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**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
CLAIM NO. HCV 01771 OF 2004**

**BETWEEN ASTLEY SMITH CLAIMANT
AND CARMEN BAILEY-SMITH DEFENDANT**

IN CHAMBERS

Mr. Lawrence Haynes for the claimant

**Miss Simone Jarrett instructed by the Kingston Legal Aid Clinic for
the defendant**

February 10 and 14, 2006

**DIVISION OF MATRIMONIAL PROPERTY, POST SEPARATION
MORTGAGE PAYMENTS**

SYKES J

1. Mr. Astley Smith was a Corporal in the Jamaica Constabulary Force. He was married to Mrs. Carmen Bailey-Smith. In 1983, the couple bought land located at lot 897 part of the Albion Estate in the parish of St. Thomas and registered at Volume 1055 Folio 803 of the Register Book of Titles. Both names were registered on the title as joint tenants. The land was purchased by Mr. Smith alone, using insurance moneys he received and a loan from National Commercial Bank. Mrs. Bailey-Smith did not contribute to the acquisition of the land. They separated in September 1998 and finally divorced. Mr. Smith left the house voluntarily. Since the separation, Mrs. Bailey-Smith has been the sole occupier of the house.

The mortgages

2. It is agreed that three sums of money were borrowed, from the National Housing Trust (NHT), using the land as security. The first was \$264,000. The second was \$260,405.14 and the third was \$150,000. All three mortgages were used to build a house.
3. Based on the evidence before me the first two sums were borrowed solely by Mr. Smith. His wife was not a co-mortgagor and there is no evidence that she agreed to contribute to the repayment of the mortgage.
4. The third sum was borrowed either by Mrs. Bailey-Smith alone or together with her husband. Mrs. Bailey-Smith alleges that she alone borrowed this sum and had repaid most of it when her husband said he would pay the balance. Mr. Smith on the other hand says he alone borrowed this sum and was solely responsible for repaying the loan.
5. It is important to say how this third sum was borrowed. It is common ground that Mrs. Bailey-Smith was unemployed at all material times. This meant that she was not eligible to borrow any money from the NHT. Mr. Smith agreed to pay her "contributions" to the NHT so that she could borrow either solely or along with him the \$150,000. He paid her "contributions" and she was registered with the NHT as a self employed person. This was how the couple were able to borrow this additional sum.
6. I should note as well that Mrs. Bailey-Smith's name was placed on the title from 1983. The first mortgage was borrowed ten years later in 1993 and the second and third in 1997. Mrs. Smith for her part denies knowledge of the additional loan of \$260,405.14.

The issues

7. Mr. Smith is claiming a fifty percent share in the house. His wife is also claiming fifty percent. The parties have sensibly agreed on a valuation of the property. That value is \$2,743,500. This means that each party is entitled to \$1,371,750.

8. The point at issue is whether the mortgage payments made by Mr. Smith from the inception of the mortgages to date should be deducted from Mrs. Bailey-Smith's half share or should he be credited with the sums he paid since the parties separated in September 1998.

Findings of fact

9. There was no cross-examination on the affidavits but I am still able to make certain findings of fact based upon the undisputed evidence. The first is that Mrs. Bailey-Smith was unemployed for all material times. The necessary conclusion from this is that at no time was she able to contribute to the acquisition of the land and neither was she able to contribute to the repayment of the loans. There is no evidence before me that at the time of the acquisition of the land when her name was placed on the title the parties had any other intention other than that Mrs. Bailey-Smith would have an interest in the property. In other words, Mr. Smith was making a gift to his wife of an interest in the property. It was never the intention of the parties that the wife should contribute financially to the acquisition or mortgage of the property. At the time when her name was placed on the title, there is no evidence that the parties contemplated that this was being done in order to increase the amounts that they might borrow. Neither is there any evidence that the parties agreed that Mrs. Bailey-Smith would not have a share in the property.

10. It is significant that it was Mr. Smith who applied for a fifty percent share of the property and his wife as respondent acknowledged his share and claimed fifty percent. This conduct is consistent with the conclusion that he was making a gift to her or if he was not making a gift to her at the time the property was acquired he certainly decided to do that subsequent to the acquisition. The law does not prevent this from happening.

The submissions

11. Miss Jarrett contends that the only amounts that should be deducted are those paid since the date of the separation because after that date Mrs. Bailey-Smith was the sole occupier of the house. She says that there was an intention to "gift" fifty percent of the land at the time Mr. Smith placed her name on the title. She relied on the case of *Forrest v Forrest* (1995) 48 W.I.R. 221, a decision of the Court of Appeal of Jamaica. In particular she relies on a passage cited by Forte J.A., before his elevation to the Presidency of the Court, from the judgment of Russell L.J. in *Wilson v Wilson* [1963] 2 All ER 447 at 454. Miss Jarrett speaks in terms of the presumption of advancement.

