

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

CLAIM NO. E129 OF 2000

BETWEEN	BEVERLEY SIMPSON	CLAIMANT
AND	ANSLYN SIMPSON	DEFENDANT

Property Dispute - Improvements carried out by spouse after other party has left matrimonial home - Parties interest in a former matrimonial home - Mortgage capital and interest elements - Occupational rent

Ms. Sandra Johnson for the Claimant.

Mr. Garth McBean instructed by Pickersgill, Dowding & Bailey Williams for the Defendant.

Heard: 20th, 22nd February and November 28, 2008.

Mangatal J:

1. This case involves a property dispute between a former husband and wife. The Claimant and the Defendant were married in 1975 and the union produced 3 children. Whilst married the parties acquired property situate at Lot 170 Westchester, Saint Catherine, registered at Volume 1192 Folio 558 of the Register Book of Titles. They were registered on the Title as joint tenants.
2. The Claimant and the Defendant began to have problems some years ago and in March 1995 they divorced. Both have since remarried. The Defendant's current wife, Ann-Marie Simpson gave evidence on behalf of the Defendant in this case.

3. I wish to commend both counsel for the skill with which they presented their submissions. The following issues arise in the case, and indeed, I must commend Counsel for the Defendant Mr. Garth McBean for the very thorough and lucid manner in which he has delineated some of the relevant issues in written submissions filed on behalf of the Defendant:

Factual Issues

- (i) *Whether the Claimant carried out improvements to the property by the addition of two bedrooms and an extension of the bathroom prior to 1995, the date when the parties were divorced.*
- (ii) *Whether the improvements to the property which were carried out by the Defendant and his present wife (the Claimant admits that some improvements were carried out but she does not admit that they were extensive), which they claim to have done between 2002 and 2004 were extensive. What is the value of these improvements?*
- (iii) *Who paid off the balance due on the mortgage between 1995 after the Claimant and the Defendant divorced and up to April 2006 when the mortgage was fully paid up, and in what amounts.*

Legal Issues

- (i) *Whether the value of the Claimant's share in the property is to be determined by the unimproved value of the property or,*

- (ii) *If the Court finds that the Defendant did make improvements, how does that affect the Claimant's proprietary interest and if it does not, how should the court deal with this issue?*
- (iii) *Whether the Claimant is liable to pay half of the mortgage payments made by the Defendant, and if so, is it from 1995 or from 1999, that he solely paid off the mortgage?*
- (iv) *Whether the Defendant is liable to pay occupational rent to the Claimant*
- (v) *Whether the Defendant is liable to account to the Claimant for any rental or income accrued from the property.*

4. This claim has been pending for a long time, and in fact, on or about the 23rd April 2007, the parties arrived at a partial settlement after mediation carried out by the Dispute Resolution Foundation . The agreement was as follows:

In exchange for the promises made the parties agree as follows:

- 1. That a new Valuation of the property Lot 170 Westchester, St. Catherine, be made by a mutually agreed valuator.*
- 2. That Claimant's Attorney-at- Law accompany the Valuator to value the said property.*
- 3. That valuation costs be shared equally between the parties.*
- 4. That Ann-Marie Simpson produce all receipts at the adjourned hearing of this mediation on the 25th April 2007 – these receipts are with respect to improvements to the said property.*

5. For completeness, I should just state that at one stage it appears to have been suggested that Mrs. Ann-Marie Simpson was making a claim in respect of the property because she claimed that the premises constituted the matrimonial home for both herself and the Defendant and that she had helped to pay off the mortgage. She further stated that she had made financial contribution to improvements carried out on the property. However, in cross-examination she conceded that even if payments were made by her out of her pocket, it was really payment being made on behalf of her husband as “what belongs to me (Ann-Marie Simpson) belongs to him (the Defendant)”. In addition, no formal claim was made on her behalf and the Defendant’s submissions do not take that approach.
6. On the 27th September 2007 D. McIntosh J. had ordered that the Affidavits of the parties were to stand as their Witness Statements.
7. When the matter came on for trial, it was indicated to me that the Defendant was in the United States, and would be unable to come for the trial because of his current status. Ann-Marie Simpson also so stated in her evidence.
8. The Affidavit of Beverley Simpson, the Claimant, sworn to on the 2nd of October 2007, was ordered to stand as her examination in chief, and in like fashion I made an order in relation to the Affidavit of Ann-Marie Simpson, sworn to on the 24th day of August 2006. All of the exhibits attached to these Affidavits were treated as exhibits. By consent, the Valuation Report of Eric G. Douglas dated January 14 2008 was also admitted into evidence as Exhibit B.S. 8.
9. Pursuant to a Notice issued by the Defendant’s Attorneys-at-Law under the Evidence Act, and to Rule 29.8(4) of the Civil Procedure Rules 2002, I ordered that the Affidavit of the Defendant, without any exhibits, sworn to on the 13th of September 2007 be admitted

Whilst I appreciate that transactions involving husband and wife are often carried out on an informal basis, without substantiating documents, I find myself unable to find on a balance of probabilities that these improvements have been established, or further or alternatively, what was the value of these improvements.

