IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. C.L. 1974/ T 064

BETWEEN	FRANCELLA THOMAS	PLAINTIFF
A N D	ROBERT ROY	DEFENDANT

MR. C.U. Hines instructed by Messrs Daley, Walker & Lee Hing for the plaintiff.

Mr. A. Mundell for the defendant.

March 21, 22, 23.

WRIGHT J.

The plaintiff by her amended statement of claim seeks-

1. A declaration that the property the subject matter of the action is owned by the plaintiff and the defendant as tenants in common in equal shares;
2. An order that the said property be sold and the proceeds divided equally between the plaintiff and the defendant;
3. A sum of $20 per month from September 1973 until the said property is sold less all necessary expense and outgoings.;
4. All proper and necessary accounts and enquiries;
5. Costs.

The defendant, while admitting that he has been the sole occupier of the land and house in question since September 1973 as alleged by the plaintiff denies that the plaintiff is entitled to any share in the said property or to any mesne profit and that he is not accountable to her.

He asserts that the property is solely his in fee simple. The property is-

part of Watermount in the parish of St. Catherine containing by Survey 1 (one) rood and 26.3 perches butting and bounding as follows:-

a. on the North by the main road leading from Macca Tree to Spanish Town in the parish of ST. Catherine

b. South by lands owned by William Henry

c. East by lands owned by Amanda Thomas

d. And west by lands owned by Joseph Wright and Margaret Lawrence.

These delineations are in accordance with a plan of survey put in evidence by the plaintiff and marked exhibit 2.

There is no registered title for the land.

The plaintiff was married in 1955 and left Jamaica for England in 1960. Her husband one Wilson, is still alive. Thomas is the plaintiff's maiden name. She lived at Harlesden and worked at the same job for 6 years and 9 months up to November, 1966 when she met the defendant who then lived on the same road as she did. They struck up a relationship and they started living together. They do not agree as to their respective positions at that time. It is not disputed that the plaintiff was employed at the time and continued in her employment. However, the plaintiff contends that the defendant was not employed then and that he told her that he had had a job but that he had been laid off because of ill-health, She further maintains that he remained unemployed for another month after they began living together but eventually got a

job with the London County Council. On the other hand the defendant insists that he was already employed to the London Borough Council when he met the plaintiff and continued in that employment by virtue of which he was able to meet all the expenses of the household without the financial assistance of the plaintiff. Indeed, he maintains that he did not know what she did with her money and he did not care. He knew, however, that she sent help to her parents and he thought that was proper. So far as contributions to her parents were concerned the plaintiff's evidence was that it was only at Christmas time that she sent money for her parents. Her mother died on 20/6/65- some 11 months before she met the defendant.

The plaintiff testified that prior to meeting the defendant she had no bank account in England. She would send her money to Jamaica to a brother who now resides in United States of America. However, after she met Roy all this changed. Indeed, her first bank account in England was a joint account with the defendant at Barclays Bank, Harlesden which was opened with £150 contributed by her and £10 by the defendant. It is common ground that they both saved in "Partners". She testified that she had had her "draw" which enabled her to make such a healthy start. However, in 1968 for the benefit of the defendant's health they withdraw all there was in this account and returned to Jamaica. Up to then they had contemplated settling in England.

The change paid off so well that they were able to return to England on the 26.7.69 and went to live together at Thornton Heath, Surrey. In keeping with the pattern they

had established they opened an account in their joint names at Barclays Bank, Thornton Heath after they had returned to work. They both made lodgments from their earnings and savings in "Partners" to the account without keeping tally the one against the other.

In addition to this joint account they also opened a joint account at some later date at the Bank of Nova Scotia Ltd Spanish Town to which remittances were made from the Thornton Heath account.

While they were in Jamaica 1968-69 they contemplated purchasing a piece of land here. Septimus Roy, a cousin of the defendant was asked to find a suitable piece of land. After their return to England Septimus advised them of the availability of the land, the subject matter of this action and the amount of £250 ($500) was sent to Septimus. She exhibited as EX.1 the receipt sent them by Septimus issued by the vendor of the land. The receipt dated 11-9-70 reads thus-

"$500.00
Received from Robert Roy and Francella Thomas jointly throught Septimus Roy the sum of five hundred Dollars ($500.00) for four square of land known as Pedro $500.00

Sgd. Elaine Nelson

Witnesses { Arnold G. Halstead
{ Glady Roy "

Both herself and the defendant read and accepted the receipt as correctly representing the fact that the land was a joint purchase by them and there was never any objection raised by the

defendant to the inclusion of her name therein.

