IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 88 OF 1979

BETWEEN	NORVEL ROSE	PLAINTIFF
AND	OUSIE ROSE)	
AND	AL ROSE)	DEFENDANTS

Mr. D. Muirhead Q.C. and Mrs. Angela Hudson for Plaintiff instructed by Chambers, Bunny and Steer.
Mr. Rapheal Codling instructed by Raphael Codlin and Co. for Defendants.

Heard: 16th February, 1982, 14th, 15th, 16th, 19th, 20th, 21st, 22nd and 23rd April, 1982.

Delivered: 30th day of July, 1982.

JUDGMENT

ALEXANDER J:

Norvel Rose, the plaintiff in this matter, met Ousie Rose, the first defendant during the late 1940's. They courted each other for a number of years and finally got married on November 20, 1958.

Prior to their marriage two children were born to them, Al, the second defendant, in May 1955 and Bernice in October, 1956.

They were divorced on 24th June, 1977.

The plaintiff is the sole owner of 13.7 perches of land situated in Inverness, St. Ann.

In or around 1950, the construction of a house was started on this bit of land, which was completed in or around 1957.

The ground floor of this construction consisted of a shop and bar.

The house itself is reasonably large having some eight rooms.

The construction seems to be reasonable, given the circumstances prevailing at the time. It consisted of stone, marl, lumber and cement.

The shop and bar had a counter and shelves. There was a

storehouse and bathroom.

After the marriage, the plaintiff, the defendants and Bernice lived in the house.

The first defendant in addition to that ran the business at the request of the plaintiff, he in his own words, taking no active interest in it.

Things seemed to have gone well until about the year 1966, when the marriage started breaking down.

At this stage the plaintiff started making trips abroad staying there for several weeks each time.

Each time he returned to Jamaica and to the matrimonial home, relations did not seem to improve, until in 1973, he finally moved out, living then and now at premises owned by one Etta Linton at Tooting, St. Ann, some ¼ - ½ mile away from the matrimonial home.

After the granting of the Decree Absolute, the plaintiff served a Notice to Quit on the two defendants, in respect of their occupancy of the premises - Exhibit 1A.

This was dated 23rd day of August 1977 and the expiry date was one year from that date.

The two defendants remained on the property despite the notice and is there to date. There is also an allegation by the plaintiff, that the defendants entered into a sub-lease of the premises. This then led to this action in which the plaintiff claimed in relation to the defendants:-

1. Possession of the said land and building.
2. Mesne profits from 23rd day of August 1978 at the rate of $100 per month until possession is delivered up.
3. An account of all monies received by the defendant from the wrongful sub-letting.
4. Value of the counter and shelves which were replaced, and the removal of zinc sheets from the storehouse and bath house all to the value of $1000.

5. Interest at the rate of 10% per annum on the amount found to be due to the plaintiff from the 24th day of June 1977 to the date of judgment or payment.

6. Costs.

7. Such further or other relief as this Honourable Court may deem just.

The defendants counter-claimed.

In relation to the first defendant, she counter-claimed for:-

1. A declaration that she is entitled to an interest of half a share in the premises which was the matrimonial home.

2. An order for the sale of the said premises and that the proceeds of sale be divided equally between the plaintiff and herself after deduction of the sums paid by this defendant towards the improvement of the premises.

3. Costs.

4. Such other and further relief as this Honourable Court deems fit.

The second defendant counter-claimed against the plaintiff.

1. To recover the sum of $2,000 being money expended in repairing and modernising a section of the ground floor of the building whereby the value has been greatly enhanced.

2. Costs.

3. Such further and other relief as this Honourable Court may deem just.

The plaintiff failed to prove that there was any sub-letting of the premises.

The defendants conceded that the land belonged solely to the plaintiff and it follows that any structure on that land would also belong to the plaintiff.

In what circumstances can someone claim a beneficial interest in property in which the legal estate is vested in another.

This problem usually arises between spouses, especially

after the breakdown in their marriage or the dissolution thereof.

This case is yet another.

That question was explored at great lengths by the House of Lords in the cases of Pettit v Pettit reported in 1970 Appeal Cases beginning at page 777 and subsequently in Gissing v Gissing - 1970, 2 A.E.R. commencing at page 780.

