

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 98/93

BETWEEN

CARMEN E. MYRIE

APPLICANT

A N D

ANDEL A. MYRIE

DEFENDANT

Mr. Gordon Steer for the applicant

Mr. Eric Frater for the defendant

IN CHAMBERS

February 19, 20 and April 12, 1996

BINGHAM, J

The parties in this matter are husband and wife. They were married on 28th December 1968 but have been living separate and apart, according to the particulars as set out in paragraph 10 of the defendant's petition for divorce, since September 1990.

The present claim has been brought by the wife/applicant by way of a Originating Summons and seeks an order as to what is the respective interests of the parties in premises known as Lot 9 ~~Montcalm Close~~ in Saint Andrew registered at Volume 1104 Folio 287 of the Register Book of Titles.

Dependent on the outcome of the Court's finding as to the interests of the parties there are certain consequential orders which are sought by the applicant in order to give effect to the application made by her.

There is no dispute as to the fact that these premises was up to the departure of the defendant therefrom in 1992 enjoyed by the parties as their matrimonial home, or that prior to this, they lived together at 7 Sirius Avenue, Kingston 17 (Harbour View) and thereafter at 29 Havendale Drive, Kingston 19.

Following their marriage the parties lived at the applicant's mother's home before acquiring 7 Sirius Avenue by way of purchase. They resided at

these premises from its acquisition in 1978 carrying out improvements to the house from a loan obtained in 1972. It is common ground that the loan was utilised in adding two bedrooms and a carport to the premises.

In 1978, 29 Havendale Drive was purchased for \$45,000.00. The deposit was obtained by using the title for the Harbour View House to obtain a loan and the balance of the purchase price along with the closing costs was obtained by way of a mortgage upon the security of the title for the Havendale premises.

There is no issue that although the parties held as joint tenants in respect of both premises that had anyone enquired as to their respective interests in the properties their response would have been that they held them in equal shares.

When 9 Montcalm Close was acquired in 1989, the parties had entered into a binding agreement for the sale of 29 Havendale Drive. The net proceeds of sale after discharging all incumbrances was \$403,000.00. The Harbour View premises was also put up for sale as the consideration price for 9 Montcalm Close, an incompleated dwelling house, was \$730,000.00. At the time of its acquisition the closing with respect to the Havendale property had not yet been effected. Moreover the sale of the Harbour View premises had not yet materialised. When it did take place the net proceeds from the sale was \$110,000.00. This left a balance of \$223,000.00 plus closing costs after the sale of both premises due on the purchase price of 9 Montcalm Close.

It is agreed by the parties that a sum of \$242,000.00 which was obtained by the applicant from Bank of Jamaica went directly towards the initial payment to the vendors. The applicant was able to acquire this sum by way of a loan from her employers Bank of Jamaica Limited and this at a preferred interest rate. She has also since removing into these premises obtained further loans which have been used to meet the payment of mortgage insurance and more particularly towards completion of the house as what was purchased was an incompleated dwelling house. In her affidavit sworn to on 13th May 1995 at paragraphs 32 and 33 she deponed that:-

"32. I have borrowed from my employers the sum of \$702,003.62 for mortgage and house improvement plus \$135,831.00 for mortgage property insurance I exhibit marked with the letters "C.M.(14)" copy statements of Loans.

33. There were personal loans totalling \$259,837.00 "C.M.(4)" which was spent as follows \$110,000.00 (special advance for deposit "C.M. (9)" \$52,180.75 J.C.B. "C.M. (12)", \$20,000.00 + \$73,000.00 C.M. (14)".

Given the fact that the marriage broke down from 1992 and that in addition the applicant has since that date been responsible for meeting the mortgage instalments the question that arises therefore is as to whether these acts by her would be sufficient to entitle her to a greater share in the premises 9 Montcalm Close?

Learned Counsel for the applicant has submitted that if the parties were not happily married at the time the improvements were carried out at the expense or cost to the applicant she would be entitled to an enlarged share in proportion to the enhancement of the value of the property by the improvements.

