IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E186/94

BETWEEN	**YVONNE NEMBHARD**	**APPLICANT**
A N D	**WINSTON NEMBHARD**	**DEFENDANT**

Gordon Steer instructed by
Chambers, Bunny & Steer for Applicant

Dr. L. Barnett and Carlton Williams instructed by
Williams, McKoy and Palmer for defendant.

Heard on: May 9,10,16,18; July 11,12;
August 21, 23 & November 14, 2000.

Harris, J.

The Applicant, by way of an Originating Summons issued on May 13, 1994 seeks an Order for the determination of the respective interests of the Defendant and herself in the following properties:

(i) Lot 106 Coopers Hill, St. Andrew

(ii) Premises at Mt. Atlas, St. Andrew

(iii) 1 North Avenue, St. Andrew

(iv) Premises known as Stony Hill Pen, St. Andrew

Certain consequential orders were also sought.

The parties were married on August 24, 1976. All 4 properties mentioned in the foregoing paragraph were purchased subsequent to the marriage.

The property known as lot 106 Coopers Hill is registered at Volume 968 Folio 575 with Mount Atlas Estates Ltd. as registered proprietor. Mount Atlas property is registered at Volume 938 as registered proprietor. One North Avenue comprises 2 properties, namely 10 & 12 Northend Place. 10 Northend Place is registered at Volume 955 Folio 432 in the names of the Applicant and Defendant as joint tenants while 12 Northend Place is registered at Volume 955 Folio 433 in the name of NEM Supply Company Ltd. The property at Stony Hill is known as 1 Gorwell Arie and is registered at Volume 1108 Folio 365 in the names of the parties as joint tenants.

This application is brought under section 16 of the Married Women's Property Act under which the Court is empowered to settle "any question between husband and wife as to title or to possession of property". The jurisdiction of the Court, however, extends only to the enforcement of proprietary or possessory rights of one spouse in the property of another.

The court may only adjudicate on assets to which either party is entitled or might become entitled.

The properties lot 106 Coopers Hill, Mount Atlas and 12 Northend Place are registered in the names of two companies. The applicant maintains that she is entitled or might become entitled.

The properties lot 106 Coopers Hill, Mount Atlas and 12 Northend Place are registered in the names of two companies. The Applicant maintains that she is entitled to a share in these properties. She is registered as a shareholder in the two Companies NEM Supply Ltd. and Mount Atlas Estates. The legal interests in these properties vest in the companies. As a consequence, the court could not entertain jurisdiction over those properties. Her claim for a declaratory interest in them is not sustainable.

I will now turn to the Applicant's claim with respect to Lot Gorwell Arie, 10 Northend Place as well as for shares in NEM Supply Company Ltd. and Mount Atlas Estate Company Ltd.

The foundation of the Applicant's claim is anchored in the law of trusts. The principles which governs the entitlement to a beneficial interest in property by way of a trust, as between husband and wife had clearly been

laid down in Gissing v Gissing 1970 2 ALL ER 780. Such trust may arise either by virtue of a common intention of the parties to share the beneficial interest in the property or by reason of the doctrine of the presumption of advancement.

It was averred by the defendant that 1 Gorwell Avenue was purchased in the joint names of the Applicant and himself from his funds and from that of the company known as NEM Supply Company Ltd. He further reported that the applicant had made no contribution to the purchase.

Mr. Steer urged that in the circumstances outlined by the defendant, the doctrine of the presumption of are advancement would be applicable. He also submitted that the parties had a clear common intention as to the ownership of the property.

As a rule, the doctrine of the presumption of advancement is operable in circumstances where there is absence of direct evidence of common intention and such intention has to be imputed by the Court.

However the court will not presume an advancement where there is evidence of common intention but where there is a common intention it must also be shown that the party who makes the claim, acted to his or her detriment. In keeping with this proposition, Sir Nicholas Brown-Wilkinson in Grant v Edwards 1986 ALL ER 426 at 435 at 437 declared: -

"This requires two matters to be demonstrated: -

(a) that there was a common intention that both parties should have a beneficial interest and

(b) that the claimant has acted to his or her detriment."

It is therefore necessary to determine at the outset whether on the evidence presented it is clear that a common intention for the parties to share beneficially in the property existed and that the applicant acted to her detriment. If no such intention is demonstrated then the question of presumption of an advancement ought to be investigated.

In the affidavit of May 12, 1994, the Applicant revealed that the defendant and herself discussed the purchasing of a house which would then become their matrimonial home. At that time they were occupying residence in Villa Nova, Spanish Town which was owned by the defendant. They inspected several houses and within a year they finally settled on Lot 1 Gorwell Arie. This property was transferred to the parties in October, 1979. This I accept.

