

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 360/95

BETWEEN	BERYL LEONIE NEMBHARD	APPLICANT
A N D	HOPETON LAWSON NEMBHARD	RESPONDENT

R. B. Manderson - Jones for applicant.

Gordon Steer instructed by Chambers,
Bunny and Steer for Respondent.

Heard: December 17, 1997, February 9
and May 1, 1998.

HARRIS, J.

The applicant, by way of an originating summons issued on September 12, 1995 claims the following:-

- a. "A declaration that the applicant and respondent are entitled to an equal interest in the corporations known as Plastic Pipes and Conduits Ltd. and Charlotte Farm Ltd.
- b. A declaration that the applicant and respondent are entitled to an equal interest in property 50 Norbrook Road in the parish of St. Andrew registered at Volume 1000 Folio 673 of the Register Book of Titles and property at Duncans Bay in the parish of Trelawny registered at Volume 1066 Folio 257 of the Register Book of Titles."

The parties are husband and wife. They were married on 26th August 1967. A decree nisi of divorce was granted to the Respondent on the 25th May 1995. Subsequent to the marriage they resided at divers places and finally at 50 Norbrook Road, one of the properties forming the subject matter of this action. During the period in which they lived together three parcels of real estate were acquired and two companies were incorporated in which the applicant claims an interest. A house at 4 Havendale Mews, St. Andrew was bought in 1968 and sold in 1982. In 1979 a lot of land was purchased at Duncans Bay, Trelawny and in 1982 a lot with an incomplete house was bought at 50 Norbrook Road, St. Andrew. The husband was registered as sole proprietor of 4 Havendale Mews and 50 Norbrook Road while

both parties were registered as proprietors of Duncans Bay as tenants in common. In 1969 and 1977 known as Plastic Pipe and Conduits Ltd. and Charlotte Farm were formed, in which only the husband hold shares.

It was the applicant's evidence that in 1968 her husband and herself discussed the possibility of purchasing a house. She forged ahead to seek a house and 4 Havendale Mews was subsequently purchased with the clear understanding that the home would be jointly owned by them. In 1970 they purchased property at Duncans Bay from funds which they had pooled in an account. She further averred that in 1971 her husband incorporated a Company called Plastic Pipes and Conduit Ltd. In December 1976 her husband discussed with her the prospective purchase of a property known as Charlottenburgh, St. Mary comprising 230 acres of land. They viewed the property and made the decision to purchase it. In 1977 her husband incorporated a Company called Charlotte Farms limited, for purpose of purchasing the property, in which her husband held majority shares and her brother in law held minority shares. She declared that she was not registered as a shareholder in either of the two companies as she was at the time an employee of government and was thereby precluded from openly holding shares in any company. But there was an agreement between them that she should share in these companies on an equal footing with her husband.

She further stated that in 1980 they purchased property at 50 Norbrook Road which comprised a lot of land and a small unfinished structure. Her husband extracted money from the Company Plastic Pipes and Conduits Ltd. for the purchase and construction of the house and then channelled the proceeds of sale of 4 Havendale Mews into that company.

It was the respondent's averment that they discussed the possibility of owning a house. His wife selected a home in Valentine Gardens while he chose 4 Havendale Mews costing £6200. He borrowed

£1000.00 which met the required deposit. He alone assumed the repayment of the mortgage of £5,200.00 and of the deposit.

He met all household expenses and wife paid a helper when there was one. They never pooled funds. On one occasion he placed his wife's name on his current account which she habitually abused, resulting in his closure of it.

Duncans Bay he asserted, was bought from his own funds and he placed his wife's name on the title. He further divulged that in 1969 a company called Plastic Extrusion Limited was formed by himself and two others. He subsequently sold his shares and applied the proceeds to incorporate his own company, Plastic Pipes and Conduits Limited. His wife made no contribution to the acquisition or running of the company, nor was it contemplated at any time that she would have been a shareholder.