In support of this proposition Mr. Steer sought to rely on Re Nicholson deceased vs. Perks [1974] 2 All. E.R. 386. Counsel for the applicant also submitted that in so far as the deposit on the premises was concerned the fact that the applicant provided this sum this ought to entitle her to an enlarged share in the said property.

Learned Counsel for the defendant, Mr. Frater submitted that the history of the relationship between the parties establishes that in so far as the acquisition of the Montcalm property was concerned their common intention was that this property was to be acquired jointly. This common intention would have been applicable in relation to the purchase of 9 Montcalm Close as the matrimonial relationship was still subsisting when these premises were acquired. That on that basis the Court ought to find therefore that the parties are entitled as to their respective interests to hold in equal shares. This was so as the beneficial interests of the parties was to be arrived at by looking at their common intention at the time the property was acquired.

Learned Counsel for the defendant did not seek to draw a distinction between the interests of the parties at the time of the acquisition of the property in respect of which there is no issue and their respective interests at the time of their separation due to the break in the matrimonial relationship.

In Re Nicholson deceased vs. Perks (referred to *supra*) the parties were wife and husband. A dwelling house was purchased in 1938 for £900.00. Of the deposit the wife contributed £75.00 and the husband £15.00. The conveyance was taken in the husband's name only, the balance of the purchase price and closing costs were secured by a mortgage and the husband was responsible for meeting the monthly mortgage instalments. This he did for the next five years.

At the time of the purchase of the house the wife had anticipated that sometime in the future she would benefit from a legacy from her mother-in-law of a former marriage (her husband's aunt). This sum when realised would enable her to discharge the mortgage. The husband knew of this fact. The legacy became available when the testatrix died in 1943. The mortgage was paid off shortly after the estate was administered.

The parties made mutual wills but the husband later prepared another will by which in 1969 he bequeathed the house to his wife for life with the remainder to the defendant absolutely.

The wife took out a summons for a declaration that immediately before her husband death she was beneficially entitled to an undivided share in the proceeds of sale of the house.

Mr. Justice Pennycuik Vice Chancellor of the Chancery Division of the High Court in delivering judgment held that: - (p. 386)

- "(1) The plaintiff (wife) could only establish her claim on a implication of a resulting trust based on a common intention of the parties at the date when the house was acquired. Just as an undertaking though unenforceable to pay mortgage instalments was a factor to be taken into account in determining the common intention of the parties so also was an unenforceable undertaking to pay off the capital of the "mortgage whatever the source might be from which the spouse concerned intended to pay off the mortgage. Taking all the circumstances into account, that the original contributions to the purchase price and the arrangements that the husband would pay the mortgage instalments and that the plaintiff (wife) would pay off the mortgage whenever she received the legacy, the only legitimate inference was that it was their common in-

intention that the beneficial interest in the property should belong to them in equal shares.

- (ii) The payment by the plaintiff (wife) for the installation of central heating represented a contribution of substantial nature, within section 37 of the Matrimonial Proceedings and Property Act 1970 (England), to the improvement of the property and accordingly when it was installed the plaintiff (wife) acquired an enlarged share of the beneficial interest."

Given the facts of this case it is clear that based on the common intention of the parties at the time of the acquisition of the house, 9 Montcalm Close, the fact that the transfer was taken in the joint names of the parties they would each be entitled to an individual half share in the property.

The fact that the entire deposit was provided by the applicant from a loan obtained from her employers Bank of Jamaica Limited would not entitle her to an increased share in the house at the time of its acquisition.

Equally so would be the payment of the mortgage instalments which the applicant has made on her own without any assistance from the defendant. Such sums for which both parties on an equitable basis ought to be equally responsible for, there will therefore have to be an accounting carried out at the time of the sale or other disposition of the house and one half of the said sums when capitalised ought to accrue to the applicants share of the proceeds of sale. (See in support dictum of Wolfe J.A. in S.C.C.A. 78/93 Forrest v. Forrest delivered on 7/4/95). In this case the Court of Appeal treated the payment by the appellants former wife discharging the mortgage as a debt due from the appellant as to one half of the said payment and not as a means whereby she could become entitled to an enlarged share in the dwelling house of which the parties held as joint tenants in fee simple.

