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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 49/98

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A. (Ag)

BETWEEN BERYL LEONIE NEMBHARD APPLICANT/APPELLANT

AND HOPETON LAWSON NEMBHARD RESPONDENT

Dr. R. B. Manderson-Jones for the appellant

Gordon Steer for the respondent

January 27, 28 and May 10, 1999

FORTE, J.A.:

Having read in draft the judgment of Bingham, J.A., I agree with his reasoning and conclusion and have nothing further to add.

BINGHAM, J.A.:

This appeal is from a judgment of Harris, J. arising out of an originating summons brought by the applicant under the Married Women's Property Act. The applicant claimed the following reliefs:

a. one-half share in a company, Plastic Pipes and Conduits Limited, controlled by the respondent;

b. one-half share in a company, Charlotte Farms Limited;

c. one-half interest in a lot of land at Duncans Bay, Trelawny, registered in the

joint names of both the applicant and the respondent as tenants in common;

d. one-half interest in a dwelling house at 50 Norbrook Road, Kingston 8 in St. Andrew registered in the name of the respondent.

There is no dispute as to the beneficial interest in the lot of land at Duncans Bay, Trelawny. Although it is common ground that the moneys to purchase this lot was provided by the respondent, it is registered in the joint names of the parties as tenants in common and the respondent has admitted that at the time it was bought there was a common intention on the part of the respondent that the applicant, who was then his wife, should share in the beneficial interest in the property.

As to the applicant's claim to an interest in the other properties, the learned judge found that the respondent was solely and beneficially entitled to the entire interest in the two companies and the dwelling house at 50 Norbrook Road. No issue being raised as to the applicant's claim to a half interest in the lot at Duncans Bay, the learned judge upheld the applicant's claim to her entitlement to the half share in the Duncans Bay lot.

Before us, the grounds of appeal sought to challenge the judgment only in so far as the declarations in respect of the applicant's claim to a share in Charlotte Farms Limited and a half interest in 50 Norbrook Road were rejected below. At the outset of his submissions, learned counsel for the appellant withdrew the appellant's complaint in respect of her claim to a half share in Charlotte Farms Limited (ground 8).

This leaves as the sole remaining question falling for our determination the issue as to whether the learned judge's conclusion

in respect of the applicant's claim to a half share in 50 Norbrook Road is correct.

Before residing at 50 Norbrook Road the parties lived at 4 Havendale Mews, the former matrimonial home. This house was acquired in 1968 shortly after their marriage in 1967. There was a dispute as to how the property was to be held, the respondent being desirous of the title being held by the appellant and himself as joint tenants and the appellant wanting it to be held by them as tenants in common in equal shares. She wanted this to be so in order to pass her half interest to her son by a former relationship. The appellant had used her life insurance policy as collateral to enable the respondent to raise the deposit of one thousand pounds (£1,000) by a bank loan. The appellant raised her objection to the respondent's wishes. He nevertheless went ahead and had the property transferred into his own name and had the appellant's name removed from the original documents. He said that this was done at the appellant's request. The appellant said that her name had been removed from the sales agreement and the mortgage documents without her knowledge and consent.

As the names of both parties were placed on the documents relating to the acquisition of the premises, it can be inferred that there was at that time a common intention that they were both to share in the beneficial interest in the house which was to be utilised as the matrimonial home. This would be so irrespective of how the property was to be vested, whether jointly or in common. The common intention formed at the time that the house was acquired would determine whether the spouse who had provided no monetary

contribution would be entitled to share in the beneficial interest in the property. In this case, the common intention in relation to this house can be inferred not only from the manner in which the original documents were prepared, that is, in the names of both parties, but by the appellant putting up her insurance policy as collateral for the loan for the deposit thereby clearly acting to her detriment.

The learned judge below was seized of the fact that the dispute as to how the equitable interest in the property should be held, did not alter the original intention for both parties to acquire a proprietary interest in 4 Havendale Mews. She said:

> "It is accepted that a dispute had arisen as to how the equitable interest in the property should be held, this in itself does not derogate from the original intention for both parties to acquire a proprietary interest in 4 Havendale Mews. There was an agreement then to share in the property, in that, it was their intention that the property would form a continuing provision for them during their joint lives."