In Pettit v Pettit, the matrimonial house was bought by the wife in her name. The purchase came from proceeds of sale of a previous house owned by her.

The matrimonial house was enhanced in value, due to the husband's work.

The question was whether or not the husband was entitled to share the proceeds.

It was held inter alia that upon the fact disclosed by the evidence it was not possible to infer any common intention of the parties that the husband by doing work and expending money or materials for the house - should acquire any beneficial proprietary interest therein; and that, accordingly, in the circumstances the husband's claim failed.

In Gissing v Gissing, the matrimonial home was purchased in the husband's name. Divorce proceedings having taken place, the wife claimed an interest in the house, based on certain contributions she had made.

Held that the wife had made no contribution to the acquisition of title to the matrimonial home, from which it could be inferred that the parties, intended her to have any beneficial interest in it.

Per Lord Reid, Viscount Dilhorne, Lord Diplock:

> "Any claim to a beneficial interest in land by a person whether spouse or stranger, in whom the legal estate in the land is not vested, must be based upon the proposition that the person in whom the legal estate is vested, holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust."

From the views expressed by their Lordships in these cases, it seems clear that any claim to a beneficial interest in these circumstances can succeed only if the claimant can show (a) an express agreement or (b) circumstances by which the claimant can show that such an agreement can be implied.

The first defendant to succeed, must therefore fall within the ambit of one or the other.

What of the second defendant? His claim is not one where he seeks to have a declaration of a beneficial interest on his behalf, but a refund of funds he expended on the property.

Different considerations must therefore apply to his claim. It is perhaps more convenient to deal with his claim first.

On his own testimony, he started to work in 1974, and with his first pay cheque started to effect repairs to the building. By then the plaintiff had moved out of the matrimonial house.

He said that the building was badly in need of repairs, which I found no difficulty believing bearing in mind, the age of the building then, and the type of construction.

I found as a fact that the repairs he said he effected, all the work he said he did and the monies spent, were so.

However, he and subsequently his wife and two children, were in occupation of the house, and enjoying all the benefits therefrom, free of cost.

In relation to the business, it is abundantly clear that he benefited from it, to the exclusion of the plaintiff.

Having expended funds on his own volition, which on the evidence shows clearly to be to the benefit of himself, his family, his mother and sister who all occupied the premises, having expended funds in relation to the business thereby reaping benefits for himself and his mother, and to the exclusion of the plaintiff, in whom the legal estate is vested, can he in addition to that still turn to the plaintiff and say to him: "Repay me my money."

If that is to be so, it would mean a double gain for the second defendant, with a consequent double loss to the plaintiff.

It seems to me that there can be no principle of law justifying such a proposal.

On this basis therefore his claim must fail.

Let me now look at the first defendant's situation. Being a spouse, up to 1977, different considerations apply to her as I have already stated.

Indeed her claim is on a different footing to that of the second defendant.

She claims that she is entitled to half an interest in the house.

She bases her claim on the following:-

1. There was an express agreement between the plaintiff and herself in relation to the construction of the house.

She stated that the plaintiff expressed that the house would belong to them both and asked for her assistance with that in mind.

On the strength of that, she expended money, materials and labour on the construction.

Her brother, she claimed, because of this, left his cabinet-making business for several periods of time, to assist in the construction.

In addition to that, along with the second defendant, she said she spent money to repair, refurbish, and generally to improve the building, starting in 1966 when she wired the entire building for electricity.

She brought one Louise Pearce who testified that she heard the plaintiff repeatedly say that the house would belong to both of them.

The plaintiff denies that he ever said anything like that to the first defendant. He denies that she contributed anything to

the construction of the house. He said that the only assistance he got from her brother was in the form of a "morning sport", that is, a voluntary day's work at a certain stage of the construction.

I did not believe her in relation to the assistance she said she gave for the following reasons:-

1. The house took over 5 years to be completed, and large as it is, I could see no basis for this if she gave the sort of assistance she claimed.

2. It appears that as soon as she moved in, she went full time into running the business, that the plaintiff had set up, strongly suggesting that there was nothing of any worth she was engaged in to prevent her from going full time into the business.

