

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 73/87

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|---------|-----------------------|-----------|
| BETWEEN | CHRISTINE STEELE | PLAINTIFF |
| A N D | ERROL PERCIVAL STEELE | DEFENDANT |

Carl Rattray Q.C. and with him Allan Deans for the Plaintiff.

Dr. Winston McCalla for the Defendant.

NOVEMBER 12, 14; DECEMBER 19, 20, 1988, AND
FEBRUARY 21, 1990.

SMITH, J:

The plaintiff, a flight attendant, and the defendant a bank credit inspector, were married on the 3rd November, 1973. There are three children of the marriage born 1975, 1978 and 1980.

In 1975 the matrimonial home, 9 Hall Boulevard, Kingston 8, was purchased and transferred into the defendant's name alone. This house was bought for \$48,112.00. The defendant paid a deposit of 10% and the balance was financed by the Bank of Nova Scotia, the employer of the defendant by way of a mortgage on the security of the house.

During 1983, a beach cottage at Silver Sands, Duncan Bay was purchased for \$94,000 as an investment and registered in the names of both parties.

A mortgage in the sum of \$100,000 was obtained from the Victoria Mutual Building Society on the security of the matrimonial home, 9 Hall Boulevard. Of this amount \$35,000 was used to settle the mortgage loan at the Bank of Nova Scotia and \$65,000 towards the purchase of the beach cottage. The balance of \$29,000 in respect of the purchase of the beach cottage was met by the defendant.

In November 1984, a mortgage loan in the sum of \$50,000 was obtained from the Girod Bank (Ja.) Limited on the security of the beach cottage. The defendant claims that this was obtained to assist in meeting expenses of the said beach cottage and that this was to the full knowledge of the plaintiff.

563

The plaintiff however denies this and contends that the defendant got her to sign the mortgage deed without her knowing what she was signing. In the same manner, she said, her signature was obtained in respect of over-draft facilities from the Girod Bank (Ja.) Limited. She contends that she never benefited from these over-drafts.

It is difficult to believe that Mrs. Steele would have signed these documents without even asking what they were. According to her "the defendant normally showed me the signing pages of documents for my signature". I am afraid I cannot accept this on the balance of probabilities.

Continuing the narrative, on the 19th February 1986, unfortunately, the parties separated. The matrimonial home was sold on the 1st September 1986, for \$390,000. The defendant refused the plaintiff's demand for a share of the proceeds of sale.

Consequently on the 6th March 1987, the plaintiff filed an Originating Summons seeking an Order:

- (i) That the defendant has in his possession or under his control money to which she is beneficially entitled by reason that it represents the proceeds of sale of premises situated at 9 Hall Boulevard, Kingston 8, in the parish of St. Andrew registered at Volume 1071 Folio 209 to which she is beneficially entitled;
- (ii) That the defendant render to the plaintiff an account of the proceeds of sale;
- (iii) Declaring that she is entitled to one half ($\frac{1}{2}$) share of the proceeds of sale;
- (iv) That the defendant pay to her such sum in respect of the money which this application relates;
- (v) That the premises situated at Lot 15 Duncan Bay and known as Silver Sands in the parish of Trelawny registered at Volume 1068 Folio 907 be sold;

(vi) That the defendant pays from his own one half ($\frac{1}{2}$) share of the proceeds of sale, the amount due to the registered proprietor of mortgage No.432496 endorsed on Certificate of Title registered at Volume 1068 Folio 907 and such other sums as may be due to the said proprietor of mortgage No.432496 for ever-draft facilities and a demand loan granted to the defendant.

'THE MATRIMONIAL HOME' - 9 HALL BOULEVARD:

The legal estate in fee simple vested in the plaintiff's husband, the defendant, subject to a mortgage to a bank first and then a building society.

In this regard the relevant law as stated by Lord Diplock in Gissing v. Gissing (1970) 3 W.L.R. 255 at 267C and referred to by Counsel on both sides is:

" 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 holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust".

