson's advice that the property be rented or Mrs Johnson's independent decision, it does not affect the legal position that Mr Johnson was entitled to half the rental income as co-owner. Therefore, having found that Mr Johnson had not abandoned the property and his interest was not extinguished by virtue of the Statute of Limitation, the learned judge should have considered that Mr Johnson had a right to share in the rental income.

[35] In this regard, on 17 June 2013, Mrs Johnson filed a response to a request for information made by Mr Johnson concerning the rental proceeds. She provided a statement of account regarding the rental of the property. The statement shows that between January 2006 and December 2011, monies were taken from the rental income for mortgage payments, stamp fees, property taxes and maintenance. The statement of account also shows that the property was empty between January 2012 and June 2013 and that no rent was collected during this period. However, in her affidavit sworn to on 13 March 2013 and filed 19 April 2013, Mrs Johnson said: "I now have a new tenant in the property and the moneys collected are used by me as I deem fit". Therefore, the period in which no rent was collected would have ended by March 2013 and did not go up to June 2013 as provided in the statement of account.

[36] It follows that for the periods the property was rented, Mr Johnson's share of the income would have been used by Mrs Johnson for, at least, paying the mortgage, maintenance and property taxes. In those circumstances, it was not open to the learned

judge to conclude, as she did, that Mrs Johnson alone paid the mortgage after Mr Johnson left and that his contribution to the mortgage payments was significantly less than hers. Accordingly, she was plainly wrong to conclude that Mrs Johnson's mortgage contribution was so significantly more than Mr Johnson's that it ought to be treated as a factor indicative of a change in the parties' common intention regarding their beneficial interests in the property.

[37] In any event, given the evidence presented, even if Mrs Johnson had made a greater contribution to the mortgage payments after the parties had separated, that could not have changed their common intention or altered the beneficial interest that existed up to the date she and Mr Johnson lived together as man and wife. It is well-settled on compelling authority that unequal mortgage contributions, especially after the parties had separated, do not affect the parties' beneficial interests. In **Forrest v Forrest** (1995) 48 WIR 221. Forte JA, at page 226, authoritatively stated that:

> "If the court is to give effect to the common intention of the parties, the conclusion must be that they should share equally as that was their obvious intention at the time of the acquisition and at least up to the time of their separation. The question to be decided, however, is whether the payment of the mortgage arrears entitles the respondent to a greater share in the property, than that which they intended at the time of the acquisition. In my view, in the absence of evidence as to an agreement either express or implied between the parties to vary the original beneficial interest, as was clearly in the intention of the parties at the time of acquisition, the court can do nothing else but give effect to what was the common intention of the parties. There being no such evidence in this case, the court cannot vary the beneficial interest of the parties based on mortgage payments being paid by one of the parties. However, the respondent would be entitled to recover the share of the mortgage arrears payment which the appellant would have been liable to pay, that is 50 per cent."

[38] Also in **Paul Wayne Barnes v Marjorie Richard-Barnes** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 77/2001, judgment delivered 5 July 2002, Langrin JA similarly opined:

> "Where a husband and wife purchase 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 unequal the law leans towards the view that the beneficial interest is held in equal shares (see **Gissing v Gissing** [1970] 2 All E.R. 780 and **Cobb v Cobb** [1955] 2 All E.R. 696)."

[39] Therefore, the learned judge had no cogent evidential basis on which she could have justifiably concluded that Mrs Johnson had made significantly more contributions to the mortgage payments than Mr Johnson so as to rebut the presumption that they held equal shares in the property. She had already established that both parties contributed to the mortgage repayments even beyond separation. This should have guided her to a finding that the beneficial interest is held in equal shares in keeping with the continued common intention of the parties since the date of acquisition. Therefore, there is nothing regarding the payment of the mortgage that could have tipped the scale away from equal shares. The learned judge was wrong to so find.

(b) Expenditure on improvement and maintenance of the property

[40] The second factor the learned judge found indicative of a change in the common intention of the parties to share equally in the property was what she viewed as significant improvements made by Mrs Johnson to the property. Mrs Johnson had relied on improvements made to the property in or around 1995 (as seen in a letter written by her and exhibited by Mr Johnson to his affidavit) and repairs effected in or around 2012 when the property was not rented. Mrs Johnson gave no documentary evidence to substantiate her assertions that she solely undertook expenditure on improvements to the property that could be seen as being so significant as to displace the presumption of equal shares. As Ms Shaw successfully pointed out and accepted by Mr Williams, the evidence shows that some of the improvements identified by Mrs Johnson, and taken by the learned judge

to have been significant improvements, were done around the time the property was being acquired in 1995 and before the property was transferred to them as joint tenants in 1998. They also jointly undertook the mortgage responsibilities for the balance purchase price after 1995, when the improvements were done.

