

NMCS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. K015/1989

BETWEEN	DEVON KELLY	PLAINTIFF
A N D	MAUREEN CUPIDON	DEFENDANT

Garth McBean instructed by Dunn Cox & Orrett & Ashenheim for Plaintiff.  
Rudolph Smellie instructed by Daley, Thwaites & Campbell for Defendant.

Heard: January 6, July 1 & 7, 1994;  
March 13, 1995 & March 20, 1997.

JAMES, W.A. J.

Mr. Garth McBean when closing his address suggested that no problem would be created if at the start of this judgment it was stated that there is an abundance of evidence that the parties intended that each should have a share of the property. The question then would be what is the share to which each party is entitled.

The plaintiff gave evidence that he is a motor mechanic and Managing director of D.K. Motors Limited.

He testified that premises at 11A East Kirkland Heights is registered in their joint names. A photocopy of the title registered at Volume 1183 Folio 305 was admitted in evidence as Exhibit 1. Premises were acquired in 1986.

Mr. Kelly testified that he paid a deposit of \$20,000 and that the balance of the purchase price of \$160,000 was obtained by way of a mortgage in their joint names from the Jamaica National Building Society Limited.

His testimony that the acquisition of Exhibit 1, was accomplished at a time when the plaintiff and defendant were intimate friends, but were not living together. However, shortly after acquiring those premises they lived together for approximately one and a half

years. He said it was his intention that the defendant should have a share of the premises Exhibit 1.

On the issue of the monthly mortgage payments, closing costs and household expenses, the plaintiff had this to say:

"I have paid the monthly mortgage instalments." There has been no contribution by the defendant." Originally she paid  $\frac{1}{2}$  of the monthly (mortgage) instalment for about six (6) months. This may have been in 1987."

He did not recall in what sum the monthly mortgage instalments were paid but believes it to be \$2,200 per month.

In respect of the closing costs he said both of them contributed towards it.

Regarding expenses the plaintiff testified that the defendant contributed towards the expenses. She looked after the general upkeep of the place which was neat. She provided food and prepared meals.

He further said that the defendant got cheques on a weekly basis from D.K. Motors for about \$400. This was a way of assisting her in whatever she did.

The relationship broke down in late 1988 and the defendant left the house. The plaintiff has continued to live at the house.

In cross-examination the plaintiff said he was a married man. He denied that he lived with the defendant at Midland Drive but that he had slept there. He agreed that the defendant suggested that they buy a house together. That it was after that the premises were acquired and that they owned it as joint tenants. He did not agree with a suggestion that he and the defendant had agreed that he would pay the monthly mortgage instalments together with certain other sum per month towards household expenses and that the defendant would contribute the balance of the household expenses. He denied ever discussing with the defendant the question of their getting married. The defendant however, bought all the furniture in the house except a refrigerator and a washing machine.

The defendant's evidence was in several respects quite different from the plaintiff's.

She said that in 1984 they discussed getting married, owning a home and having children. She testified of their viewing a premises in Liguanea and of their living together in Midland Drive in the latter part of 1984. The defendant's evidence regarding their living together at Midland Drive is supported by evidence of Doctor Jepheth Ford who lived at Midland Drive between 1978 - 1988. At that time the defendant was a Cosmotologist earning she said not less than \$4,000 per month. In 1987 she also worked at a small company named Hot Rod which was opened by the plaintiff for selling auto parts and accessories and was paid \$500 per week. She was a shareholder in this company. In the latter part of 1987 the defendant gave evidence that she commenced the business of higglering. She said she realised a profit of \$10,000 on each trip made once every three months.

Regarding the payment of the deposit towards the acquisition of the premises, closing costs, expenses and mortgage instalments the defendant testified as follows:

"The plaintiff paid the deposit of \$20,000 in June 1986. I gave him \$3,900 as my contribution towards the deposit."

In respect of the closing costs the defendant's evidence that of more than \$8,795 the plaintiff contributed \$1,400. She testified further that she paid the valuator's fee to have the premises valued in connection with the application for the mortgage from Jamaica National Building Society Limited. She also paid for the Installation of electricity, the maintenance of the grounds, helper, food and telephone charges.

According to the defendant this arrangement continued up to February 1988 when the plaintiff told her she should pay  $\frac{1}{2}$  the mortgage instalment as the relationship was going down. To this she agreed provided the plaintiff paid  $\frac{1}{2}$  the household expenses

she met before. This new agreement lasted until the defendant left the house in the latter part of 1988.

Findings

Having seen the parties I am impressed with the evidence of the defendant and hold that her evidence is more reliable than the plaintiff's.

I find the following:

- (a) Plaintiff and defendant shared an intimate relationship.
- (b) They lived together as man and wife at Midland Drive and finally at 11A East Kirkland Heights.
- (c) They jointly acquired premises at 11A East Kirkland Heights.
- (d) The plaintiff initially paid the deposit of \$20,000.
- (e) The defendant paid amounts as her contribution towards the deposits.
- (f) The defendant paid closing costs of \$8,795 less \$1,400 paid by plaintiff.
- (g) By agreement the parties decided that the monthly mortgage instalment would be paid by the plaintiff while the defendant took care of household expenses.
- (h) That the agreement at (g) above continued up to about February 1988 when it was changed.
- (i) Thereafter a new agreement was entered into whereby the defendant paid  $\frac{1}{2}$  the monthly mortgage instalment while the plaintiff paid  $\frac{1}{2}$  the household expenses.
- (j) That the defendant left premises 11A East Kirkland Heights in late 1988.