He went on to say that the legal principles applicable to the claim are those of the law of trusts. And at p.267H he said:

" if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing.....

What the court gives effect to is the trust resulting or implied from the common intention expressed in oral agreement between the spouse that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed".

The plaintiff admits that there was no express agreement creating a trust but she founds her claim on the contention that there was an "implicit understanding" at the material time. In her affidavit in support of the Originating Summons she states that the "defendant and I decided to purchase the matrimonial home". It is her contention that throughout the transaction and when the property was transferred it was always "our intention that the house would be jointly owned.....".

The defendant strongly disputes this contention.

It would be appropriate, I think, at this point to again quote Lord Diplock in Gissing v. Gissing (supra) at 268C.

" But parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate ~~this~~ intention to one another..... In such a case, it may be possible to infer their common intention from their conduct".

Thus what the parties said or did which led up to the acquisition of the matrimonial home and while the acquisition was being carried through is of paramount importance in ascertaining the common intention of the parties. What they said and did after the purchase was completed " is relevant if it is explicable only on the basis of them having manifested to one another at the time of the acquisition some particular common intention as to how the beneficial interest should be held" Gissing v. Gissing (supra).

It is agreed that the defendant made the initial deposit and secured the mortgage. But the plaintiff claims that although the defendant operated his own account (she was not a party) she up to the time of separation maintained a joint account with the defendant to which all her earnings were lodged and from which she "verily believed" the defendant drew on to cover the costs with respect to the transfer of the said premises and also the costs with respect to the mortgage loan. This is strongly denied by the defendant. One cannot avoid detecting a degree of uncertainty on the part of the plaintiff in this regard. I accept the defendant's evidence that he alone met those expenses.

The burden of the plaintiff's evidence as appears in para.10 of her affidavit in support of Originating Summons is that " after the purchase of the house was completed I purchased all the furniture and appliances and stood the cost of domestic expenses which included grocery and school fees on the understanding that without these added expenses the defendant would have been better able to make the mortgage payments". She further stated in her affidavit in reply dated

1st January, 1987, that " although there was no expressed agreement or understanding it was always the implicit understanding with the defendant as stated in paragraph 10 of my affidavit". Going back to Gissing v. Gissing Lord Diplock at p.271 G-H said:

" Where the wife has made no initial contribution to cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day to day expenses of the household while each spouse retains a separate interest in capital assets acquired with their own monies".

One must therefore consider the evidence carefully to see if by his words or conduct the defendant induced the plaintiff to act to her detriment in the reasonable belief that by so acting she was acquiring a beneficial interest in the matrimonial home.

Mr. Rattray for the plaintiff submitted that when the property is the matrimonial home it is not difficult to assume what the intention of the parties was. He contended that where at an early stage of the marriage of two young people a matrimonial home is acquired that would provide sufficient evidence that the property was acquired for the purpose of both to be owned by both. He further argued that the intention was buttressed by the fact that the money realised from mortgage obtained on the security of the matrimonial home was used to purchase property in both names.

Dr. McCalla for the defendant submitted that property bought by one spouse presumptively belongs to that spouse to the exclusion of the other.

He contended that there is a presumption in favour of the defendant and that the evidence must demonstrate that the presumption has been displaced. The law of this country, he urges, knows of no community of property or of any special rules applicable to family asset. No presumption, he continues, arises by virtue of the fact that they are husband and wife, thus even if a spouse buys property for common use this does not by itself, give the other a proprietary interest. Many authorities were cited by Dr. McCalla in support, but he relied heavily on Pettitt v. Pettitt and Gissing v. Gissing (supra).

Let me here state that I cannot accept the argument that the use of the loan obtained on the security of the matrimonial home to purchase the beach cottage in both names is only referable to a common intention of the parties at the time of acquisition of matrimonial home that the wife should have a beneficial interest therein. There is certainly no basis for this neither in logic nor in law.