12. Mr. Haynes for his part has cited *Cracknell v Cracknell* [1971] 3 W.L.R. 490 and *Leak v Bruzzi* [1974] 1 W.L.R. 1528. Mr. Haynes relied on these cases to say that once the parties separated then Mr. Smith is entitled to recover all the mortgage payments made since the mortgage was taken out. To put it another way, at the time of separation the presumption of advancement is rebutted and the husband is entitled to recover from his wife's share of the property all his mortgage payments and not just those from the date of separation

The law

13. The positions taken by both parties seem at variance with the law as I understand it. Forte J.A. in *Forrest* made it abundantly clear that where the parties at the time of the acquisition have decided upon the respective interests of the parties no court has the power to vary that agreement unless there is evidence to show that at some point after the acquisition and the parties have varied their interest.

14. My examination of the cases show that deductions of mortgage payments from the share of the non-paying party have only been made in cases where the non-paying party was legally obliged to pay, failed to do so and this obligation was taken up by the claiming party. The obligation may arise either (a) by both parties being jointly liable on the mortgage

or (b) if only one party is liable on the mortgage but the parties have agreed as between themselves that the one that is not liable on the mortgage would contribute to the mortgage payments. In the case of (b) it would be a matter of evidence to show whether this is so and in what proportion the non-labile party contributes to the mortgage.

15. I have not yet found case (and I am not saying there is none) where the courts have allowed the claimant to make deductions for mortgage payments absent either of the two circumstances outlined in the immediately preceding paragraph. Admittedly, paragraph (b) is a derived conclusion from the authorities. I have not found a case where the husband made a gift to his wife and on separation the wife is asked to repay the cost of acquiring the gift. However this derivation is permissible because all the cases I am about to examine show that the deduction was permitted because the non-paying party was either legally obliged to pay on the mortgage instrument but failed to do so or the parties had agreed between themselves that the non-labile party would contribute to the mortgage payments. There is nothing in law to prevent the parties agreeing as between themselves how the contribution is to be divided in circumstances where only one is liable on the instrument.

16. In *Forrest* the facts outlined by Forte J.A. suggests that both husband and wife were joint mortgagors. They separated and the husband had failed to pay or otherwise contribute to the mortgage. The wife cleared the debt and she was allowed to deduct the payments from his share. She had paid a debt on which he was jointly liable. Similarly, in *Cracknell* both husband and wife were joint mortgagors. Furthermore, in *Cracknell* the wife left the matrimonial home on her own accord and failed to contribute to the mortgage payments. She was not forced from the home. In those circumstances the court held that her conduct should be taken into account and once she left and the husband continued paying the mortgage without any contribution from his wife, he should be credited one half of the payments made since the separation. However, this must be on the proposition that wife was liable to pay on

the mortgage or had agreed with her husband to so contribute. Likewise, in *Wilson* both husband and wife were joint mortgagors. After the separation, the husband paid off all the debt without any help from the wife. Again, the court permitted the husband to deduct the post separation payments from the wife's share of the proceeds of sale. Similarly, in *Leake's* case although the evidence is not very clear whether the parties were joint mortgagors the actual outcome of the case is explicable on the bases that they were both jointly liable or she had agreed to contribute to the mortgage. This being so it is not surprising that once again the non-paying party suffered a deduction for post separation mortgage payments from the share of the proceeds of the sale of the house. The final case to which I shall refer is *Suttill v Graham* [1977] 1 W.L.R. 819. Once again both parties were either joint mortgagors or as between themselves they had agreed that both would contribute to the mortgage. I need not refer to any other cases because I have seen nothing in other cases that cannot be explained in the way I have postulated.

Application of legal principles

17.In the case before me there is nothing like the cases to which I have referred. At all material times the parties knew and agreed that in respect of the two sums of over \$200,000 the husband was the sole mortgagor and there was no agreement by his wife, express or implied, for her to make any contribution to the payments on those sums. Therefore in respect of these sums it is not reasonable for Mr. Smith now to say that Mrs. Bailey-Smith's half share should be reduced by the mortgage amounts paid on these sums. He undertook to pay these sums without any contribution from her.

18.In respect of the \$150,000 even if Mrs. Bailey-Smith were the sole mortgagor, it is clear that it was never the intention of the parties that she would pay any of the mortgage instalments. The parties as between themselves had agreed and understood that Mr. Smith and Mr. Smith

alone would repay the principal and interest on this sum because his wife had no source of income. This was the intention at the inception of the mortgage for this sum. There is therefore no basis in law for there to be any post separation deduction mortgage payments from Mrs. Bailey-Smith's half share of the proceeds of sale.

19.The fact that the parties have separated cannot change the intention that they formed at the time the mortgages were taken out. What they may do, but there is no evidence of that here, is to alter their contributions to the mortgage repayment.

Conclusion

20.The true intention of the parties at the time of the acquisition of the property was that Mrs. Bailey-Smith would have a fifty percent interest. It was also agreed that Mr. Smith would be solely liable and responsible for the repayment of principal and interest on the sums of \$264,000, \$260,405.14 and \$150,000. In this case the parties not only decided on the division of interest in the property of each party but also on who would be solely responsible for repaying the loans.