The plaintiff seeks declaration of the respective interests of himself and the defendant in the premises 11A East Kirkland Heights. The defendant counterclaim against the plaintiff seeks:

- (1) A declaration that their interests in the subject premises are equal.
- (2) An account of the plaintiff's conduct and management of the premises in defendant's forced absence.

- (3) An order that the premises be sold in the open market at the current market price and the net proceeds thereof be distributed equally amongst the plaintiff and defendant.
- (4) An order that the Registrar of the Supreme Court be empowered to execute a transfer of the subject premises to the purchaser for such consideration as may be fixed by a competent Real Estate appraiser as the market price at the date of the Order.

Mr. McBean submitted that where property is held as joint tenants and there is no express declaration as to their shares, their share is to be determined substantially by their respective contribution. He cited Bernard v. Josephs 1982 1Ch. 391 and relied on it greatly. He concluded that this case is distinguishable from Bernard v. Josephs supra because the plaintiff paid the mortgage instalment totally. This view caused him to identify and total the contribution of each party. This is part of the process by which the share of each may be ascertained. It is not all.

The defendant said in her evidence that when the plaintiff and herself signed the agreement for sale the plaintiff stated that because they were not married as yet he would hate for the defendant to lose the property should he die before the defendant. Secondly, the plaintiff in giving his evidence said that from the time of the acquisition of the property he intended that the defendant should have a share. Now it is clear that in neither of the statements attributed to the plaintiff has he spelt out what share the defendant should have.

In Cooke v. Head [1972] 1 WLR 518 Lord Denning M.R. said at p.521:

"In the light of recent development,  
I do not think it is right to approach  
this case by looking at the money  
contributions of each and dividing  
up the beneficial interest according

to those contributions. The matter should be looked at more broadly, just as we do in husband and wife case. We look to see what the equity is worth at the time the parties separate. We assess the shares at that time."

In that same case Griffith, L.J. in his judgment said:

"It emerges clearly from the speeches in Pettitt v. Pettitt [1970] A.C. 777 and Gissing & Gissing [1971] A.C. 886 that it is the intention as to the beneficial ownership at the time the house is bought that is crucial, and contributions made by the parties to the acquisition are examined to establish that intention."

Mr. Smellie in his submissions referred to several cases.

Among them was Grant v. Edwards 1986 2 ALL ER 426. He also submitted that the facts in Bernard & Josephs supra are not distinguishable from the instant case. In that case the parties were held to share the property equally.

In Josephs v. Josephs RMCA 13/84 Carey JA. said that it is only where the extent of the contribution is trifling would that be disregarded. Such a situation does not exist in this case. Reliance was also placed on Howard v. Mitchell 1992 2 ALL ER 109.

Having regard to the evidence and the decisions in similar cases I hold that premises at 11A East Kirkland Heights are held by the parties in equal shares.

The next question to be determined is whether the plaintiff should account to the defendant on his management of the premises during the defendant absence. Since the departure of the defendant from the house the plaintiff has been living there. The plaintiff pays an occupational rent to the defendant in respect of enjoyment of and living at the house. Up to the date when the plaintiff gave evidence, he said that the mortgage instalments were up to date. The monthly mortgage instalment is \$2,200 (approximately). One half is \$1,100 (approximately). This amount should be subtracted from the figure arrived at as occupational rent.

I now turn to determine how the defendant will realise her portion of the premises. I think in all the circumstances an order for sale of the premises be made. The premises must naturally be valued. There must be deducted from it all the money needed to redeem the mortgage. The plaintiff would be given credit for paying the defendant's share of the mortgage instalments and he would be debited with the occupational rent for using the defendant's share of the house.

No figure was stated as representing what occupational rent would be. The Court cannot say what the sum will be. I would therefore make an order that the plaintiff should account to the Registrar of the Supreme Court within eight (8) weeks. In such account a reasonable amount for occupational rent for using the defendant's share of the house must be stated.

Because the plaintiff has been living in the house, I think it is only fair that he should be given an opportunity to purchase the defendant's share within six (6) months of this order.

The Registrar of the Supreme Court is authorised to execute the transfer of the premises the subject of this action to the plaintiff or other purchaser.

The judgment is:

- (i) A declaration that the plaintiff and defendant are equally entitled to premises at 11A East Kirkland Heights.
- (ii) That the plaintiff pays occupational rent for the period since the defendant has left the house.
- (iii) Order for sale of the premises 11A East Kirkland Heights. The order for sale be not enforced for six (6) months if the plaintiff purchases the defendant's share within that time.
- (iv) The plaintiff account to the Registrar of the Supreme Court within eight (8) weeks of this order, of his management of the premises during the defendant's absence

submitting a reasonable amount representing occupational rent.

- (vi) If the plaintiff fails to perform his obligations/option under this Order the Registrar of the Supreme Court is authorised to execute the transfer of the premises, the subject of this action to the purchaser.

Each side will bear his or her own costs.