MORTGAGE INSTALMENTS:

The plaintiff in paragraph 30 of her affidavit stated that due to financial difficulties experienced by the defendant during 1985 she paid mortgage instalments due to Victoria Mutual Building Society with respect to the matrimonial home. A cheque in the sum of \$5000 payable to Victoria Mutual Building Society was exhibited. Defendant claimed that he borrowed \$5000 from the plaintiff to make mortgage payment. This amount he said was repaid - a copy of National Commercial Bank in deposit slip /favour of plaintiff was exhibited. This he said was the only such payment by the plaintiff.

In her affidavit in reply the plaintiff countered this by saying that the \$5000 deposited in the N.C.B. represented a refund of school fees which were paid by her for the year 1986.

It is difficult to reconcile the plaintiff's statement here with her claim that she undertook responsibility to meet the payment of school fees and so on. However even if the court should accept that she made this payment, for this to amount to a contribution she must show that such payment was regular. It would be unreasonable to infer from this one

payment a common intention from the outset that she should share in the beneficial interest - See Gissing v. Gissing (supra). I accept the defendant's evidence that the plaintiff did not contribute to mortgage payments. Indeed implicit in the plaintiff's claim that she contributed to the household expenses so as to better enable the defendant to make mortgage payments, is, I am inclined to think, an admission that it was the defendant who was making the mortgage payments.

HOUSEHOLD AND OTHER EXPENSES:

The plaintiff contends that she purchased all the furniture and appliances and stood the cost of domestic expenses including grocery and school fees.

This contention was vigorously disputed by the defendant. About ten affidavits were filed by the defendant in response to the plaintiff's 3 or 4 affidavits.

With regards to household expenses the plaintiff must show that there was a change in the arrangement for the payment of these expenses when the house was acquired. There is an abundance of evidence to support the conclusion that these expenses were met by both parties. The payments made by the plaintiff are consistent with a common intention to share the day-to-day expenses of the household.

There is not sufficient evidence here to demonstrate that the payments made by her in this regard are referable to an "understanding" at the time of the acquisition. The plaintiff's mere assertion that they are is not enough.

The defendant in response to the plaintiff's claim that she bought all the furniture and appliances after the matrimonial home was bought set out a list of the items of furniture and appliances that he bought and a list of those purchased by his wife. This has not been challenged.

The court may not infer a common intention that the plaintiff should have a beneficial interest in the said property from the mere fact that the plaintiff provided furniture and appliances for their joint use. There is nothing from the conduct of the defendant that could reasonably lead the plaintiff to so believe.

I find therefore that the plaintiff has not on the balance of probabilities rebutted the prima facie inference that the defendant who paid the deposit, paid for legal charges and took a conveyance and granted a mortgage in his own name intended to acquire the sole beneficial interest as well as the legal estate. I therefore refuse the order sought in terms of paragraphs (i), (ii), (iii) and (iv) of the Originating Summons.

THE BEACH COTTAGE:

The plaintiff is seeking inter alia an order for the sale of this property. She claims an entitlement to half ($\frac{1}{2}$) share of proceeds of sale.

The legal estate in this property is in both parties. Thus there is the presumption that both parties have a beneficial interest therein. However this presumption is rebuttable. The evidence must therefore be examined carefully to ascertain whether or not this presumption is displaced.

The plaintiff in her affidavit in support of the Originating Summons said that the decision to buy this property was a joint effort. The plaintiff contends that to facilitate the purchase of the beach cottage a mortgage in the sum of \$100,000 was obtained from the Victoria Mutual Building Society on the security of the matrimonial home. It should be noted that the defendant though not denying this, claims that he paid part of the cash outlay from his own funds. (See p. 1 above). In her affidavit in reply the plaintiff stated that:

" It was our expressed agreement that the beach cottage would have been in our joint names as joint tenants".

Her contention is that "the purchase of the beach cottage was achieved only through our joint efforts in contributing towards the expenses of the matrimonial home which was mortgaged to Victoria Mutual Building Society....."

It is her claim (see affidavit dated 24th June, 1987) that she bought all the necessary linens, curtains, pots and pans for the beach cottage.