In support I rely therefore upon Forrest vs. Forrest (supra) where the learned judge of Appeal following the dictum of Nourse L.J. in Turton v. Turton [1987] 2 All. E.R. 641 at 648, the learned Lord Justice said:

"It must always be remembered that the basis on which the court proceeds is a common intention, usually to be inferred from the conduct of the parties, that the

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claimant is to have a beneficial interest in the house. In the common case where the intention can be inferred only from the respective contributions, either initial or under a mortgage, to the cost of its acquisition it is held that the house belongs to the parties beneficially in proportions corresponding to those contributions."

(Emphasis supplied)

The learned judge of appeal then stated:-

"Once the interests of the parties are defined at the time of acquisition it is my view that the unilateral action of one party cannot defeat or diminish the proportions in which the parties hold the property. The payment to redeem the mortgage cannot, therefore, diminish or increase the proportions in which the parties intend to hold at the time of the acquisition."

In my view the situation in respect of the efforts of the applicant at attempting on her own to complete the house, has to be examined on a different footing. The principle which applies in this regard being that provided the applicant's contribution is of a substantial nature, such acts in so far as they can be regarded as improvements thereby appreciating the value of the house then following the dictum of Pennycuik V.C. in Re Nicholson deceased vs. Perks (supra) at p. 392 (E):-

"One should treat the share of the party who makes the improvement as enlarged by a proportionate amount corresponding to the increase in value represented by the improvements."

(Emphasis supplied)

This increased share can be arrived at by a simple calculation. As indicated by the above citation one ought to determine the extent of the sum expended by the applicant towards completion of the house and calculate the proportion that this sum bears towards the value of the property as represented by the improvements.

Given the facts as set out at paragraph 33 of the applicant's affidavit sworn to on 13th May, 1995, which mentions a sum of \$73,000.00 expended towards Home Improvement which sum is also referred to in a memorandum addressed

by the applicant to the Director of Finance and Accounts, Bank of Jamaica dated 14th November 1990 (C.M. 14) this sum would have been approximately one-tenth of the purchase price paid for the said property. To that extent therefore this sum would have amounted to a substantial improvement to the said property entitling the applicant to an increased share in the said proceeds of sale in proportion that this sum bears towards the value of the said property. The respective shares of the parties following the improvements would, therefore, be six-tenths to the applicant and four tenths to the defendant or three-fifths and two-fifths respectively.

As to the payment of the deposit and the mortgage instalments following the departure of the defendant from 9 Montcalm Close there is no issue that these payments have been the responsibility of the applicant. In so far as these sums are concerned both the deposit and the mortgage instalments when quantified on accounts being taken by the learned Registrar of the Supreme Court, one-half of such capital sum is to be regarded as a debt due to the applicant from the defendant's share of the proceeds of sale and recoverable upon an order for accounts to be taken by the said Registrar of the Court. (Vide Forrest vs. Forrest (supra) per dictum of Wolfe J.A. at page 19.)

It is hereby declared that the applicant is entitled to a beneficial interest of 60% and the defendant to an interest of 40% in property known as 9 Montcalm Close, St. Andrew registered at Volume 1104 Folio 287 of the Register Book of Titles.

2. Order for partition and sale of the said property and distribution of the net proceeds of sale to the parties in shares stated in (1) above
3. That there be deducted from the defendant's share and paid to the applicant the sums of \$121,000.00 being one half of the sum of \$242,000.00 paid by the applicant as the initial deposit in respect of the purchase price of the said property.
4. An account to be taken by the Registrar of the Supreme Court of the payment made by the applicant by way of mortgage instalments on the said premises since August 1992. That one half of such capital

sum when arrived at to be paid to the applicant by the defendant as a debt due by him as his portion of the said mortgage instalments.

5. That the property be valued by a competent valuator to be appointed by the Registrar of the Supreme Court.
6. That upon refusal by the defendant to sign all documents of transfer upon sale the Registrar of the Supreme Court be empowered to sign.
7. For the purposes aforesaid all necessary accounts and enquiries be made.
8. Costs to the applicant agreed at \$30,000.00.