The intention of the parties was clear. They held discussions with respect to the purchase of a home which would become the matrimonial home. A house was purchased. It was acquired in their joint names. Title was issued to them as joint tenants. This obviously and unequivocally

points to an intention that both parties at the time of agreed the acquisition of the property that the applicant should benefit therefrom. It is plain that the property was intended to continue to provide a home for there and then children which they have, for the foreseeable future. Additionally, the Applicant executed the mortgage deed where the property was purchased. In so doing, she would have acted to her detriment. She is therefore beneficially entitled to an interest in the property.

Having found that she ought to share in property the matter of the apportionment of the respective shares of the parties must be determined. To do so, I must make reference to Gissing v Gissing 1970 2 ALL ER - 780 with respect to apportionment of matrimonial property, in which Lord Denning at page 828 declared:

> ***"The remaining question is: in what proportions? In most of these cases the parties do not get down to the proportions. It is impossible to say what they would have agreed about it if they had thought about it. In the absence of any clear division the only course that the court can take now, as it did before Pettitt v. Pettitt, is to say that it should be half and half."***

The property was acquired as a matrimonial home. It was intended by such acquisition that it should be a continuing provision for the parties and their children for the future. The parties are jointly entitled to the property,

this they would have treated as belonging to them equally. This Applicant is entitled to a one half share.

I will now turn to 10 Northend Place. This property is registered in the joint names of the parties. It was purchased in 1981. The defendant states that it was purchased from funds from the business NEM Co. Ltd. and material for the construction of building on the property was obtained from the business and with the aid of mortgages.

He asserts that the property is owned by the Company but the title was issued in the joint names of the Applicant and himself as the vendor was unwilling to grant a mortgage to a company. Section 68 of the Registration of Titles Act mandates that a certificate of Title is conclusive evidence that the person so named therein is the one in whom the proprietary and possessory interest of the land is vested. The proprietorship of the premises is vested in the parties. The Company and is not and could not be a party to these proceedings and therefore is not competent to contest the ownership of the property under the present application.

The Company's statement of Accounts for the years 1985, 1987, 1988, 1989 and 1990 the property is included as one its fixed assets and states that the title was registered in the name of a Director. This would not in any way establish that the property is an asset of the Company.

Although the defendant declared that the vendor was unwilling to grant a mortgage to the Company, hence the taking of the property in the joint names of the parties, in her affidavit in response dated March 3, 1995, this was refuted by the Applicant. She went on to state that "we intended to purchase the premises in our names from the outset and this we did." She also stated that the defendant informed her that that since 10 Northend Place was in their joint names 12 Northend Place should be put in the name of the Company for tax purposes.

In my opinion if the property had been purchased from funds of the company, then, the statement of account would have specifically recited in its schedule of expenses this expenditure with respect to 10 Northend Place. No reference was made to it despite the defendant's assertion that all transactions are reflected in the Company's accounts.

There is no evidence that the source of the initial funding for the purchase of the property came from the company. A mortgage on the security of the property was obtained in its acquisition. Payments towards interest and sinking fund were made by the defendant. The receipts produced by him show that payments were made by him and not by the company. Indications are, on examination of the receipts that only 3 of several payments were made by cheque. It is a distinct possibility that if

payments were made on behalf of the company they would have been made by cheques, as the company operated a chequing account.

It is my view that when the property was purchased the husband had made the initial payments from his resources and a mortgage was obtained for the balance. At the time of acquisition of the property the parties expressly agreed to purchase the property in their joint names. The defendant continually reassured the applicant she had an interest in the property.

The applicant, pursuant to that agreement to purchase the property, had executed the mortgage deed. She would have committed herself to an obligation for repayment of the mortgage debt. In so doing she would have acted to her detriment.

The common intention of the parties was made plain. It seems clear to me that there was not only an understanding but also an agreement that the applicant should receive some proprietary interest in the property. It follows therefore that she is entitled to a beneficial interest in it.

The proportion to which she is entitled must now be determined. There being no means by which the proportionate shares of the parties can be ascertained, the maxim 'equality is equality' becomes operable. Consequently the interest of each party in the property amounts to one half.

On the other hand, assuming the view is adopted that at the time the property was acquired there was no express agreement between the parties to share it, then, the presumption of an advancement would arise. In the absence of evidence to the contrary, where property is purchased by a husband in the joint names of his wife and himself, a gift to the wife is presumed. The cases of *Pettitt v. Pettit 1969 2 All ER 385 and Harris v Harris (unreported) S.C.C.A 1/81* dated July 7, 1982 support this proposition.

