JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 77/99

BEFORE: **THE HON MR. JUSTICE BINGHAM, J.A.**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE WALKER, J.A.

BETWEEN:	**JASCINTH MAE COX PHIPPS**	**APPELLANT**
AND	**RICHARD ANTHONY PHIPPS**	**RESPONDENT**

Dennis Morrison, Q.C., instructed by Dunn Cox for the appellant

Dawn Satterswaite for the respondent

October 28, 29, 2002 and April 11, 2003

BINGHAM, J.A:

I have taken advantage of the opportunity of reading in draft the judgment prepared in this matter by Walker, J.A. I agree with his reasoning and the conclusion reached that the appeal be allowed, that the judgment entered below be set aside and that the reliefs sought by the wife/appellant be granted. However, because this Court is, as result of the judgment, taking a course different from that of the learned judge below, I wish to add a few words of my own.

Irrespective of the divergence of the accounts emanating from the affidavits of the parties, there was evidence which clearly showed that

the wife/appellant contributed materially towards the acquisition of the property in dispute. That apart, it is by now trite law that where a husband acquires property in the joint names of his wife and himself as joint tenants, there is a presumption of advancement which arises in favour of the wife that she was intended to share equally with him in the beneficial interest in the property. The intention of the parties may be inferred as to the manner in which the property is conveyed and at the time of its acquisition. The presumption, however, may be rebutted by evidence indicating a contrary intention.

Given the evidence of the nature and extent of the financial contribution made by the wife/appellant towards the purchase of the Saint Mary property, there was no necessity for her to rely on this presumption.

When the evidence for the determination of the learned judge is examined, it is clear that he founded his judgment on the wrong premise. This is so as he came to the conclusion in favour of the husband/respondent based on:

1. His assessment of the husband's credibility which was unshaken by cross-examination when tested on his affidavit evidence. In this regard, this finding was materially flawed as he found the husband to be less than frank and wanting as to credit having rejected his evidence

as to the ownership of the motor car and the alleged repayment of the $40,000.00 which was rejected as untrue.

2. He then attempted to carry out what would only be regarded as a balancing act by a division of what he saw as matrimonial property viz: awarding the Oakland apartment in respect of which there was no issue as to its ownership to the wife, and the property in dispute in the joint names of both parties which in the absence of evidence to the contrary, had to be so treated, to the husband.

In the light of the above, it was clear that in approaching the issues in this manner, ~~the learned judge failed to~~ take ~~the~~ advantage afforded him to properly weigh and assess the evidence available to him in reaching the conclusion arrived at. In that regard this Court is placed in as good a position as he was to examine the material before it and if necessary to come to a contrary finding and conclusion from that of the learned trial judge: Vide ***Watt (or Thomas) v Thomas*** [1947] A.C. 484.

When my learned brother Walker, J.A., said therefore, that:

> "in the present case it was common ground that the presumption of advancement did not arise for consideration in as much as the intention of the parties at the time of the acquisition of the property was ascertainable on the evidence,"

I too share his view in this regard. It was in that area of the case that the learned judge needed to have focused his attention. Had he done so, he would have come to a finding that based on the material available to

him there was no evidence suggesting any other conclusion rather than an equal division of the property based on the principle that equality is equity and on the intention of the parties at the time of its acquisition .

It is for these reasons that I agree that the appeal be allowed in terms of the order as proposed by Walker, J.A.

HARRISON, J.A:

This is an appeal from a judgment of Theobalds, J. on June 16, 1999. The learned judge ordered that:

> (1) The respondent is the sole owner of Lot 73, Prospect in the parish of St Mary registered at Volume 1234 Folio 38 and ~~the~~ appellant has no beneficial interest therein.
>
> (2) The Honda Civic motor car be reverted to the appellant and;
>
> (3) The respondent repay to the appellant $40,000.00 lent to him by the appellant.

The parties were married on July 20 1991, in Florida, United States of America, where the appellant then lived and worked as a registered nurse. The property in dispute, Lot 73, Prospect, was purchased in 1993. The transfer was registered on February 25, 1994 in the names of the appellant and the respondent as joint tenants.

At the time of acquisition of the said property, a mortgage in the sum of $1,000,000.00 was obtained from the Air Jamaica Pension Fund. Both parties joined in acquiring the said mortgage in 1993. The respondent's salary was then insufficient, and therefore 50% of the

appellant's salary was notionally nominated to qualify the parties for the mortgage loan. The respondent was then an airline pilot.

In 1994, the appellant purchased a 1990 Honda Civic motor car which she sent to Jamaica. The car was registered in the appellant's name, but was driven by and remains in the custody and control of the respondent. The respondent contended that they bought the 1990 Honda Civic motor car jointly, in 1989 before marriage.