When the learned judge came to consider and determine whether the appellant had acted to her detriment, she sought to rely upon the statement enunciated by Nourse, L.J. in *Grant v. Edwards* [1986] 3 W.L.R. 114 at 120 (G-H) where the learned judge said:

> "In a case such as the present, where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it."

The learned trial judge nevertheless came to a determination that the appellant was not entitled to a beneficial interest in 4 Havendale Mews. She came to this conclusion on the basis that following the dispute the appellant's insurance policy was returned to her and her name removed from the documents relating to the purchase of the property. This she saw as altering the original common intention of the parties that the appellant was to share in the beneficial interest in the house. As the insurance policy had been used to obtain the loan to cover the down-payment, this would not have affected the return of the policy as regards the application for the mortgage. Given the respondent's income, he would have had no difficulty in qualifying for a mortgage on his own.

I am of the view, therefore, that the learned judge was in error in concluding that the appellant's insurance policy had been provided as collateral towards assisting the respondent to obtain a loan to meet the total purchase price. The respondent had deposed to providing both the deposit of £1,000 by way of a loan as well as undertaking sole responsibility for obtaining the mortgage of £5,200. It was the uncontroverted evidence of the appellant that her insurance policy had been used as collateral to enable the respondent to obtain the loan to cover the down-payment of £1,000. The critical question, therefore, is as to whether the subsequent removal by the respondent of the appellant's name from the purchase documents at a time when the sale was already being negotiated, would have been sufficient to alter the original common intention of the parties that they were to share in the beneficial interest in

the property, it being seen as a continuing provision for them during their joint lives.

I would hold that when the insurance policy was used as collateral to enable the down-payment to be realised, this amounted to a detriment suffered by the appellant as a result of or in reliance on the common intention of the parties. This would be conduct sufficient to enable the appellant to seek the aid of a court of equity in imposing a trust on the legal estate in her favour. This would not have affected any subsequent change of position by the respondent in completing the sale by taking the property in his own name.

When the learned trial judge concluded that:

> "The inference is that as a result of the disagreement she was no longer interested in sharing in the property and she requested the return of her policy of insurance. It was returned to her thus not depriving her of its use."

the policy had already been utilised as collateral for the loan to meet the down-payment of £1,000.

The learned judge then went on to say that:

> "Moreover, the husband would have had to resort to other means to secure the loan. Although she had initially made the policy available in the belief that she had an interest in the house that in itself does not show that she acted to her detriment in reliance on the common intention assuring her a beneficial interest in the house."
> [Emphasis supplied].

This latter statement by the learned judge is in direct conflict with her earlier position in which she correctly found that the dispute which arose between the parties as to the manner in which the equitable interest in the property was to be held by them

would not derogate from the original common intention for both parties to acquire a beneficial interest in the property. Once there was the common intention by the parties that both should share in the beneficial interest in the property, which was acted upon by the appellant by way of providing her insurance policy as collateral for the loan to cover the down-payment, then "equity will not allow the defendant to deny that interest and will construct a trust to give effect to it." (Per dictum of Nourse, L.J. in *Grant v. Edwards* {referred to supra})

I would hold, therefore, that on the material before the learned judge below as regards her finding in respect to 4 Havendale Mews, that she erred in concluding that the appellant was not entitled to share in the beneficial interest in the property. I would hold that the parties were entitled to share equally in the proceeds of sale of this house.

The question which naturally follows, therefore, concerns whether the proceeds from the sale of 4 Havendale Mews can be identified as part of the funds utilised in acquiring 50 Norbrook Road by way of applying these funds in the completion of the construction.

The learned trial judge rejected the appellant's claim to share in the beneficial interest in 50 Norbrook Road. In supporting the decision arrived at by the learned judge, learned counsel for the respondent submitted that following the acquisition of 4 Havendale Mews in 1968 that rather than pooling their resources both parties were busy buying up various properties on their own. When the respondent, who by the 1970's was now a successful businessman,

acquired 50 Norbrook Road in 1981 he took the transfer of the title to these premises in his sole name. There was, therefore, nothing strange or unusual about this purchase and the manner in which this property was acquired. There being no common intention that the appellant was to share in the beneficial interest in this property, no amount of detriment could suffice to give the appellant a beneficial interest in the property purchased. Counsel cited in support:

1. *Gissing v. Gissing* [1970] 2 All E.R. 780

2. *Lloyds Bank v. Rosset and another* [1990] 1 All E.R. 111.