On the other hand the defendant is saying that the beach cottage is his alone. Dr. McCalla for the defendant submitted that the evidence adduced by the defendant:

- (i) establishes that the plaintiff did not contribute to the purchase of the beach cottage or provide any funds for its purchase; and
- (ii) is sufficient to rebut the presumption of advancement.

As to the first limb of this submission I agree with Dr. McCalla. The defendant in most of his affidavits supports many of his contentions with bills. It is not so with the plaintiff. However bearing in mind my decision as to the matrimonial home it would follow that the defendant alone purchased the beach cottage and so the crucial question here is whether or not there is sufficient evidence to displace the presumption of advancement as suggested by Dr. McCalla. The defendant said that his wife's name was added to the title as joint tenant "by way of gratuity only". Mr. Rattray for the plaintiff forcefully argued that this is an admission that the plaintiff was intended not only to have a legal estate but also a beneficial interest in the property. I have no hesitation whatsoever in agreeing with Mr. Rattray that this is a clear admission by the defendant. I should also state that the other evidence adduced by the defendant does not displace the presumption of advancement. The presumption is that the defendant intended a gift to his wife of half ($\frac{1}{2}$) share of the beach cottage.

I would therefore grant the plaintiff's prayer in the terms of paragraph (v) of the summons.

In support of her prayer (at paragraph vi) the plaintiff stated she was not a party to and did not benefit from the mortgage loan of \$50,000 obtained from the Girod Bank (Ja.) Limited and from the overdraft facility. She stated that the defendant alone benefited from these, that she was not advised of them and that she did not know the purpose for which they were used. The defendant denies these. The plaintiff claims and it is not disputed that she received no rental from the beach

cottage. . The defendant in response claim that the plaintiff was well aware of the loan of \$50,000 and the over-draft facilities.

An inspection of the Mortgage Deed shows that on the face it was signed by both parties in the presence of a Justice of the Peace. It seems to me that unless the plaintiff can prove fraud she is bound by her signature and cannot say the document is not hers - she cannot plead non est factum.

The defendant said that the rental was used to defray expenses incurred in the upkeep and maintenance of the beach cottage. The cottage he said was operating at a loss hence the plaintiff not receiving any part of the rental. He repeatedly denied that the rental was used to pay mortgage secured on 9 Hall Boulevard.

The plaintiff in her affidavits does not give the impression that she has a detailed knowledge of the maintenance and operation of the cottage. Indeed much of what the defendant states in his many affidavits remain uncontroverted.

The defendant asserts that the mortgage loan of \$50,000 was used to meet the expenses of the beach cottage. The only document submitted in support of this assertion is a letter from Century National Bank dated 9th July, 1987. It will suffice to say that this letter is not admissible to prove this contention. However the defendant submitted income and expenses statements for years 1983 - 1987. These statements reflect deficits ranging from a low of 17,000 to a high of \$75,000 approximately.

Thus although there is no document to indicate how the loan of \$50,000 was spent and inspite of the fact that the statements of income and expenditure were not audited it seems not unreasonable to conclude on a balance of probabilities that this amount was expended on the upkeep and maintenance of the cottage.

Although I have found it difficult to ascertain the true position from the affidavit evidence on close scrutiny of this evidence I have come to the following conclusions:

- (1) That the defendant is the one who can better speak
as to what was and/or is happening at the beach cottage;

(ii) The plaintiff was not directly involved with the day-to-day management of the cottage.

As a consequence I accept the defendant's evidence that the cottage was operating at a loss. I also accept that loan and over-draft facilities were used to meet the expenses of the said beach cottage. I therefore hold that the losses and expenditure would be properly deductible prior to the distribution of any interest. The order sought at para.(vi) of Summons is therefore denied.

CONCLUSION:

The judgment of the court is as follows:

The orders sought in terms of paras. (i), (ii), (iii), (iv) and (vi) of the Summons are refused. Order sought at para. (v) granted. Each party to bear his/her own costs.