3. Up to 1974 when her son started to work, she seemed heavily dependent on the plaintiff for economic assistance.

It was suggested that from 1966 when the marriage showed signs of breaking down, and the plaintiff started to make his overseas visits, she sold most if not all of his cattle, cultivation and other assets he had.

She admitted selling only one cow, and that was for purposes of maintaining herself and the children.

The wiring she spoke of was paid for out of the profits of the business.

She sought and obtained a maintenance order against the plaintiff in respect of herself and the children.

The second defendant stated that the building was badly in need of repairs in 1974 and he financed certain repairs. She did nothing in relation to this up to then.

4. On her marriage certificate, she described herself as a domestic helper. It was suggested that that was so because that was all she was. She denies this giving some unacceptable explanation for her being described as a domestic helper on the certificate.

I believe this is all she was, and in fact had nothing with which she could contribute to the construction.

In cross-examination she was in my view, completely demolished in relation to her claim that she had a source of income, and the sources from which the other contributions came.

This still leaves the question of whether or not there was an express agreement.

What can reasonably be expected to be said by a man to a woman while they are courting each other, with the intention of marrying each other, and the man is building a house, or intends to.

I would expect that things would have been said by him to her indicating that they would both be occupying the house after its completion and their marriage, in whatever order.

I am therefore sure that the plaintiff would have used phrases like "it will belong to both of us".

By saying this, did he mean to convey a beneficial interest in the first defendant, or was it just the normal expectation or duty of a man to provide a home for his wife?

The only way to answer this is to see what transpires subsequently.

He builds a ground floor which is to be a shop and bar. He makes the first defendant run the business, and in his own words, he took "no active part in it."

This continued up to 1966 when the marriage started breaking down.

The breaking down of the marriage did not alter that arrangement. It continues. Indeed her input would have had to be that much more, as he goes off to the U.S.A. for a year, on vacation.

Out of the assets of the business, the building is wired for electricity, by her.

Between 1966 and 1973, when he finally leaves the matrimonial home, the plaintiff showed far more interest in his visits overseas than to the business or the matrimonial home.

After 1973, although he lives nearby, his interest in both is negligible. His explanation is that he was threatened by both defendants and so was afraid to enter the premises.

From about 1974, the evidence is, and I believe it, that substantial work was done on the premises.

The shop was completely refurbished. Extensive repairs were done to the house. Additions were made in the form of a kitchen, a bath house and an air tank.

Evidence was led, and I accepted it, that the value of the work done was in the region of $22,000.

I was satisfied that the building was substantially improved and its value enhanced.

Looking at the circumstances in its totality, what emerges is the plaintiff in whom the legal estate is vested freely permitting the first defendant to be in charge of a shop, which forms part of the matrimonial house.

It is a new venture, for both, but she is left entirely in charge.

Obviously then she is expected to so conduct the affairs of the shop that it would become a profitable exercise, and this must therefore mean that she is free to make whatever adjustments she deemed necessary.

This would become more obvious and necessary from 1966 onwards.

The shop is a part of the structure of the house.

I am unable to see how one can separate the one from the other.

I cannot see the plaintiff saying that the first defendant had a virtually free hand in relation to the shop, but not in relation

to the house, when both are in fact one structure.

Therefore even if what I have found that the plaintiff said in the beginning in relation to the house was equivocal, the subsequent events show a course of conduct on his part which is, in my view, reasonable for one to believe that the intention to convey a beneficial interest in the first defendant, can be implied.

Additionally, there is the question of acquiescence.

The plaintiff having left the premises in 1973, does nothing to prevent any of these things being done.

His explanation is that he was threatened by both defendants.

There are other ways to prevent them from doing that which was being done, which would have been very effective, and at the same time involving him in no risk to his person. This was never done.

The second defendant in examination-in-chief said: "I have seen the plaintiff there from time to time while repairs were being effected. He would pass by, see the work and would register no objection. This would happen more than once....."

I believed this. Additionally, the plaintiff said in cross-examination: "If my wife had treated me right, then she would share in whatever I acquired, bearing in mind our children together."

It seems therefore, that on the basis of either express words to the first defendant, or the plaintiff's conduct and strengthened by his acquiescence after 1974 when the substantial work started to his knowledge, that the plaintiff intended the first defendant to have a beneficial interest in the property.