She exhibited also as EX. 2. A Surveyor's diagram of the lot of land sent them subsequently by Septimus Roy. Both names are reflected thereon and her evidence was that no objection was ever raised by the defendant to the continued representation of her as a person having an interest in the land.

It may be well to state here the defendants evidence relating to these documents. He said that he had not instructed Septimus Roy, his agent to include the plaintiffs name in any of the documents nor even to have the place surveyed but because of his love and high esteem for the plaintiff he voiced no objection. Both himself and the plaintiff were child less and he intended whatever he had to be theirs forever. He accepted both documents without protest.

The plaintiff is not claiming any gratuity from the defendant, She is claiming her own and in furtherance of her claim she set out to show how the land was acquired and how the house was built.

She said at first that the £250 sent to Septimus Roy had been withdrawn from the account at Thornton Heath and that both herself and the defendant had purchased Postal Orders and sent them to Septimus. However, under cross-examination having been shown the relevant bank book, which the defendant tendered as exhibit 3, she identified an amount of £169 withdrawn on 21.8.70 as the amount actually withdrawn from the bank and further stated that they added to that sum an amount which they had at home and so made up the £250

The defendant agreed that the £169 had been withdrawn for that purpose but doesn't agree with anything else the plaintiff had to say about the £250 or the remittance of the money to Septimus Roy. His version is that Septimus had money for him and that he sent the money withdrawn to Septimus to make up the purchase price to £250. What is more, he mantained that the plaintiff knew nothing about the remittance.

The plaintiff had mantained that both names were entered in EX. 3 at the time the account was opened but on looking at the book in which both names appear in ink of different colours she explained that when she discovered that her name was not in the book after they had returned home from the bank she asked the defendant about it and he replied "it can go on like that because we are together". Her name was included at a later date about which she could not be definite.

A perusal of EX. 3 disclose that from the account was opened on 16/2/70 to 7.1.72 when the last entry was made at the time of decimalization with the exception of the amount of £169 referred to above no other sum was withdrawn from the account.

The plaintiff testified that they had been saving towards building a house on the land and that a total of £1500.00 had been accumulated in the Spanish Town account up to the time of their return to Jamaica on 28/3/73. They

brought with them a further £50 which was lodged to the Spanish Town account. The house was built out of this total leaving a balance of about £30 at the time of completion. They borrowed no money in connection with the construction or at all.

The defendant agreed that it was the intention of them both that the money in the Spanish Town account should be used to build the house and that it was used for that purpose.

The house was completed in August 1973 and both parties went to live there. But the plaintiff's occupancy was brief. According to her she was forced to leave after just one month. She said that"in England the defendant used to knock, knock me up if I went to do shopping and stayed late or if I worked overtime and came in late but in Jamaica he beat me up a lot after the house started". She was eventually chased from the house with a machete and her belongings thrown out. The Brown's Hall Police were notified. A Corporal visited the home along with her and that was how she recovered some of her things.

The defendant agreed that the police did attend but not because of any ill treatment he had meted out to her. On the contrary he claimed she sought the help of the police because her infidelity had made her scared of him.

The defendant both by his demeanour and the content of his testimony offered a violent opposition to the plaintiffs claim. He stated that the money in the bank book EX. 3 was

his and that "the plaintiff did not contribute one cent to this account!" Against this statement I contrast the obviously sincere testimony of the plaintiff "I worked most of the money when the defendant sick and under blanket. I leave him with porridge and lamp by his bed and go to work". Concerning the account at Spanish Town the defendant made a similar denial; though he agreed that her name was also on that account He could not say when this account was opened but he did say her name was put on shortly after it had been opened. It was Septimus Roy who had attended to this matter.

He denied that illness ever inhibited his earnings but the account he gave of how her name came to be on both accounts does not bear that out. He said that he put her name on the Thornton Heath account not because she had made any contribution there to but because he was so ill in 1971 that he thought it best to make provision for his funeral and also to protect her interest. He wished his body to be brought back to Jamaica for burial in the event of his death and as the account stood in his name alone she would not be able to get the necessary funds from the bank. For a similar reason her name was put on the Spanish Town account.