Second Factual Issue-whether the improvements to the property which were carried out by the Defendant and present wife were extensive

13. According to paragraph 10 of his Affidavit, the Defendant says that in or about early 2004, he and his present wife carried out extensive improvements and renovations to the premises and that they spent in the region of \$600,000.00. Ann-Marie Simpson states the same thing in paragraph 10 of her Affidavit. In cross-examination, Ann-Marie Simpson claims to have started carrying out the improvements in 2002.

14. In the Defence and Counterclaim filed on his behalf, amongst other matters it is stated as follows:

Defence

...4. After the year 1992, the Claimant made no further contribution to the repayment of the mortgage and indicated to the Defendant that he could have the house for himself as he had no intention of returning to Jamaica or of claiming an interest in the house. Since that time the Defendant took over sole responsibility for paying the mortgage up to its repayment in full in or about April 2006 having been persuaded that it was the Claimant's intention to surrender her interest in the property to him.

5. The Defendant denies that the Claimant did any or any extensive addition to the said premises as alleged in paragraphs 8 and 9 of the Statement of Claim or at all. From

sell her one-half share in the property to the Claimant. I agree with Miss Johnson that this state of affairs does render incredible the Defendant's statement that he did these alleged extensions in the honest belief that the Claimant was making no further claim or interest in the property.

17. The receipts exhibited to the Affidavit of Ann-Marie Simpson do in fact total closer to \$100,000.00 than the \$600,000.00 which the Defendant and Ann-Marie Simpson claim to have spent in improvements. However, the receipts were not put in evidence it seems, as representing the full sum spent by the Defendant and his current wife. Instead, the purpose was to persuade the Court that the Defendant in fact incurred expenditure in relation to improvements.

18. In cross-examination the Claimant states that she cannot deny that the Defendant and Ann-Marie Simpson have done extensive improvements to the premises. However, it is common ground that the Defendant's current wife Ann-Marie Simpson has not allowed the Claimant to view the inside of the premises. The Claimant states that she did see some renovations when she went to look at the premises, however, those which she has seen are not extensive.

19. In his written submissions on behalf of the Defendant in relation to this factual issue, Mr. McBean submits as follows:
5. It is submitted that this Honourable Court ought to find as a fact that extensive improvements by the addition of a kitchen, dining room , extension of the front bedroom and the addition of a verandah were carried out as stated by the Defendant....and Ann Marie Simpson...It is so submitted for the following reasons:

(a) in paragraph 5 of the witness statement of Ann-Marie Simpson she exhibits as AS 3 a photograph of the property

renovations and improvements would have been retained for proof in the future.

21. In cross-examination, although Ann-Marie Simpson makes the curious statement that she was not aware that there were negotiations going on between the Defendant and the Claimant in relation to the Defendant purchasing the Claimant's half share in the property, she nevertheless agrees that before she started any improvements, she knew that the premises were jointly owned by her husband and his former wife. She also states that during the time that she and the Defendant sought to do these improvements they did not seek the consent of the Claimant in order to do, or before effecting, these improvements.

22. In all the circumstances, and on the totality of the evidence, I am satisfied on a balance of probabilities that the Defendant did carry out renovations to the premises, particularly to the front of the house, and I am prepared to treat same as being of the order of \$200,000.00. I also find that these improvements were carried out without the knowledge, agreement acquiescence or encouragement of the Claimant.

Factual Issue No 3-Who paid off the balance mortgage between 1995 and April 2006 when the mortgage was cleared off.

23. In her closing submissions on behalf of the Claimant, Miss Johnson makes the valid point that whereas in the Defence it is said by the Defendant that the Claimant made no further contribution to the mortgage from 1992, in his Affidavit he states that the Claimant made no further mortgage payments from 1999. This is indeed a credibility issue. I note also that in letter dated August 4 1999 written on behalf of the Claimant, the Attorney is

premises brought about by the expenditure of one party only. However, the party who has spent on the improvement or renovation is entitled to be compensated by the other party in respect of the expenditure carried out.

26. In the 10th edition of **Bromley's Family Law**, 2007, by Nigel Lowe and Gillian Douglas, under the caption "**Improvements to the Family Home**", the learned authors at page 169 state:

Improvements to the Family Home

It may be argued that the parties' interests in the home have been varied if, after purchase, one of them has been solely responsible for enhancing its value by extension or improvement (either by cash payments or by doing the work himself). Unlike a contribution to the purchase price, the mere fact that A does work on B's property does not of itself give A any interest in it. To establish such an interest, A must show that the expenditure was incurred or the work done in pursuance of an agreement or a common intention that it should do so or, alternatively, that B has led A to believe that the improvement would confer an interest on him so as to give rise to a proprietary estoppel.