He also denied that Charlotte Farms was purchased by them both or that they had any discussions relating to her becoming entitled to shares in that company.

It was further stated by him that his wife was not privy to the purchase of 50 Norbrook Road. She only became aware of the purchase subsequent to the sale, to him, of the property.

It is settled law that where contributions are made by parties in the acquisition of property, in which the legal estate is vested in one party, in the absence of evidence to the contrary, the other party to the purchase, gains a beneficial interest in such property. But in a situation where property is held in the name of one of two parties, the party claiming a beneficial interest must show that the other party holds his or her interest by virtue of a constructive or resulting trust and that it would be inequitable for the legal ownership to reside solely with the party in whose name the title stands. Any such claim must be demonstrated by proof of a contribution to the purchase, or by a common intention that the party should have a beneficial interest in the property and on the faith of such common intention, he or she acted to his or her detriment.

In enunciating the principles relating to the claim of a spouse to an entitlement to a beneficial interest in property, the legal estate of which is vested in another spouse, Lord Diplock in *Gissing v Gissing* [1970] ALL ER 780 at 793 asserted,

"Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties, no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift."

Viscount Dilhorne in *Gissing v Gissing* (supra) at pg.

785 declared:

"I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest."

I will first make reference to the claim by the applicant relating to an interest in Plastic Pipes and Conduits Limited. It was her averment that when the company was formed in 1971 it was the intention of the parties that the company would

be owned equally by them. She stated she was not named a shareholder as she was then an employee of the government and was prohibited from holding shares in a company. She declared she had made no cash contribution to the establishment but asserted that her contributions included accompanying her husband overseas to purchase machinery and supplies. It was also her evidence that the company was not financially viable in its initial stage, a consequence of which, she had to assume domestic responsibilities for the household expenses. It was further asserted by her that her husband had sold 4 Havendale Mews and applied the proceeds of sale to the company as he had extracted money from it to purchase 50 Norbrook Road.

For convenience, it is necessary to make reference to the acquisition and sale of 4 Havendale Mews at this juncture. The applicant conceded she had not advanced any money on account of the purchase price of the property but that there was an agreement by the parties that they should own the property jointly. Consequently, her case is dependent on whether she has demonstrated that there was a common intention that she should have gained a beneficial interest in that property. To establish such intention there must be some evidence which points to its existence. "It would not for instance, suffice if the wife just makes a mortgage payment while her husband was abroad. Payment for a lawn, and provision of some furniture and equipment for the house does not of itself point to the conclusion that there was such an intention" per Viscount Dilhorne in *Gissing v Gissing* (supra) at 796.

In 1968 the parties discussed the possibility of purchasing a matrimonial home. 4 Havendale Mews was subsequently purchased for the sum of £6200. The deposit of £1000 was obtained by way of a loan on the security of a policy of insurance owned by the wife. The balance purchase money was obtained by a second mortgage of £5200. The husband alone repaid the loans.

It was contended by the applicant that she met most of the household expenses. She stated that at the inception of the marriage she had been in a stronger financial position than her husband as her salary of £1600 monthly exceeded his. There is evidence from the Respondent which disproves this assertion. The husband's averment in paragraph 3 of his affidavit sworn on the 12th December 1997, supported by relevant documentation clearly rebuts the applicant's statement as to their respective incomes. At the material time the husband was in receipt of salary amounting to £2100 in addition to allowances of £1140 monthly, which was, more than twice that of the applicant.

Although the applicant stated that she substantially contributed to the household expenses to facilitate her husband to meet expenditure relevant to the mortgage payments and although this has been refuted by the husband, he admitted that there was an understanding that she should share in the property. However, the husband disclosed that a dispute arose with regard to the manner in which they should hold their respective interests and the applicant demanded the return of her policy of insurance, following which, she requested that her name be not placed on the title. The applicant stated that she only requested the return of her policy of insurance when she discovered that her name had been erased from a document she had signed in the office of the real estate agent, and this was done without her knowledge.