[41] Therefore, the improvements done before the transfer of the property in the parties' joint names as joint tenants cannot be used to establish a change in the common intention subsequent to the acquisition of the property.

[42] Furthermore, the learned judge also failed to appreciate that Mrs Johnson, who bore the burden of proof, did not prove any expenditure made on improvements but rather threw figures at the court. It cannot be overlooked that Mr Johnson had put her to strict proof of her averments regarding her expenditure on improvements to the property. In the end, Mrs Johnson failed to substantiate her assertions, particularly, so in a context where cross-examination was waived on account of her inability to participate in an oral hearing. The learned judge ought to have exercised greater caution in her evaluation of the evidence against this background to avoid unfairness to Mr Johnson who had no burden of proof.

[43] On the other hand, Mr Johnson provided evidence that he had expended money in purchasing materials to improve the property. The learned judge noted this evidence and there is nothing to say she rejected it. Therefore, there was cogent evidence before the learned judge that Mr Johnson also contributed to the improvement of the property in or around the time it was acquired.

[44] The improvements were obviously done to enhance the amenities and comfort of the property at a time when both parties viewed themselves as a team working to provide a home for their joint lives as man and wife. The letter exhibited by Mr Johnson that was written by Mrs Johnson in January 1995 (exhibit 2RJ4) is quite indicative of the relationship that existed between the parties when the house was acquired and

improvements were made. There is nothing to show that this relationship had changed up to 1998 when the transfer to them as joint tenants was effected.

[45] Therefore, the learned judge erred in concluding that the 1995 improvements, alleged by Mrs Johnson to have been solely carried out by her, were part of greater contributions made by her which pointed to a change in 1999 of the parties' common intention that Mr Johnson should share equally in the beneficial interest.

[46] Mrs Johnson also deposed that she had expended $333,800.00 on repairs to the property following damage to it by the tenant who left in or around December 2011. Of course, in the absence of evidence that the parties' common intention was changed expressly or impliedly by them, any expenditure made post-separation cannot be used to affect the beneficial interest that would have vested before the parties separated. Both parties would have been liable for the repairs and so any sums proved to have been expended on the property must be borne by them in equal shares. In effect, Mrs Johnson would have been responsible for $166,900.00 of the $333,800.00. Mr Johnson would have been liable for the remaining half. This is a matter of accounting and refund and has nothing to do with how the beneficial interest vests. Therefore, the sums Mrs Johnson said she spent on repairs cannot be taken as a significant contribution to the property that would manifest a change in the common intention that existed at the time the property was transferred to them as joint tenants.

[47] Even if the court were to accept that Mrs Johnson had improved the property after the parties separated in 1999, the repairs would have had to be so substantial as to amount to an improvement to the property that made it significantly different from what the parties had up to their separation in 1999 (see **Stack v Dowden**). This is not proved to be so.

[48] Furthermore, in **Muetzel v Muetzel** [1970] 1 WLR 188, Edmund Davies LJ, at page 192, stated that:

> "If one postulates that the matrimonial home has been acquired by joint efforts… the fact that one spouse spends money on extension of that house does not mean that the other can claim no part of the increased value of the property resulting from the extension. On the contrary, in the absence of a specific agreement, the extension should be regarded as accretions to the respective shares of each and not as affecting the distribution of the beneficial interests. In other words, the divisors must stand whether applied to the house in its original or in its extended form."

[49] Similarly, in **Wessell George Patten v Florence Edwards** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/1995, judgment delivered 20 December 1996, this court following **Brickwood v Young** [1905] 2 CLR 387 (HC) noted:

> "The true position is this: The value of the undivided share of each tenant in common will increase but the proportion in which they hold their respective share remains constant. But the money expended by one tenant in common to effect the improvement can be recovered in a suit for partition or on distribution of the value of the property…"

[50] Therefore, we accept the submission of counsel for Mr Johnson that the learned judge erred in treating repairs to the property as improvements that are capable of varying the beneficial interest in the property.

