IN THE SUPREME COURT OF JUDICAUTRE OF JAMAICA

IN EQUITY

SUIT NO. E170/99

BETWEEN CECIL MELBURN SAMUELS APPLICANT

A N D VALRIE ELAINE LOWE-SAMUELS RESPONDENT

Mr. Dennis Morrison QC. For the Applicant.
Mrs. Nancy Tulloch-Darby and Mr. A. Cunningham for the Respondent.

JUDGMENT

HEARD: 14TH March , 2000
15th December, 2000

RECKORD, J.

This is a summons under the Married Women's Property Act whereby the husband applicant seeks an order from this court as to the respective interests of the applicant and the respondent in respect of the following premises:-

dwelling premises situate at 22 Grove Road, Mandeville

in the parish of Manchester registered at Volume 1226

Folio 467 of the register book of titles;

dwelling premises situate at 13 Confidence Avenue,

Mandeville in the parish of Manchester and registered

at volume 1061 folio 993 of the register book of titles.

At the outset, the parties announced that with respect to the matrimonial house at Grove Road, there would be no contest as both sides agreed on an interest of 50% each. This, therefore, leaves to be considered what is the interest of each in the Confidence Road property.

In this issue the applicant is claiming a 50% interest while the respondent contends that he is not entitled to any interest at all. It all belongs to her.

What is the applicant's case?

The Confidence Avenue property was purchased from the Administrator General in October, 1993 in the joint names of the applicant and the respondent for the sum of $950,000.00. He paid a deposit of $300,000.00. They obtained a mortgage of &950,000.00 from the Victoria Mutual Building to complete the purchase. In 1994 they obtained a 2nd mortgage from V.M.B.S. for $412,000.00 for re-furbishing this property which now consists of a 2 bedroom house and 2 one bedroom flats. The respondent's mother now occupies the 2 bedroom house rent free while the flats were rented out from which they earn an income of $10,000.oo per month. They

both agreed that the income from the rental should be applied to repay the mortgage.

Since their separation he has been living in rented premises paying $17,500.00 per month after respondent refused his request to allow him to occupy one of the two properties: Of the $200,000 so far paid on the mortgage he has paid the most.

He had obtained a loan of $20,000.00 from his mother to provide the deposit which has not been repaid.

In response the wife respondent referred to paragraphs 2- 23 of the applicant affidavit concerning the purchase of the Confidence Avenue property, as to be and misleading. The applicant had in fact a very minimal part.

The respondent deponed that in or about 1992 – January, 1993, she decided to acquire residential accommodation in Mandeville for her mother and contracted to purchase from the Administrator General of Jamaica the property registered at Volume 1061 Folio 993 of the register book of titles for the sum of $950,000.00. A deposit of $300,000.00 required was obtained as a loan from Mr. W. B. Frankson. The balance of the purchase price was financed in its entirety by way of a mortgage from V.M.B.S. where she is employed.

Although the applicant's name appears on the mortgage documents, this was as a matter of convenience. She was the principal borrower. She exhibited statements from V.M.B.S. as to monthly payments made by her by way of automatic salary deductions from her salary.

These premises needed renovation. Both herself and the applicant made financial contributions for this purpose. She admitted that the applicant contribution amount to about $400,00.00 which was more than hers. However, it was understood that his contribution would be refunded to him which in fact was done through her attorneys-at-law from a further loan which she obtained from V.M.B.S. She alone repaid this loan by way of automatic salary deductions. The respondents' connection with V.M.B.S. enabled her to receive loans which carried interest at staff rate of 3.5% per annum. The loan from Mr. Frankson was also repaid by her through her attorney-at-law. The respondent stated finally that the applicant has no proprietary or beneficial interest in the said premises, and has no right either at law or in equity to be in occupation of these premises.

SUBMISSIONS

On behalf of the applicant Mr. Morrison, Q.C. submitted that taking into account all the evidence, it was the common intention of both parties that they should share in the beneficial interest of the both properties. That

in relation to the Confidence Avenue property to treat the fact that it was registered in both names as joint tenants, a strong, although not conclusive evidence of that common intention. The maxim in equity should apply. He referred the court to the case of **Cobb vs. Cobb (1955) 2 A.E.R. 696.**

If the court accepts that loan by Mr. Frankson to the applicant for renovation and the fact of using their joint income constitutes evidence of the common intention that they should both hold the property beneficially, then the fact the respondent subsequently bore the greater share of the mortgage repayment could not alter that position.

On the evidence there was a disparity of income of both parties when the application for mortgage was being made. On respondent's income she could not do it alone:- **see Patricia Jones v Laurenton Jones S.C.C.A. No. 87/91 also Edmonson v Edmonson dated 23/6/ 92.**

Mr. Cunningham, on behalf of the respondent, submitted that there is no proof of any financial contribution by the applicant to the acquisition of the Confidence Avenue asset. On the evidence no common intention can be shown and neither can it be shown any conduct on his part referable to this common intention. In her affidavit the respondent made certain financial assertions which have not been contradicted, then they might be accepted as

conclusive statements of fact for the purpose of this trial – see the criminal case of **Janet Sinclair vs. the Queen, R.M.C.A. NO. 10/72**.