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.

It is necessary however, to embark on further exploration of the evidence to ascertain whether, based on the common intention of the parties that the applicant should acquire a proprietary interest in the house, the applicant acted to her detriment.

In *Grant v Edwards* 1986 2 All ER page 43, Nourse L.J. declared:

"In 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 on 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 parties intended to purchase the house as a joint enterprise. A dispute arose. The husband desired that they should hold their respective interests as joint tenants while it was the applicant's desire that the property be held by them as tenants in common, as, she wanted her child, who was not a child of the union, to benefit from her share, upon her demise. The respondent stated that the applicant instructed the vendors to remove her name from the relevant documents and requested the return of her policy of insurance following which her name was struck off the documents and her policy was returned to her.

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 surrendered to her. The policy was not retained thus not depriving her of its use. 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.

I would therefore hold that the applicant is not entitled to an interest in 4 Havendale Mews.

I will now return to continue consideration to the claim in respect of shares in the company. The applicant has imputed, that her indirect contributions to the company grants her an entitlement to share in it. It was contended by her that she met most of the household expenses during the early stages of the life of the company.

In **Falconer v Falconer [1970] 3 ALL ER 449 at 452 Lord Denning** emphasized that:

"where reliance is placed on financial contribution to family expenses the contribution must be substantial."

Is there evidence to support the applicant's allegation that she had substantially contributed to the household expenses to enable the husband to direct his funds into the business? She related that during the early life of the company there were difficulties touching its viability resulting in her discharging expenses attendant on the domestic responsibilities. However in cross-examination, it was discovered that this was untrue. She revealed that, from the commencement of the marriage the parties agreed that they would share the payment of household bills. She also stated that on occasions she met the grocery bills in its entirety but went on to say that she would not say the household expenses paid by her husband were minimal. He was generous. He gave her money but when he commenced the business she did not ask him for money, or expected him to give her money. It was suggested to her that her husband gave her a cheque weekly to purchase groceries. Her response was, "I would not say that it did not happen, but it would be years ago." The respondent had even disclosed that he had at one time placed the applicant's name on one of his bank accounts. Bills were paid from that account. She admitted that this was true. He continued by stating that

he was compelled to close the account by reason of the applicant's abuse of it.

The applicant also stated that she accompanied her husband overseas to assist with purchase of equipment and machinery for the business. This was refuted by the respondent. He asserted that a company called Plastic Extrusions Limited was incorporated in 1969 by two other persons and himself. He owned 40% of shares in that company which he sold and the proceeds of sale were applied towards the purchase of Plastic Pipes and conduits Ltd. He also stated that he was accompanied overseas by one Ferdinand Barnes, who had knowledge of equipment needed, to purchase the machinery and not by the applicant. Even if she had done so, this itself does not rank as a contribution which would entitle her to share in the company.

It is uncontroverted that the applicant had not injected any direct financial assistance in the company. She did not assist in the daily operation, nor did she render any unpaid services therein. It is clear that she did not assume responsibility for the domestic expenses in order to permit the strengthening of the company's viability as I find that it was the husband who met the major part of the household expenses. In cross-examination she stated that some nights she remained with him at the company and she prepared meals and took it to him there. This cannot be rated as creating an interest for her. Here she is performing an act which any dutiful wife would do. It is evident she made no contribution to the formation or running of the company and it is my opinion she did not have any knowledge of the circumstances giving rise to the genesis of Plastic Pipes and Conduits by virtue of which any discussions with the respondent as to an interest could have emerged. I find therefore, that she is not entitled to share in the company.

I will now consider the claim relating to the purchase of Lot 133 Duncans Bay, Trelawny. The applicant stated that the property was purchased from their joint funds and was registered in their joint names. The husband stated the lot was bought from his resources only and wife had no input. There is no evidence they pooled funds.

It is settled law that, in the absence of evidence to the contrary where a husband transfers property into the name of his wife there is a presumption that it is intended as a gift, or an advancement to her. Similarly, where property is in the joint names of spouses the presumption is that a joint beneficial tenancy is created, in absence of contrary evidence.