Apart from the intention of the person in whom the legal estate is vested, it appears that the person seeking to establish a beneficial interest, must point to or prove some expenditure representing a substantial or fundamental contribution to the property, or some expenditure in relation to the family structure

which enabled the holder of the legal estate to acquire the property. In the words of Lord Diplock in Gissing v Gissing:

> "Any claim to a beneficial interest in land by a person whether spouse or stranger in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested hold it as a cestui que trust. The legal principles applicable to the claims are those of the English Law of trust and in particular in the kind of dispute between spouses that comes before the court, the law relating to the creation and operation of 'resulting implied or constructive trust'. Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give affect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53 (i) of the Law of Property Act 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.
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> A resulting, implied or constructive trust, and it is unnecessary for present purposes to distinguish between these 3 classes of trust, is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.
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> This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interest in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it - notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be merely a voluntary declaration of trust and

> unenforceable for want of writing. But in the express oral agreement contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit on the mortgage instalments when it is purchased on mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each act in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed...."

It follows from this, that the first defendant would have to show some contribution from her own assets.

In cross-examination the first defendant made the following admission ..... "I do not know where the money came from for the improvements. My son was responsible for that. I know nothing about the costs."

In the light of that, can the first defendant still successfully claim that she is entitled to a beneficial interest.

I would say she is so entitled by finding that all the work done on the property by the second defendant can be deemed to be done for and on behalf of the first defendant, thus bringing her within the ambit of the requirement as laid down.

The next step is to decide the extent of her interest.

She is claiming half a share.

How should her beneficial interest be evaluated?

Referring again to Gissing v Gissing Lord Reid had this to say:

> "It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct, she gets a share proportionate to what she has paid. Otherwise there must be some rough and ready evaluation. I agree that this does not mean that she would as a rule get a half share. I think that the high sounding brocard 'Equality is Equity' has been misused.

> There will of course be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than half."

Lord Pearson had this to say:

> "I think also that the decision of cases of this kind has been made more difficult by excessive application of the maxim Equality is Equity. No doubt it is reasonable to apply the maxim in a case where there have been very substantial contributions by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contribution to the total purchase price or cost is difficult to fix. But if it is plain that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half or nothing."

Lord Diplock stated:

> "I take it to be clear that if the court is satisfied that it was the common intention of both spouses that the contributing wife would have a share in the beneficial interest, and that her contributions were made on this understanding, the court in the exercise of its equitable jurisdiction would not permit the husband to whom the legal estate was vested and who had accepted the benefit of the contributions, to take the whole beneficial interest merely because at the time the wife made her contributions there had been no express agreement as to how her share in it was to be quantified. In such a case, the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse on which each must have acted in doing what each did even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently. It is only if no such inference can be drawn that the court is driven to apply as a rule of law and not as an inference of fact the maxim 'Equality is Equity' and to hold that the beneficial interest belongs to the spouses in equal shares."

In this case, there was a complete building, built by the plaintiff.

What the first defendant did, was to repair, add to,

and make certain improvements.

An estimate of all this was given as $22,000, and this was based on 1980 estimates.

The plaintiff estimated the value of his property at $20,000.

This presumably must be in or around 1973, which would have been the last time he would have had an opportunity to see the entire property so as to give some kind of realistic estimate.

Taking all the circumstances into account, and the legal principles involved, it is my view that a reasonable proportion representing her beneficial interest in the property, would be one-third.

It is ordered therefore:-

1. That the plaintiff be awarded 2/3 of the property, that is to say the house and land situated at Inverness, in the parish of St. Ann.
2. That the first defendant be awarded ⅓ of the aforesaid property.
3. That there be no award to the second defendant.
4. That the plaintiff be entitled to immediate possession and or occupation of the said premises, along with the first defendant.
5. That the second defendant immediately give up possession on occupation of the said premises to the plaintiff and first defendant.
6. That the property, the subject matter of the suit be sold and the net proceeds be divided as to 2/3 to the plaintiff and ⅓ to the first defendant.
7. That having regard to the total circumstances and the principles upon which an award of costs is made, that there be no order as to costs.

Judge