

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 77/92

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN PHILLIP MOUNTBATTEN WHITTAKER DEFENDANT/APPELLANT

A N D LILIETH EDWINA WHITTAKER PLAINTIFF/RESPONDENT

Patrick Foster and Dennis Morrison for Appellant

Janet Nosworthy for Defendant

February 28; March 3 and October 24, 1994

RATTRAY P.:

On the 3rd of March 1994 we dismissed the appeal with costs in favour of the plaintiff/respondent, promising then to give our reasons in writing. We do so now.

The proceedings originated in the Supreme Court by Summons brought under the Married Women's Property Act by the plaintiff/respondent, the wife of the defendant/appellant. It was the not infrequent situation when a marriage having broken down one party or the other, usually the wife, seeks from the Court a determination of entitlement to property acquired during the currency of the marriage. By the time of the trial the issues related to:

- (a) premises known as 8 Great House Mews, in the parish of St. Andrew;
- (b) apartment No. 206 Trafalgar Court, in the parish of St. Andrew;
- (c) premises known as 3 Norbury Drive, in the parish of St. Andrew;
- (d) certain items of furniture in the apartment No. 206 Trafalgar Court.

It is the judgment in respect of (b) and (d) above which is being challenged in the Court of Appeal.

The story is all too familiar. At the time of the marriage in August 1976, the parties were pursuing studies; the husband as an actuarial student, the wife in medicine. They had common ambitions for a future life together and at that time a common impecuniosity. The husband shortly after the marriage proceeded to London to complete his studies and returned to Jamaica in March to April 1977. They lived rent free with the plaintiff/respondent's mother and from a common pool which included the inputs of the mother they met their personal and domestic expenses. In early 1978 they purchased a three bedroom town-house situated at 8 Great House Mews, Mona, St. Andrew. The title was taken in the names of both parties. They lived in it as the matrimonial home. The Trial Judge found that the parties were each entitled to a half share in this property and this decision has not been challenged on appeal by the defendant/appellant. Any reference therefore to the method by which that purchase took place and its subsequent history in the scheme of things is relevant only to indicate:

- (a) how the parties conducted their domestic affairs, particularly in respect of financial matters;
- (b) the origin of part of the security which was the launching pad for future investments.

Suffice it to say at this stage that the purchase price of \$50,000.00 was partly provided by a loan obtained by both parties from Barclay's Bank of \$10,000.00 secured by a mortgage on premises owned by the mother of the plaintiff/respondent and situated at 5A Eastwood Park Road. The parties operated a joint Savings Account at Barclay's Bank, as well as, a joint Savings Account at Teacher's Credit Union. They had a joint Current Account at Barclay's Bank against which both would draw their

cheques. The loan from Barclay's Bank in respect of 8 Great House Mews was serviced from the joint Savings Account at Barclay's Bank. Both parties jointly applied for and obtained a mortgage loan in the sum of \$45,000.00 from Citibank on the security of 8 Great House Mews and this loan was used to pay off the balance of the purchase price owing on 8 Great House Mews.

The parties organised their domestic affairs in such a manner as to meet the payment of their household requirements out of joint funds.

In the late 1970's the defendant/appellant gained employment with Life of Jamaica and this provided an easy avenue for the obtaining of staff loan funds at low interest rates. In 1979 such a loan was obtained and utilised to pay off the loan outstanding to Citibank and a loan also of \$11,000.00 obtained by the parties from Barclay's Bank. In 1982 and 1983 further loans were obtained from the defendant's employers. These loans from the defendant's employers were repaid by way of monthly deductions from the defendant's salary. They were used to defray domestic expenses of the parties. Indeed in 1984 from earnings of the plaintiff/respondent in her part-time practice a water tank was installed at Great House Mews at a cost of \$16,000.00, carpeting at a cost of \$4,000.00 approximately plus \$300.00 for installation.

In August of 1986 the plaintiff/respondent received a fellowship to pursue post-graduate studies in Canada. She deposed in her affidavit that by agreement between her husband and herself premises 8 Great House Mews was leased to the United States Embassy for US\$1,000.00 per month. The Embassy required certain improvements to be done to the premises. These cost approximately \$12,000.00 and this sum was secured by a joint loan from National Commercial Bank in the sum of \$30,000.00. The lease was taken in the name of the defendant/appellant only. This particular fact is mentioned as an indication of how the parties conducted their business since there is no doubt that the property was owned by both parties.

The plaintiff/respondent deposed that the \$30,000.00 loan was re-payable by monthly instalments of \$1,250.00 deducted from their joint savings account with the Bank. These allegations are admitted save that the defendant/appellant maintained that the plaintiff/respondent had ceased making lodgments to the joint account since the early 1980's. This is denied by the plaintiff/respondent who states that while abroad in Canada her salary cheque was lodged to this account.