The law was well stated by Lord Upjohn in **Pettitt v Pettitt** [1969] 2 All Er 385 at 407:

"So that in the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her but if he puts it into joint names then (in the absence of other evidence) the presumption is the same as a joint beneficial tenancy."

In the present case, the applicant stated that it was intended that the lot should be owned by her husband and herself in equal shares. Her name has been recorded on the certificate of title with that of her husband as tenants in common. This raises the presumption of an advancement of a share in the property to her. The presumption has not been rebutted. The fact that this is intended to be a gift to her has not been challenged. I therefore hold that the applicant has acquired a beneficial interest in the lot at Duncans Bay and they both hold same in equal shares.

Reference will now be made to the purchase of Charlotte Farms Ltd. Paragraphs 20 - 23 of the affidavit of the applicant sworn on the 27th September, 1997 reads:-

- "20. That in December, 1976 my husband discussed with me the purchase of Morris Cargill's Farm Charlottenburgh" which consisted of 230 acres of land a dwelling house and workers housing.
21. That we went and looked at the property together and we agreed to buy it. We discussed different projects and we bought cattle from the Ministry of Agriculture. That as far as I am aware we still have cattle on the property.
22. That my husband told me he was going to form a company called Charlotte Farms Limited which company would purchase and manage Charlottenburgh.
23. That in 1977 Charlotte Farms Limited was incorporated for the sole purpose of purchasing and did purchase the property Charlottenburgh. That at the time of incorporation my husband held 11,000 shares in Charlotte Farms Limited which he held in trust for the both of us. That my sister's husband, Phillip Nathaniel Morris held 9,000 shares in trust for himself and his wife. That within one year Phillip Morris sold his shares to my husband who since then has held all the shares in the said company in trust for the both of us. That there was a clear understanding between my husband and myself that we would both own an equal interest in the company."

In paragraphs 18 and 19 of her affidavit of the 6th October, 1997 she stated:-

- "18. As to paragraph 35, respondent came home at lunch one day in December, 1976, while I was on Christmas vacation from my studies. He told me that Johns, the salesman, had approached him about purchasing Charlottenburgh - Morris Cargill's farm. He wanted my opinion and I told him I thought we should look at it. We went to look at we decided to purchase the property. The respondent said that he would invite Phillip Morris to invest as he knew he was preparing to come home. Respondent had purchased a piece of land for Phillip previously.
19. As to paragraph 42, the down-payment was made before I returned to school and we discussed the financing though I did not take part in any negotiations as I was away at school. We agreed to seek financing through Jamaica Development Bank."

The applicant has averred that there was an agreement between the parties that she should hold shares in the company called Charlotte Farms Ltd. but was precluded from overtly doing so by virtue of her being a civil servant. The husband denied that there was any such agreement. No direct contribution to the acquisition of the company was made by the applicant. The question which arises is whether she has established that she had made indirect contribution, on the basis of which it had been demonstrated that there was a common intention for her to benefit from shares in the company and the basis of that intention she acted to her detriment.

The husband stated that he told his wife about the property and of his intention to purchase. She informed him that her brother-in-law Phillip Nathaniel Morris was desirous of returning to live in Jamaica. He went on to say "I agreed to this and he put up some money." The property was purchased in the name of Charlotte Farms Limited. The majority shares were held by her husband and the minority shareholding was held by Phillip Morris.

Mr. Manderson-Jones urged that it was the applicant who had found Phillip Morris, the equity investor, without whose imput her husband could not have purchased Charlottenburgh through Charlotte Farms Ltd. He also urged that this act of hers was one which reflected the common intention of the parties to acquire the property and that the shares though in the husband's name would be held in the trust for them both. He further submitted that she did not only introduce the equity partner but invested her time, skill and effort into making the company and farm a worthwhile venture.