In the instant case no opportunity was taken to cross-examine the respondent. Therefore all the uncontraverted facts in her affidavit ought to be accepted or binding. Further, her evidence that she was purchasing this property for her mother had not been challenged. The respondents' evidence that she had repaid all loans was also unchallenged. She has even denied that there were any agreement as to how the mortgage money was to be discharged. In fact, it was understood that she would be responsible for repaying this loan. The respondent had purchased the property, made all payments. On the preponderance of the evidence it is clearly established that both at law and in equity the respondent is solely entitled to the legal and beneficial interest in this property and that this is supported by evidence of the respondent that she bought the property for her elderly mother.

Counsel referred to the Edmonson case (supra). The fact that the applicant's name appears on the mortgage documents is nothing more than a mere presumption at best of a beneficial joint entitlement and on the evidence this presumption had been rebutted.

The fact that these premises were being bought for her mother is clear evidence that there was no common intention between herself and the applicant to share the beneficial interest in this property. The applicant's name on the title was a matter of convenience. Acting on legal advice her mothers' name was not included on the title. The fact that one property has been jointly acquired in pursuance of a common intention is not evidence of a common intention, in acquiring other property. The court has to look at each transaction separately. **See Azan vs. Azan 25 J.L.R. page 301.**

Counsel further submitted that even if court finds that there is common intention, court should look further for something else. There must be conduct referable to this intention. **See Grant vs. Edwards (1986) 2 A.E .R., 426 at 431.** Court should look for expenditure which is referable to the acquisition of the house. On the evidence there is none on the part of the applicant.

The respondent therefore submits that on the preponderance of the evidence that the applicant is not entitled to any share in the beneficial interest of the Confidence Avenue premises.

With respect to the Grove Road property, counsel asked the court to order that the conduct of the conveyance be by the respondent's attorney-at-law. She now occupies that premises with her 14 years old daughter.

Mr. Morrison, in reply, submitted that the applicant had subscribed to a mortgage upon which he had a personal liability – he had acted to his detriment - **see Cobb vs. Cobb (supra) pg 698 (g).** This was on all fours with the instant case in that both assumed responsibility for the repayment of the mortgage but that by arrangement between them, it was actually paid by one party.

CONCLUSIONS

Mr. Justice Rowe, the president of the Court of Appeal in Jones vs. Jones, S.C.C.A. No. 19/88, said that "the law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives then even if their contributions are unequal the law leans towards the view that the beneficial interest is held in equal shares" – **see Cobb vs. Cobb (1955) 2 A.E.R. 696**.

Lord Justice Nourse in **Grant vs. Edwards (1986) 2 A.E.R. at page 431**, stated

"where there had been no written declaration on agreement nor any direct provision by the plaintiff or 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. And in **Edmonson vs. Edmonson S.C.C.A. No. 97/91 Mr. Justice Rowe,** president of the Court of Appeal said

> " Thus, where there is no express agreement the court needs to address itself to whether there is evidence of a common intention at the time of its acquisition that the property is to be owned jointly. In determining whether or not there was such a common intention, regard can be paid to the conduct of the parties and also any expenditure incurred by them which is related to the property."

In the instant case there was no express agreement; there was no common intention that this property was to be owned jointly between these parties. However, there is evidence of expenditure incurred by the applicant related to the acquisition of this property.

The respondent's evidence that this property was being purchased for her mother had not been challenged by the applicant. It was her evidence that the applicant was aware of this and that it was understood that any expenditure on his part in acquiring the property would be repaid to him. The applicant has not denied that the $300,000.00 advanced by him for the initial deposit and that the $400,000.00 spent by him to renovate the

property were refunded to him after the mortgage was obtained. Her evidence also that the sum borrowed from Mr. Frankson the applicant's uncle was repaid from the mortgage remains unchallenged.

The applicant has acknowledged that the mortgages were being repaid by automatic deduction from the respondent's salary at V.M.B.S. In an apparent admission that this property belonged to the respondent, the applicant stated at paragraph 1 of his affidavit of dated 23rd of April, 1999, "that when I suggested to the respondent that I be allowed to occupy one of the two properties, she refused."

On the evidence I can find no conduct on the part of the applicant referable to a common intention that at the time of the acquisition of this property it was to be owned jointly by the applicant and the respondent.

The repayment of the mortgages had been well secured, therefore the applicant having subscribed to these mortgages cannot be said to have acted to his detriment.

Accordingly, the applicant's claim for a 50% share in the Confidence Avenue property is refused. I find that this property is wholly owned by the respondent. As agreed by the parties the Grove Road property is jointly owned by the parties in equal shares.

Paragraphs c to i of the originating Summons dated 23rd of April, 1999 are refused.

Costs to the respondent to be agreed or taxed.

Leave to Appeal granted.