It is worthy of note that up to the time of his testimony the defendant had not recovered from the illness that affected him in England over eight years ago and which he admitted caused him severe pains in his side but never stopped him from work or from meeting single-handedly the expenses of the household. It was only under much pressure that he grudgingly conceded that "the plaintiff must have

contributed to the household expenses." He had no idea of the ~~account~~ amount of these expenses. Despite his high regard for her while they lived together in England he never thought of their pooling resources together for their mutual benefit. Indeed, it never concerned him as to what she earned nor how she spent her money.

I find the defendant to be less than truthful and am not impressed with this testimony. The high bravado content of his evidence is obvious but transparent and the truth is hard to come by.

Not only did he deny illtreating her and forcibly ejecting her but asserted that he awaited the completion of the house to marry her and that as far as he was concerned the house would be theirs jointly as man and wife till death and that he had never ceased to love her.

In his effort to show good faith he has obviously over-stated his case because there is no evidence of any divorce proceedings having ever been initiated or even contemplated. He denied emphatically that the plaintiff has any proprietary claims to the premises in question. What he did make allowance for would be the equivalent of a conferment to which a dum casta clause is attached in that he said that had she behaved herself he had intended that she should live in the house until she died. This be it noted, not as of right but out of the magnanimity of his heart.

The obvious was conceeded namely, that if she had indeed acquired a propriatary right based on her contribution then her subsequent behaviour would be irrevelant when considering the existence of such a right. For a proprietary

right once established would not alter because love had to hatred turned.

It is therefore not necessary to determine the charge of infidelity mounted against the plaintiff by the defendant to arrive at a a conclusion on the question before me. But since it must be a matter of some concern to the plaintiff, involving as it does a moral taint, I will say that if a verdict were required on this issue substantially more evidence would have to be presented by the defendant to procure a finding to the detriment of the plaintiff. For despite the fickleness of human nature, I find it difficult to accept the defendants evidence, unsupported as it is, that after the plaintiff had stood by him for some seven years she should, at the point when their dream was materialising suddenly, and apparently in his presence strike up a relationship with the mason whom they had employed and so forfeit the enjoyment of the home towards which they had aspired. It seems more probable that she was forced to leave the home because of the defendants il-treatment of her and I so find.

What are the indications as to where ownership in the disputed premises lay?.

Mr. Hines calls to his assistance the decisions of the House of Lords in Pettitt v Pettitt [1969] 2 W.L.R. 966 and Gissing v Gissing [1970] 2 All. E.R. 780. in which although the dispute arose between former spouses the law applicable was held to be the same even where the contending parties were not thus specially related. The principle to be

extracted is that what is involved whether proceedings be brought under section 17 of the Married Woman's Property Act 1882 (as in Pettitts case) in Chancery by originating summons (as in Gissing's case) or indeed by any approprate means the court's duty is not to confer proprietary rights but to ascertain where such rights lay. In the Pettitt case the house of Lords denied the claim of a husband who sought to obtain a declaration that he shared beneficially in a house owned by his wife to which he had made some improvement. There was no agreement, express or implied that he should so share and no trust had been created. In the Gissing case it was the wife's turn to lose, and she failed because she could prove no contribution direct or indirect referable to the right she claimed. Contribution must be proved because the court is not empowered to make gift.

The plaintiff's case rested heavily too on the court of Appeal decision in Cooke vs. Head [1972] 2 All. ER 38 in which Cooke (Head's mistress) secured a declaration that she was entitled to a one-third share of the proceeds of the sale of a house built on lands which had been bought in Head's name alone. But the evidence there showed beyond a doubt that she had contributed to the planning of the house, and its construction as well as to mortgage payments through joint savings with Head. The plaintiff's claim does bear some relationship to this case.

But in seeking to identify the indicators of ownership I am confronted with a very human situation. These are two anxious parties. Indeed the very obvious yet understandable anxiety of the plaintiff to secure what she insists is hers by right is met by the undisguised

anxiety and hostility of the defendant. In such a matter therefore , which must be decided without the assistance of third parties one must of necessity tread cautiously in deciding between their conflicting claims. On the whole, however I find the plaintiff to be more trustworthy.