The position of spouses, civil partners and former engaged couples

The injustice that this could cause led to the passing of s.37 of the Matrimonial Proceedings and Property Act 1970. This provides:

'...where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement to the contrary express or implied, be treated as having been

this action was commenced by Writ of Summons instead of by way of originating summons because the parties were divorced in 1995 before the action was commenced. Under section 16 of the **Married Women's Property Act** (now repealed) only a husband or wife could bring an application by originating summons.

30. In submitting that the court should find that the Defendant's share in the property has been enlarged by virtue of the improvements which he had effected to the property, Mr. McBean makes the following intriguing arguments:

(a) *It is unjust to allow a spouse who has not contributed to improvements to benefit from improvements to property by the other spouse even if those improvements were carried out without the consent of the other spouse....*

...

(1) *Having regard to the overriding objective it is just to make such a finding (of increased share) and unjust and contrary to the principles against unjust enrichment to allow the Claimant to benefit from improvements to which she did not contribute.*

31. As attractive as those arguments are, I must reject them. The fact that legislation was passed in the U.K. to specifically deal with these matters (albeit there was a divide within the body of common law decisions), suggests to me that I too ought not to so decide without likewise being enabled by legislation applicable in Jamaica. Secondly, the whole question of the "overriding objective of dealing with cases justly", though it permeates the rule of law, cannot in my judgment be used to decide cases against the mainstream of the common law on substantive issues. This

approach. In my view the correct method of accounting is to have the one repay to the other half of the amount expended on improvements.

34. In my judgment this means that the Claimant is indebted to the Defendant, and must give him credit for half the cost of improvement expenditure, the total of which I have treated as \$200,000.00. Therefore the Defendant is entitled to be paid \$100,000.00 by the Claimant.

(iii) Whether the Claimant is liable to pay half of the mortgage payments made by the Defendant, and if so, is it from 1995 or from 1999, that he solely paid off the mortgage?

35. The answer to this question will partially depend on the accounting to be provided by the Defendant. However, in my judgment the correct approach is to have the Claimant credit the Defendant for her proportionate share of the capital element of the mortgage only. I arrive at my decision in relation to this question partially because of the view I have come to on another legal issue raised at the beginning of this judgment, i.e.

(iv) Whether the Defendant is liable to pay occupational rent to the Claimant.

36. In my judgment, the Defendant is liable to the Claimant for occupational rent. I am of the view that the answer to both of these issues is to be found in the well-thought out discussion in the 10th edition of **Bromley's Family Law**, at pages 177-178 under the caption **Distribution of assets after sale : equitable accounting;**

.....

required to pay an occupational rent . For example, in **Byford v. Butler** the husband was made bankrupt but he and the wife continued to live in the matrimonial home, the wife meeting the mortgage payments. The trustee in bankruptcy made no effort to realize his interest in the property until after the husband's death some nine years after the bankruptcy. The wife argued that she should not be obliged to pay an occupational rent but it was held that the fact that there has not been an ouster or forcible exclusion from the property is not conclusive. As Lawrence Collins J. pointed out, the trustee cannot reside in the property nor can he derive any financial enjoyment from the property while the bankrupt's spouse resides in it, and the bankrupt spouse's creditors can derive no benefit from it until he exercises his remedies. Since the wife had had the benefit of continuing to live in the property, it was just to require her to pay an occupational rent.

If the party in occupation is bound to pay rent and is also paying mortgage installments, it may be simpler (as was in fact agreed by the parties in Byford v. Butler) to regard the payment of interest as equivalent to the payment of rent and thus avoid a double computation. In such circumstances it would be proper to order the party who has left to account for his or her proportionate part of the repayment of capital only. This occurred in Leake v. Bruzzi, where the wife left the husband and obtained a divorce based on the fact that the husband's behaviour had been such that she could not reasonably be expected to live with him. (my emphasis).

37. In my view, this is a case where, albeit the Claimant left the property voluntarily,(it not being necessary to establish that she has been excluded from the property), the Defendant is bound to pay occupational rent to her. However, since the Defendant also paid the mortgage installments, inference being from March 6

\$100,000.00), such option to be exercised within three months of the date of receipt of the Valuation Report.

- (7) Failing the exercise by the Defendant of the option as aforesaid the property is to be sold by private treaty and the net proceeds divided equally between the parties after taking into account the \$100,000.00 regarding improvements and other equitable accounting to be carried out between the parties as set out in paragraphs (8) and (9) below.
- (8) The Claimant is to pay to the Defendant half of the amount paid by the Defendant on account of the capital (or principal) element of the mortgage installments between March 6 1995 to April 11 2006 after production by the Defendant of an authenticated statement of account from the National Housing Trust or authenticated receipts for the period March 6 1995 to April 11 2006. The authenticated accounts are required to show the split between the capital (or principal) and interest elements. The interest element of the mortgage is treated as the occupational rent due from the Defendant to the Claimant. This accounting is to be produced by the Defendant by the 26th January 2009.
- (9) The Defendant is to account to the Claimant by the 26th January 2009 for all rental received for the said property from March 6 1995 to date and to pay to the Claimant half of the amount so accounted for .
- (10) The Registrar of the Supreme Court is to carry out all necessary enquiries after the said accounting is provided.