At the time of purchase of Lot 73 the appellant gave to the respondent $40,000.00 which was applied to the purchase price. The respondent, in his affidavit dated November 4, 1998 at paragraph 11, said:

> "... I say that the $40,000.00 mentioned by the applicant in paragraph 7 of her affidavit was a loan which became necessary as time was essential to the agreement ... I was forced to borrow the sum of $1,000,000.00 from family and friends ...".

and at paragraph 12:

> "12 ... the sum of $40,000.00 received by me from the applicant was a loan and I do not know how the applicant came by the money ... I repaid the applicant the $40,000.00 I borrowed from her."

On the other hand, the appellant claimed that this was a part of her contribution towards the purchase of Lot 73. She also contended that she gave to the respondent a sum of US$6,000.00 as a further contribution to the acquisition of Lot 73. In addition she contended, she had loaned the

respondent US$7,000,00 to attend the Flight Safety School in Vera Beach, Florida, but on contracting to purchase the said premises, Lot 73, they both agreed that the sum would be applied towards the purchase price instead of being repaid by the respondent. The respondent, apart from saying, in his said affidavit dated November 4, 1998:

> "... I provided all the sums required to purchase the property;"

did not refute the receipts of these two sums of US$6,000.00 and US$7,000.00.

The marriage began deteriorating in 1994, the parties separated in May 1994, and the decree absolute was granted on May 5, 1996.

The appellant filed an originating summons dated May 18, 1998 under the Partition Act seeking a declaration that she was entitled to 50% of the said property, Lot 73, and sought the return of, or payment of the value of the said Honda Civic motor car.

Theobalds, J. made his findings principally in favour of the respondent, resulting in the current appeal.

Proceedings under the Partition Act between parties, no longer married, with regard to their respective rights in matrimonial property are governed by similar principles that govern such applications under section 16 of the Married Women's Property Act.

Where property is bought in the joint names of parties to a marriage and there is no declaration of any trust nor any declaration of the manner

in which the beneficial interest is to be held, the presumption is that the parties had the beneficial interest in equal shares. The presumption is displaced if there is evidence that the parties hold in different proportions. In ***Bernard v Josephs*** [1982] 3 All E.R. 162, the parties were unmarried, but engaged, and purchased a house in their joint names without any declaration of any trust. They took a mortgage in their joint names in respect of the whole of the purchase price and each contributed to the initial acquisition of the house. Both worked and shared the living expenses. They ~~separated~~ after three years and the male defendant remained in the house and married ~~another~~ woman. The female plaintiff obtained an order in proceedings for the sale of the house, declaring that she was entitled to one-half of the proceeds of sale. The Court of Appeal holding that where an unmarried couple lived as if they were married, and bought a house in their joint names, the entitlement to a share of the beneficial interest is governed by the same principles as married couples. The headnote, at p. 163, inter alia, reads:

> "Since the house had been purchased in the parties' joint names in order to provide a house for them, since the mortgage was in joint names and since each had contributed to the purchase price and they had pooled their incomes, the proper inference to be drawn was that the parties intended that they should have equal shares in the house."

However, despite the fact that the legal estate is jointly held by the parties, the beneficial interest might reside in one party only depending

on the circumstances of the case. For example, the name of one of the parties may have been placed on the title to the legal estate solely for the purpose of obtaining a mortgage (***Lynch v Lynch*** (1991) 28 J.L.R. 8).

It is the duty of the trial judge to ascertain the facts from the evidence. Accordingly, once he makes findings of facts, having seen and heard the witnesses, an appellate court will not disturb such findings unless the said trial judge failed to take advantage of having seen and heard the witnesses, and made findings which he could not properly do. In ***Watt v Thomas*** [1947] A.C. 484, with reference to the findings of facts of a trial judge, Lord Thankerton in his speech, at page 488, said:

> **"III** The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court".

This approach has been consistently followed by appellate courts. The passage assumes the duty to give reasons, and for the appellate court to intervene when those reasons are unsatisfactory. To give no reasons cannot be satisfactory when reasons are required (***Flannery et al v Halifax Estate Agencies Ltd.*** [2000] 1 W.L.R. 377, per Henry, L.J.).

In the instant case, the learned trial judge found the respondent to be a credible witness. The learned judge in his reasons, said:

> "I paid close attention to Mr. Phipps and I was impressed by what I regard as his truthfulness."