In the case under review, the parties discussed the purchase of the property. The property was purchased. The defendant's continuous reassurance that the applicant had an interest in it would have fortified her belief of part ownership. She executed the mortgage deed. In my view the parties intended to purchase the property to be owned exclusively by them. The circumstances illustrate that the husband intended a gift to her by way of are advancement, there being no evidence to demonstrate otherwise.

The matter of the extent of the share to which the applicant is entitled remains to be considered. The extent of the share to which she is entitled being unascertainable the maxim "equality is equity" must be invoked. Accordingly the parties should benefit equally as owners of the property.

I will now refer to the claim with respect to the Applicant's interest in N.E.M. Supply Company Ltd. She maintains that she is entitled to a 50% shareholding in the Company.

The memorandum of association of the company establishes her subscription for 50 of the 1000 shares issued with the defendant being the holder of the remaining 950 shares. Her shareholding would be 5% of the share capital.

She contends however, that when she affixed her signature to the memorandum and articles of association the allotment of her shares had not been entered on these documents and at all times she believed that 50% of the shares had been allotted to her.

The defendant stated that prior to the execution of the documents everything had been completed. It has been noted that pens with 2 different colour ink was used in the completion of the allotment of the shares in t he memorandum. This notwithstanding, the Applicant must establish that the area on the document designated for the allotment was blank when she signed.

Having co-signed the Memorandum of Association, as a matter of law, the onus is on her to show that she had acted carefully, in light of her contention that she had signed the document before the allotment was

inserted. This propoundment is recognised by the learned author in ***Chitty on Contract (27th ed) Vol. 1*** in the following context: -

> ***"The plea of non*** *est factum* ***is likewise applicable where one person signs a document in blank and hands it to another, leaving him to fill in the details and complete the transaction. Where erroneous details are inserted which are not in accord with the instructions of the person executing the document, he may yet be liable if the transaction which the document purports to effect is not essentially different in substance or in kind from the transaction intended. The onus is on the person signing the document to show that he has acted carefully, and if he fails to discharge that onus he will be bound."***

The Applicant admitted executing the Annual Returns which showed her confirmation of her shareholding as reflected in the memorandum of association. There was also admission by her that she had appended her signature to the Company's account's charging the properties in their names as part of the company's capital assets.

She asserted that at all times she was made to believe she was an equal partner and shareholder in the Company. This would have been clearly a misconception on her part.

The Company started in 1977. Prior to that time the defendant had been employed to E. R. Ehrenstein as a full time Sales Representative and he also worked part time as an Accounting Clerk. He was the owner of a

house in Spanish Town and a car. He had savings. The Applicant on the other hand was a pre-trained teacher. She would and could not have been able to have made any financial contribution to the initial capital outlay at the formation of the Company.

She stated that she was never paid a salary. There is evidence that cheques were drawn in her favour which the defendant stated represented salary paid to her. Although the vast majority bears no endorsement, they were all negotiated. I am not satisfied that she did not negotiate them or they were not encashed on her behalf.

I am of the view that she had executed the memorandum fully knowing that she had been allotted 5% of shares. She is bound by the terms of Memorandum of Association. These shares rank as a gift from the defendant. The Defendant has not denied that she was allocated a 5% shareholding. Her entitlement to shares in the Company amounts to no more than 5%.

I will now make reference to Mt. Atlas Estates Company Ltd. The Memorandum of Association shows that the Applicant subscribed for 2,500 of 10,000 shares. The defendant holds the remaining 7,500. Applicant's shareholding of 2,500 would be 25% of the share capital. She is therefore entitled to 25% of shares in Mt. Atlas Estates Company Ltd.

It is ordered that: -

(a) The Applicant and Defendant hold property known as 1 Gorwell Arie, in the parish of St. Andrew registered at Vol. 1108 Folio 365 in equal shares.

(b) The Applicant and Defendant hold property known as 10 Northend Place in the parish of St. Andrew registered at Volume 955 Folio 432 equal shares in

(c) The Applicant is entitled to 5% of the share capital of the company known as NEM Supply Company Ltd.

(d) The Applicant is entitled to 25% of the share capital of the company known as Mount Atlas Estates Ltd.

(e) A report on and Valuation of the said premises be taken, or alternatively, a valuation be agreed upon by the Plaintiff and the defendant.

(f) The Registrar of the Supreme Court be empowered to execute any and all documents to effect a registrable transfer if either party refuses or is unable so to do within 30 days of being requested to do so.

Costs to the Applicant.