The company was formed and the property Charlottenburgh was bought at a time when the applicant was absent from the island pursuing a course of study. She averred that on a visit to Jamaica on holiday she was told by her husband of the availability of the property. They went and inspected it. She suggested to him that her brother-in-law Phillip Morris

wished to return to reside in Jamaica and he could join in the purchase with him. There is nothing in her statement which connotes an introduction by her of an equity partner to enable her husband to purchase the property. Further, it is clear that it was after she was informed by her husband of his intention to purchase that she made the suggestion about her brother-in-law's impending return to Jamaica and his joining in the purchase. There is no evidence that the husband could not have purchased the property on his own. Interestingly, he purchased Morris's entire holding in the company within a year. It cannot therefore be recognised that the applicant had introduced an equity investor thus enabling the husband to acquire the property.

Is there any other evidence from which by implication it could be asserted that a common intention for the applicant to benefit from shares in the company existed? The applicant declared that she had through her instrumentality obtained a certain strain of cattle for the farm. This cannot be characterised as a contribution, as this in no way relates to the acquisition of the farm, or the company.

It is of interest to note that the applicant stated among other things, that they had discussed securing financing through the Jamaica Development Bank. This was denied by the husband who stated that he obtained a vendor's mortgage. Logic dictates that if he secured a vendor's mortgage, it would have been absolutely unnecessary for him to have considered a mortgage from the bank. In cross-examination she said she did not know her husband's business she was only aware of what he told her. This clearly appears to be the situation touching the arrangements and negotiations relating to the acquisition of Charlotte Farms.

The averment by the applicant that her husband had expressly agreed that she should hold shares in the company remains unpersuasive. She did not perform any act in the light of which it could be inferred that there was a common intention for

for her to benefit from shares in the company. There is no evidence to show that the conduct of her husband influenced her into assuming that she should have acquired an interest in the company's shares. I therefore find that she does not qualify to share in Charlotte Farms Limited.

It will now be necessary for me to advert my attention to the applicant's claim in 50 Norbrook Road. She stated that her husband and herself purchased 50 Norbrook Road and it was their intention that it would be their matrimonial home. She stated also that she bought decorative items, bore the responsibility of the landscaping of the property, gave structural advice and also delivered \$10,000.00 from her savings towards the construction of the house.

In *Grant v Edwards* 1986 2 ALL ER page 435 Mustil L.J.

declared:-

"The law does not recognise a concept of family property, whereby people who live together in a settled relationship ipso facto share the rights of ownership in the assets acquired and used for the purposes of their life together. Nor does the law acknowledge that by the mere fact of doing work on the asset of one party to the relationship the other party will acquire a beneficial interest in that asset."

In continuing he said:

"In a case such as the present the inquiry must proceed in two stages. First, by considering whether something happened between the parties, in the nature of bargain, promise or tacit common intention, at the time of the acquisition. Second, if the answer is yes, by asking whether the claimant subsequently conducted herself in a manner which was (a) detrimental to herself and (b) referable to whatever happened on acquisition. (I use the expression 'on acquisition' for simplicity. In fact, the event happening between the parties which, if followed by the relevant type of conduct on the part of the claimant, can lead to the creation of an interest in the claimant may itself occur after acquisition. The beneficial interests may change in the course of the relationship.)"

The applicant stated that the cost price of the property and the cost of construction were met from funds from Plastic Pipes and Conduits Limited and when the husband sold Havendale Mews the proceeds of sale were put back into Plastic Pipes and Conduits.

The certificate of title exhibited shows the purchase price of the property as \$34,000. However, the respondent declared that the total cost price was \$52,000.00. The lot was purchased for \$34,000.00 and an incomplete building thereon was bought for \$18,000.00. He further stated that the purchase price was paid from funds in a Heavy Duty Equipment Company owned by him and the cost of construction was funded by a mortgage. It is of importance to make mention of the fact that the certificate of title for Norbrook Road bears, among other things, endorsements of mortgage for \$50,000.00 dated the 12th March 1982 and a mortgage for \$200,000 dated the 19th March 1982. These facts would therefore render the applicant's averment that the cost of construction was met from the company's account, unreliable, as the inference must be that the proceeds of the mortgages were utilised to carry out the construction, these mortgages being obtained during construction.