This finding is not supportable because of other conclusions of the learned trial judge that the evidence of the said respondent was untruthful. The evidence of the payment of $40,000.00 by the appellant to the respondent, is a material aspect of the question of contribution by the appellant to the acquisition of the property. The learned trial judge found that the said sum was given to the respondent by the appellant. The respondent alleged that he had repaid to the appellant the said sum. The learned trial judge found:

> "... the $40,000.00 that he has not able (sic) to satisfy me has been repaid, must be paid over to the wife."

In addition, the learned trial judge found:

> "As regards the Honda Civic car – I find that that unit was acquired in Florida and sent out to Jamaica in order to assist respondent. The respondent took delivery, cleared it from wharf and registered it in his own name. He is seeking to capitalize on the fact that the certificate of title is registered in his name by claiming it is his sole property."

On these two issues the learned trial judge accepted the truth of the evidence of the appellant in preference to that of the respondent. Although the respondent was, in the words of the learned trial judge, "... searchingly cross-examined," no evidence was referred to by the learned

trial judge in his reasons, as given by the respondent, to explain away these obvious untruths by the respondent, on crucial aspects of the issues.

On the other hand, the learned trial judge was unimpressed by the appellant. He found:

> "Miss Cox was not cross-examined and on the basis of her affidavit there are certain areas which in my view she discredits herself and I could with justification place a question against her credibility as a witness as for example, there are allegations that it was Mr. Phipps who encouraged her to obtain a loan of $40,000.00 cash. There is no contest on affidavits of previous friendly relationships – no way would he only know about it subsequent to $40,000.00 loan."

The learned trial judge failed to indicate how the appellant "discredits herself" on the basis of her affidavit, on which she was not cross-examined and which affidavit is acceptable documentary proof, not viva voce evidence.

Furthermore, the learned trial judge's finding that the "To whom it may concern" note was "... I think ... a fabrication made up in 1997 to add credit to the applicant's statement that the respondent got money from her", is patently flawed. The note, which was a letter dated September 5, 1997 and exhibited to the affidavit of the appellant dated May 18, 1998 was in evidence. The respondent did not challenge its authenticity. The writer was not called for cross-examination. Nor was the said letter proven to be a fabrication by any proof that the handwriting of the writer was not genuine. In any event the respondent admitted that he

received the said $40,000.00. To use this evidence as the basis to find against the appellant that, "overall she has discredited herself", the learned trial judge was in error.

In these circumstances, on the basis of ***Watt v Thomas***, (supra), the finding of the learned trial judge, not being capable of support from the printed record, is deficient. This Court is accordingly at large, in respect of some aspect of the facts.

The appellant by her contributions of US$6,000.00, US$7,000.00 and Jamaican $40,000.00, all of which sums were utilized in the purchase of the said premises, and which the respondent admitted he received, participated substantially in the initial acquisition of the said property and is accordingly entitled to her share. The question of the respondent wanting to "give any legal or equitable interest in the property in St Mary to his wife" as referred to by the learned trial judge, does not arise on the facts of this case. Nor did any issue arise as to the ownership by the appellant of an apartment at Oaklands. Therefore, the learned trial judge's order that:

> "... the Applicant/Wife keeps her apartment in Oaklands and by the same token the Respondent/Husband keeps the house and land in St Mary"

reveals a fundamental flaw in the treatment of that issue on the evidence. Neither the Married Women's Property Act nor the Partition Act gives to a trial judge the power to distribute matrimonial property between persons. What is required is a mere declaration of their existing rights to property.

For these reasons, I agree that the appeal should be allowed. The appellant is entitled to a one-half share in the said property.

WALKER, J.A.:

This appeal is concerned with the ownership of property described as Lot No. 73 situated at Prospect in the parish of St. Mary and registered in the names of the appellant and the respondent (hereinafter referred to as "the wife" and the "husband," respectively) as joint tenants. The parties were married on July 20, 1991 and were divorced on May 29, 1996. The property was acquired in or about the month of February, 1994 at a price of J$2,100,000.00.

By an originating summons issued under the Partition Act the wife sought, so far as is now relevant, an order:

> "That it be declared that the interests of the Applicant and Respondent in premises at Lot# 73, Prospect in the Parish of St. Mary comprised in Certificate of Title registered at Volume 1234 Folio 380 of the Register Book of Titles be one-half (1/2) respectively."

The summons was heard by Theobalds J who on June 6, 1999 ordered inter alia as follows:

> "That the applicant has no interest in Lot number 73, Prospect, Saint Mary comprised in Certificate of Title registered at Volume 1234 Folio 380 of the Register Book of Titles. The Respondent is entitled to 100% legal and equitable interest therein."