Both cases are clearly distinguishable on the facts from the present case. The former being decided on the failure by the wife, who was claiming a beneficial interest, to establish a common intention that she was to share in the beneficial interest in the property or that she had made a substantial contribution to entitle her to claim an equitable interest by way of trust. In the case of the latter, it was held that:

> "...in resolving a dispute between two persons who shared a home in circumstances where one party was entitled to the legal estate and the other party claimed to be entitled to a beneficial interest, or in determining whether the person claiming to be entitled to a beneficial interest had an `overriding interest' in the property prior to the completion of the disposition of the property to a third party so that, by virtue of section 70(1)(g) of the 1925 Act (Law of Property Act of England), the transferee's estate was subject to that interest; the fundamental question which had to be resolved was whether, on the basis of evidence of express discussions between the partners and independently of any inference to be drawn from their conduct in the course of sharing the property and managing their joint affairs

> there had been at any time prior to the acquisition of the property or exceptionally at some later date any agreement, arrangement or understanding reached between them that the property was to be shared beneficially coupled with detrimental action in the alteration of position on the part of the person claiming the beneficial interest or failing that whether there had been direct contributions to the purchase price by the person claiming the beneficial interest from which a constructive trust could be inferred. On the facts, the monetary value of the wife's work expressed as a contribution to the cost of acquiring the property was almost de minimis and although discussions had taken place between the husband and the wife no decision had been made prior to completion that she was to have an interest in the property. It followed that the wife was not entitled to a beneficial interest in the property and, accordingly, the question whether she had an overriding interest in the property prior to completion which by virtue of section 70(1)(g) of the 1925 Act took priority over the bank's charge did not arise." [Emphasis supplied]

The respondent said that the purchase price of $52,000 required to acquire the lot with an unfinished structure at 50 Norbrook Road came from a heavy equipment company controlled by him. In 1981 the only such company was Plastic Pipes and Conduits Limited. The respondent obtained mortgage financing in completing the dwelling house at a cost of $250,000. The parties removed into these premises in March 1982 which became the new matrimonial home. When 4 Havendale Mews was later on sold in 1982 the entire proceeds of sale amounting to $135,000 was put back into Plastic Pipes and Conduits Limited.

Given the manner in which 4 Havendale Mews was disposed of and 50 Norbrook Road acquired, it can be reasonably inferred that the purchase of the latter was undertaken by the respondent with the

full knowledge and consent of both parties that these premises was to become the new matrimonial home. Having regard to the manner in which the proceeds of sale from 4 Havendale Mews were applied, it can also be inferred that the appellant's share in this house could be regarded as her contribution towards the purchase and completion of the property 50 Norbrook Road.

As the appellant was entitled to share equally in the beneficial interest in 4 Havendale Mews, equity would not allow the respondent to use these funds in which the appellant was entitled to share by way of a benefit without the respondent doing equity as between the parties and would cause a trust to fasten upon the legal estate in the new matrimonial home to which the appellant was entitled at least to the extent of her contribution.

The half share to which the appellant was entitled on the sale of 4 Havendale Mews is to be seen, therefore, as her contribution towards acquisition of the premises at 50 Norbrook Road, the total cost of the property with the completed building amounting to approximately $300,000. This would result in the appellant's beneficial interest in this property being fixed at a one-quarter share.

To this extent, therefore, the appeal is allowed. The judgment of the learned judge with respect to the appellant's claim to a one-half share in 50 Norbrook Road, St. Andrew, is set aside. Her entitlement is to a one-quarter share in the said property.

On the question of costs, no argument having been advanced in relation to ground 8 relating to the appellant's claim to a one-half share in the company, Charlotte Farms Limited, this ground was

treated as having been abandoned. The appellant having succeeded in part on the only remaining ground raised in argument, I would order that half the cost of the appeal be awarded to the appellant.

LANGRIN, J.A. (Ag.):

I also agree.

FORTE, J.A.:

Appeal allowed in part. Order of the court below in respect of the appellant's interest in 50 Norbrook Road set aside and substituted therefor an order that the appellant holds one-quarter interest in 50 Norbrook Road in the parish of St. Andrew registered at Volume 1000 Folio 673 of the Register Book of Titles.

Half costs of appeal to the appellant to be taxed if not agreed.