[51] It is also clear that if Mr Johnson was responsible for contributing to the maintenance of the property, as alleged, then the statement of account filed by Mrs Johnson would include Mr Johnson's portion of rent that was due to him but was never paid over to him. Therefore, like in the case of the mortgage payments, it cannot be said that it was Mrs Johnson alone who expended money on maintaining the property. Neither can it be said that any money she expended was to such an extent that would justify a finding that she should get a greater share of the beneficial interest in the property. Accordingly, the evidence put forward by Mrs Johnson does not support the conclusion of substantial expenditure by her that would rebut the presumption of equal share that arises in favour of Mr Johnson.

Conclusion

[52] It would be wrong in fact and law, as well as inequitable, to hold that Mrs Johnson had made significantly more contributions to mortgage repayments and improvement to the property than Mr Johnson, which should be taken as being indicative of a change of the parties' common intention that Mr Johnson would share, and share equally, in the beneficial interest. In other words, there is nothing that merits a displacement of the presumption of equal share of the beneficial interest that would enure to Mr Johnson's benefit.

[53] Baroness Hale in **Stack v Dowden** stated that it is in unusual cases that one would find that the beneficial interest does not follow the legal interest. This is not one such case. The learned judge was wrong to have so found.

[54] Mr Johnson is, therefore, justified in his complaint that the learned judge erred in her findings of fact due to her failure to have proper regard to and correctly evaluate all the relevant evidence in the case. She also erred in her application of the relevant law to the facts when she found, in the circumstances of this case, that unequal mortgage repayments and expenditure on improvement to the property, without more, were sufficient to vary the beneficial interest that had vested at the time of the acquisition of the property.

[55] Having had regard to the standard of review applicable to the assessment of a trial judge's findings of fact as set out in **Watt v Thomas** [1947] 1 All ER 582 and subsequent authorities from the Privy Council such as **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, and **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25, this court would be justified in interfering with the learned judge's decision. It is quite clear that she erred in her evaluation of the evidence by making some mistakes that are sufficiently material to undermine her conclusion that Mr Johnson is entitled to only a 25% share of the property.

Disposition of the appeal

[56] Given the preceding finding that Mr Johnson is entitled to share equally with Mrs Johnson in both the legal and beneficial interests in the property, this court should allow the appeal, set aside the orders appealed against and make the necessary consequential orders, in their stead, that ought to have been made by the court below on Mr Johnson's claim.

[57] Therefore, the order of this court is as follows:

(1) The appeal is allowed.

(2) Orders numbered 3., 6., and 7. made on 15 June 2015 by the learned judge of the Supreme Court, appealed against, are set aside and substituted therefor are the following declarations and orders:

> 3. Mr Raymond Lincoln Oliver Johnson, the appellant, is entitled to 50% of the legal and beneficial interests in the property registered at Volume 1280 Folio 757 of the Register Book of Titles and known as Lot 322 Reids Pen now called West Aintree, Greater Portmore, in the parish of Saint Catherine.
>
> 6. The respondent, Mrs Angella Eunice Johnson, has first option to purchase the appellant's 50% share in the property within 90 days of the valuation report ordered to be done in order 5 of the learned judge's order dated 15 June 2015.
>
> 7. If Mrs Johnson fails to exercise her option to purchase Mr Johnson's 50% share in the property within the 90 days the property is to be sold on the open market and the net proceeds of sale divided equally between the

parties in accordance with the apportionment of their equal share in the property.

(3) Order number 5. of the said order dated 15 June 2015, is varied to facilitate the changes made by this court in the preceding orders as follows:

> 5. The property is to be valued by a valuator to be agreed upon by the parties and the cost of the valuator be shared equally between the parties within 90 days of the date of the order of this court.

(4) If the parties fail to agree a valuator, the Registrar of the Supreme Court is empowered to appoint a valuator from an approved list of valuators.

(5) Mr Johnson's attorney-at-law to have the carriage of sale.

(6) Mrs Johnson is to provide to Mr Johnson a statement of account, with substantiating evidence, of the rental income and expenditure made on the property after their separation.

(7) Mrs Johnson is entitled to recover from Mr Johnson directly or from the net proceeds of sale of the property any sums expended by her on his behalf for mortgage repayments, repairs, improvement and maintenance of the property following their separation which is not accounted for in expenditure from his share of the rental income. Mr Johnson is also entitled to recover any sums found to be payable to him following the accounting exercise, if any, either directly from Mrs Johnson or from the net proceeds of sale of the property.

(8) The parties are at liberty to agree to dispense with the accounting if they desire within 90 days of the date of this order and upon written notification to this court.

(9) Costs of the appeal to the appellant to be taxed if not agreed.

(10) Liberty to apply to the Supreme Court for any further orders considered necessary to give effect to these orders.