The wife now appeals that order and asks for relief:

> "That the Judgement of His Lordship Mr. Justice Theobalds be varied as follows:-

(a) That the **Applicant/Appellent** is entitled to one-half interest in the property Lot 73, Prospect in the Parish of St. Mary being the land comprised in Certificate of Title registered at Volume 1234 Folio 380 of the Register Book of Titles.

(b) That the said property be sold and the proceeds be divided equally between the parties".

In support of this appeal Mr. Morrison, Q.C. for the wife submitted that the trial judge misdirected himself both on the law and on the facts and thereby came to a judgment which cannot be sustained. As to appeals on a question of fact there can be no doubt that in an appropriate case this court is entitled to differ from the findings of a trial judge. In this regard the observations of their Lordships' Board in ***Union Bank of Jamaica Ltd v Dalton Yap,*** Privy Council Appeal No. 17 of 2001, delivered the 28th May, 2002 are apposite. There, in delivering the judgment of the Board, Lord Rodger of Earlsferry said:

> "The approach which an appellate court must apply when dealing with an appeal on fact from a judge who has seen and heard the witnesses giving evidence is not in doubt. Their Lordships refer for convenience to the decisions of the House of Lords in ***Thomas v Thomas*** [1947] AC 484 and of the Board in ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** (1986) 35 WIR 303. One situation where, exceptionally, an appeal court may be entitled to differ from the judge of first instance on such questions of fact is described by Lord Thankerton ([1947] A.C. 484. 488) in these terms:
>
> > 'The appellate court, either because the reasons given by the trial Judge are not

> satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court'.
>
> As Lord Shaw of Dunfermline observed in the earlier case of ***Clarke v Edinburgh and District Tramways Co.*** (1919) SC (HL) 35, 37, the appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was 'plainly wrong'."

In the present case it was common ground that the presumption of advancement did not arise for consideration inasmuch as the intention of the parties at the time of acquisition of the property was ascertainable on the evidence. That intention was to be inferred from the conduct of the parties at the time, including the financial contributions made by the wife towards the purchase price of the property. The evidence of the wife was, firstly, that she contributed US$7,000.00 originally intended as a loan to the husband to assist him in attending a Flight Safety School in Vera Beach, Florida, U.S.A., but which was subsequently diverted and applied towards the purchase of the property. Secondly, she contributed a sum of US$8,000.00 which was utilized to prevent a cancellation of the agreement for the sale and purchase of the property. Thirdly, she said she contributed J$40,000.00 which had been loaned to her for the purpose by a male friend. The wife's evidence as to her contributions in the amounts of US$7,000.00 and US$8,000.00 were not specifically controverted by the husband, and the trial judge made no specific

findings in this regard. However, the wife's assertion of her contribution of J$40,000.00 was expressly denied by the husband who, while admitting that he received such a sum of money from the wife, and applied that money towards the purchase of the property, contented that the money was, in fact, a loan from the wife which he had since repaid. On this aspect of the matter the court found that the sum of $40,000.00 was a loan from the wife to the husband. However, the trial judge rejected the evidence of the husband that he had repaid the money and ordered repayment of the same as part of the judgment of the court. But what is of significance is the basis on which the trial judge came to this finding. He did so by concluding that a note produced by the wife as evidencing the loan of J$40,000.00 obtained by her was a "fabrication" supplied by a "former suitor" and that, consequently, the wife "discredited herself".

That conclusion was palpably wrong. It mattered not from whom the wife obtained the money. The source of her funding was an irrelevant consideration on which the trial judge laid unwarranted store to discredit the wife's evidence in a general way. The fact was that the husband admitted receiving the money and applying it towards the purchase of the property. There was absolutely nothing to justify the finding of the trial judge that the money was, in fact, a loan from the wife to the husband and not, as the wife maintained, a contribution by her towards the purchase price of the property. The evidence in this case preponderated in favour of the wife's role as a financial participant and an equal partner

with the husband in the purchase of the subject property. It seems to me that, in essaying what I might call a "Solomonic" judgment, the trial judge failed to properly assess the wife's evidence. Ultimately, he rejected that evidence and has given flawed reasons for doing so.

I would allow this appeal in terms that the wife is entitled to a one-half beneficial interest in the Prospect property, and I would further order that the said property be sold and the net proceeds of sale divided equally between the parties. The wife being the successful party in this matter is entitled, **ex debito justitiae**, to have her costs both here and below.

ORDER:

BINGHAM, J.A.:

The appeal is allowed. Judgment of Theobalds, J. set aside. Judgment entered for wife/appellant. Further ordered that the said property be sold and net proceeds be divided equally between the parties. Costs both here and below to the wife/appellant to be taxed if not agreed.