The cost of improvements required by the United States Embassy left a remainder of \$18,000.00 from the joint loan received from the National Commercial Bank. The plaintiff/respondent stated that they had agreed to purchase a two bedroom apartment known as 206 Trafalgar Court Apartments for \$280,000.00 and that of the balance of the loan \$17,000.00 was to be used to pay the transfer and closing costs for that apartment. The defendant/appellant obtained a staff loan of \$300,000.00 at a low interest rate with the premises mortgaged as security for the loan. The monthly payments were to be deducted from the defendant/appellant's salary.

The parties had agreed that the plaintiff/respondent would take the children with her to Canada and they were to meet living expenses from the fellowship of Can.\$10,800.00 per annum, and the rental from the Great House Mews property of US\$1,000.00 per month. Before the wife's departure for Canada the United States Embassy was given possession of the Great House Mews property and the family moved into the Trafalgar apartments which the wife maintained was purchased as an investment but also as an alternative matrimonial home if the Great House Mews home was not available. When the wife left Jamaica with the children for Canada the transfer of the Trafalgar Court Apartments had not yet been completed but the wife deposed that it was agreed that the Certificate of Title would be taken in the names of both her husband and herself. As it subsequently turned out the Certificate of Title was taken in the name of the husband only. When she returned to Jamaica and discovered

the omission of her name from the title and inquired why, since they had agreed otherwise, he replied that it was convenient to do this since she was off the Island. In reality he said the apartment was jointly owned by both of them and he had no ulterior motive. The defendant denies that there was any such agreement. He claims to be the sole legal owner of the property purchased from funds borrowed by him from his employer, Life of Jamaica. In respect of the allegation that the \$17,000.00 balance on the other loan was agreed to be used for the purposes of payment of the transfer fees and closing costs of the Trafalgar Court Apartment he also makes a denial but offers no explanation as to what happened to that balance. These costs which amounted to \$16,539.00 were met he says by a further sum of \$20,000.00 borrowed from Life of Jamaica making the total mortgage loan \$300,000.00.

With respect to the Trafalgar Court Apartment the Trial Judge found that there was an express agreement that the property would be jointly owned by the parties. This was against the background of the arrangements between the parties as to how they would manage their affairs, financial and domestic while the wife and children resided in Canada. In support of this was the husband's failure to account for the \$18,000.00 balance from the joint National Commercial Bank loan of \$30,000.00 which the wife specifically claimed was agreed to be used to pay the closing costs of the Trafalgar Court Apartment. Pertinent too, was the fact that the family lived at the apartment before the wife and children departed for Canada. The transfer had been signed after the wife left for Canada. Although the husband had deposed that she was present throughout the negotiations and knew her name was not on the title this assertion was negatived by the established fact that the Registration of the transfer was in October 1986 and the wife's sojourn in Canada was between August 1986 and September 1988.

The principles which govern "the termination of the beneficial interest in property of one party to a marriage where the property has been registered in the name of the other party" are by now very well established both in the Courts of the United Kingdom and of Jamaica. They rest upon the basis that the person in whom the legal estate is vested holds it in trust to give effect to the claimant as cestui que trust. The applicable law therefore is the law relating to the operation of resulting, implied or constructive trusts - see Gissing v. Gissing [1970] 2 All E.R. 780. The party maintaining a beneficial interest has to demonstrate: (a) a certain intention that both should have a beneficial interest, and (b) the claimant acting to his or her detriment on the basis of this common intention - see Grant v. Edwards [1986] 2 All E.R. 426 at 437 - both English authorities are cited in Azan v. Azan, Supreme Court Civil Appeal No. 53/87 (unreported) as representing the law. The Trial Judge clearly understood these principles and identified the evidence which he accepted as sufficient to support his finding that the wife was entitled to a half share in the Trafalgar Court Apartment.

With respect to the proportion of the ownership the principle of equality is equity is demonstrated in such cases as Nixon v. Nixon [1969] 3 All E.R. 1133 per Lord Denning, M.R. at page 1137:

"When husband and wife by their joint efforts acquire property which is intended to be a continuing provision for them both for the future such as the matrimonial home or the furniture in it the proper inference is that it belongs to them both jointly no matter that it stands in the name of one only. It is sometimes the question what is the extent of their respective interest, but if there was no other appropriate division, the proper inference is that they hold in equal share".

See also Ivan Josephs v. Evelyn Josephs, Resident Magistrate's Civil Appeal No. 13/84 (unreported).

It may be appropriate to comment that in a dispute over the ownership of matrimonial property where the affidavits of the two contesting parties represent the totality of the evidence, the Trial Judge is better assisted by a cross-examination of the parties which was absent in these proceedings, the parties or their legal representatives not having so required. It avoids the danger of the balance of probabilities being influenced by the better draftsman.

We concluded that the Learned Trial Judge was correct in his determination that the plaintiff/respondent was entitled to an equal share in the Trafalgar Court Apartment.

Eventually the question of ownership of the furniture was not pursued.

We therefore dismissed the appeal and awarded costs to the plaintiff/respondent.