The respondent denied that the house was purchased with the view of it becoming a matrimonial home. It was his assertion that it was bought for speculative purpose and on completion his admiration for the edifice influenced him in making a decision to reside there. He further stated that it was bought without the applicant's knowledge, as at the time of purchase, she was desirous of migrating from Jamaica and even when she became aware of the purchase, she chided him for buying property in Jamaica during that period.

During the time Norbrook was purchased, the applicant had property of her own. The reason proffered by her for owning property, was to obtain a profit and eventually purchase a house of her own, as her name had been removed from the title.

for Havendale Mews. She however sold her holdings in 1981 converted the proceeds of sale to United States dollars, which she gave to her husband to place in a foreign exchange account in Florida. It is somewhat bewildering to conceive that the applicant who had purchased property of her own as a result of the failure of husband to include her name in the title for Havendale Mews would have been involved in any arrangement with the respondent in relation to the purchase of another home. Moreover, she sold her properties, transported the proceeds of sale abroad, which gives credence to the respondent's evidence that she had wished to migrate. The conclusion to be gleaned from her conduct would be that she had no interest in owning property here. I find that respondent's evidence, that when he bought the property she was unaware that he had done so, cogent.

Although the property was purchased exclusively by the respondent through his own resources and the applicant initially had no knowledge of its acquisition, I must proceed to consider whether there was any direct contribution or there were any events which occurred after the acquisition, from which it can be inferred that there was a common intention by the parties which leads to the creation of an interest in Norbrook Road attributable to the applicant.

The applicant averred that she contributed \$10,000.00 towards the construction of the house. It is difficult to comprehend that a wife who wished to migrate and was disappointed about her husband not placing her name on the title of a house which was bought shortly after marriage, not having misgivings about contributing to the construction of a house bought by her husband. For the foregoing reasons and in light of material discrepancies in her testimony, which severely affects her credit, I am not convinced this sum or any money whatsoever was given towards construction. I accept the husband's evidence that the construction was exclusively funded by a mortgage taken by him.

In **Midland Bank PLC v Dobson v Dobson 1986 1 FLR 171**

it was held that it was within the province of a trial judge to find a common intention from the evidence if it is accepted that the parties treated the house as "our house" and had "principle of sharing everything." It was however pointed out that a mere common intention was insufficient. It is important for the claimant to demonstrate that she acted to her detriment in the reasonable belief where she was so acting.

She also announced that she substantially contributed to the household expenses. There is no connection between the payment of household expenses and the cost of construction to show that without her contribution the respondent could not have repaid the mortgage.

It was also her evidence that she bought decorative items, had the gardens landscaped and purchased plants. "The court is not entitled to infer a common intention from the mere fact that she provided chattels for the joint use in a new matrimonial home" per Lord Diplock in **Gissing v Gissing 1970 2 ALL ER 780 pg. 794**. Even if she had bought the items for the house, purchased plants and had the landscaping of the garden done, these would not rank as contribution to the acquisition of the home.

She further declared that during the construction she visited the site on many occasions and gave her husband advice as to structural arrangements of the building. Paying visits to the site of construction and having an input in the structural arrangement of the house are not methods of conduct which are referable to an intention that she should have a beneficial interest in the property. Her claim as to an interest in Norbrook Drive therefore fails.

The applicant has not established that she is entitled to an interest in Plastic Pipes and Conduits Limited and Charlotte Farm Limited, neither has she substantiated her claim to an entitlement to a share in 50 Norbrook Road. It has however

been settled that she holds Lot 133 Duncans Bay registered at Volume 1066 Folio 257 in equal shares with the respondent.

Costs to the applicant.