I accept that a savings pattern was established by the joint account in the Harlesden Bank which was exhausted when the parties returned to Jamaica in 1968 in the interest of the defendant's health. I accept that on their return to England in 1969 they continued to save in "Partners" and that they saved jointly at Barclays Bank Thorton Heath and that remittances were made from this account and otherwise to their joint account at the Bank of Nova Scotia Spanish Town.
I find that the sum of £250 paid for the land in question came from their joint earnings and savings. I accept that the plaintff's name was not originally on the Thornton Heath account but it seems more probable that it was subsequently added because of the plaintiff's insistence rather than to facilitate the defendant's burial, and I so find . The receipt (EX1) and the digram (EX.2.) I regard not as merely consonant with the defendants undisclosed intention that the plaintiff should enjoy the premises but conversely as evidencing the true nature of the transaction,namely, a joint purchase by both parties. A very pertinent question on this point may be posed. Since according to the defendant he had given no instructions to Septimus Roy his agent to include the plaintff's name in the receipt for the purchase price how would Septimus know to reflect his intention so well ?.

It will be useful to quote his answers in cross-examination on this aspect.

> "Having regard to the high esteem I had for her I intended to purchase the property for the benefit and use of us both"

Further questioned he said:

> "The premises were intended for our joint occupation as man and wife till death. We both should own the place till death".

It seems therefore a remarkable coincedence that Septimus without any instructions read the defendants mind so clearly, unless of course he was clairvoyant.

On the question of title to the land the defendant under cross-examination said that he had not thought of getting one but had be done so it would have to be in both names.

I find also that the plaintiff along with the defendant did manual labour in the construction of the house. The defendant admitted that she was at the construction site along with him every day but denied she did any work at all.

The evidence preponderate in favour of the plaintiffs claim and I find that she is entitled to a share in the desputed premises.

In Cooke's case (supra) several matters were outlined which should be taken into account in assessing the shares of the contending parties. Of these the ones relevant to this case are (a) the back-ground of the parties with their earnings and contributions, (b) the method in which they saved

such as the "Partners" and joint savings account, (c) the amount of the direct cash contributions of each; (d) the amount of the work each had done on the property.

From their background and their method of saving it is impossible to determine the amount of money put in by each. Nor was any attempt made to assess the value of the work done by each. Any such effort would quite likely prove fruitless.

In all the circumstances, therefore, it seems that justice is best served by applying the maxim "Equality is ~~Equality~~ Equity". and declaring that the beneficial interest in the premises belongs to the plaintiff and the defendant in equal shares in fee simple.

In her statement of claim the plaintiff had given the market value of the land and house as $9,000 and the possible monthly rental as $40. The defendant had countered with a market value of $4,000 and a monthly rental in the region of $5.

The plaintiff did not give any evidence on this aspect of the case but relied on the evidence of one Dudley Donald Morgan an Auctioneer and Valuator of Spanish Town who stated that he has had 10 years experience in real estate valuation. In addition he is also a member of the Rent Assessment Board. Rather impressive credentials. But Mr. Morgan did not live up to expectations.

Both the plaintiff and the defendant testified that the house has two apartments both floored with board and a tiled verandah that there is no electricity in the area and no domestic water supply. However , Mr. Morgan valued it as a 3

apartment house. Not only that, he was largly influenced by non-existent factors in placing a 1974 valuation of $9000 on the premises and a monthly rental of $90. For today he would make that $130- $140 per month. He was positive that electricity ran along the road passing the premises. Domestic water supply was there too, he said. The plaintiff and defendant are agreed that up to the time of hearing neither of these amenities was there. Yet these enchanced the value of the premises in Mr. Morgan's eyes. I will devote no more attention to these witness' testimony. Out of charity I will only say he is unreliable.

So far as the value of the premises is concerned the defendant was unhelpful. He could give no figure at all. On the question of rental he said the house alone could not be rented for more than $10 per month. House and land would fetch about $120 per year plus another $15.00. Rental in the area said he is $5 per month for a room.

The premises are situate along the main road in a rural agricultural area and seems fruited to capacity. It is not the setting to attract urban level rental.

Evidence on this aspect of the case is unsatisfactory. Mr. Morgan's valuation is clearly erroneous and apart from the figure pleaded the defendant has advanced no helpful information.

Doing the best I can with the material before me I reckon a 1974 market value of about $5000 and a monthly rental of $20.

The plaintiff would be entitled to a one-half share of this income, less all necessary expenses and outgoings from September 1973 until sale of the property as well as all necessary accounts and enquiries.

To summarise, therefore, the plaintiff will have .

1. A declaration that the property the subject matter of the action is owned by the plaintiff and the defendant as tenants in common in equal shares.
2. An Order that the said property be sold and the proceeds divided equally between the plaintiff and the defendant;
3. A sum of $10 per month from September 1973 until the said property is sold less all necessary expenses and outgoings,
4. All proper and necessary accounts and enquiries
5. Costs to be taxed or agreed.