

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 01865/2006

BETWEEN MONICA BERNARD CLAIMANT
AND MICHAEL BERNARD DEFENDANT

Mr. Barrington Frankson for the Claimant

Mr. Leonard Green instructed by Chen Green & Company for the Defendant

Heard: March 28 and April 2, 2008

**Application for Declaration of Interest in Property
Property (Rights of Spouses) Act**

Straw J

The Claimant, Mrs. Monica Bernard has applied to this court for, *inter alia*, a declaration that she is entitled to fifty percent (50%) interest in the value of a house situated at Woodhall District in the parish of Clarendon. The house is situated on untitled family land owned by the defendant's family.

The defendant has denied that his wife has any interest in the house and has stated that it was built by himself and his deceased mother.

Background to the Claim

The parties were married on 20th June 1987 in the United Kingdom (UK) where they were both residing. They both lived together for two years before the marriage and produced a child, Natasha Bernard, born on the 14th January 1986.

They were both previously married. It is agreed that the construction of the house commenced in 1985 and was completed in 1995. They moved to Jamaica and into the house in 1999.

Mrs. Bernard has asserted that her husband was unfaithful and returned to England in 2001 and has been cohabiting with his paramour since 2004. She remained in the house until February 2005 when she was threatened by the defendant. She returned to live in the U.K.

Mr. Bernard, on the other hand, told the court that he left the house in 2004 to return to the U.K. and the claimant deserted the house of her own free will.

The Fixed Date Claim form was filed in the Supreme Court on the 22nd May 2006, approximately 14 months after their separation. Mrs. Bernard stated that she has commenced divorce proceedings in the U.K.

Submissions in Relation to the Property (Rights of Spouses) Act

Mr. Barrington Frankson, Counsel for Mrs. Bernard, in his written submissions, has referred the Court to Section 6 (1) and Section 13 (1) and 14 of the Property (Rights of Spouses) Act 2004.

This Act came into being in April 2006. Section 4 reads as follows:

“The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of

property and, in cases for which provisions is made by this Act, between spouses and each of them, and third parties.”

The Act has therefore replaced the Married Women’s Property Act and the common law authorities dealing with the questions of property among spouses.

Section 6 of the Act grants to a spouse a presumptive interest of 50% in the family home. The ‘family home’ is defined by the Act. Section 14 deals with the considerations to be applied to the division of the family home or property other than the family home, by the courts.

Section 13 (1) is of relevant consideration for the court in the circumstances of the case.

Section 13 – (1) A spouse shall be entitled to apply to the court for a division of property -

- a) -----
- b) -----
- c) Where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
- d) -----

(2) An application under subsection 1 (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage or separation or such longer period as the Court may allow after hearing the applicant.

Two separate issues arise in this case in relation to the Property (Rights of Spouses) Act. Firstly, would this court have jurisdiction to apply the provisions of the Act to circumstances that arose before it came in being.

In the case of **Peaches Stewart v Rupert Stewart**, Claim No. 2007, HCV 0327, my learned brother Sykes J. came to the conclusion that the Act did not apply if the specified events of Section 13 (1) occurred before the Act became law. He states as follows (at pg. 7 paragraph 19),

“...if the events occurred before the Act became law then logically it cannot apply to events that occurred before the Act became law. Before the Act came into force it was not the law. Thus the law can only speak from the time it come into force. Courts do not lightly conclude that a statute has retrospective effect”

Happily, I do not have to decide whether I agree or disagree with my brother on this fundamental issue as the secondary issue is a greater stumbling block to Mr. Frankson’s submission.

Section 13 (2) states that the application under 13 (1) is to be made within 12 months of the separation (the relevant qualifying factor in this case) or such longer period as the Court may allow after hearing this application.

As I stated previously, based on the evidence of Mrs. Bernard, the parties would have been separated by (at least February 2005, 14 months before the Claim Form was filed. She has not sought the leave of the court to bring the application outside the 12 month period.

I would therefore have to agree with the submissions of Counsel for the defendant, Mr. Leonard Green, that it is not open to the claimant to seek any remedy in relation to the division of property under the Act.

Mr. Green, however, has also argued that, based on Section 4 of the said Act, the court cannot apply the common law principles giving rise to a beneficial interest in

matrimonial property and could only deal with the application on the basis of the claimant's entitlement arising through contributions.

With due respect to Counsel, I cannot agree with this submission. The issue of the claimant's entitlement on the basis of contributions form part of the common law principles. If the Property (Rights of Spouses) Act does not apply, then the court would have to apply the common law principles existing on the issue before the Act was passed.

Having laid this foundation, the court will now consider the issues of Mrs. Bernard's interest in the house at Woodhall. Both the claimant and the defendant vary substantially in their evidence in relation to the ownership of the house.

Case for the Claimant

Mrs. Bernard stated that she met Mr. Bernard in 1983. At that time she was still married to her first husband. She lived with Mr. Bernard for two years commencing in 1985. Before they got married, she said that she received the sum of £12,000.00 as part of her divorce settlement on behalf of herself and the three children of the marriage. She asserts that, from this lump sum, she contributed to the construction of the house at Woodhall.

Mrs. Bernard explained that the defendant told her about a parcel of land at Woodhall owned by his family, that he had been given a portion and that they could build a house on it.

She said they took the decision to work together and to return to Jamaica to live. They agreed that they would use her lump sum settlement in furtherance of the project. As a result, she withdrew money from her sole account and sent to Jamaica to purchase materials for construction.

Analysis of Funds Contributed by Claimant

The claimant exhibited copy pages of her bank book in support of her claim. Examination of these revealed a withdrawal of varying amounts between 1987 to 2000, two years after the commencement of construction and five years after the house was completed.

During that period, the largest sum withdrawn was for an amount of £2,000.00 in September 1998 (post construction period). However, varying sums, for example, £100.00, £200.00, £500.00 and smaller amounts were withdrawn during the period of years.

Other Income of Complainant

Mrs. Bernard has testified (and the defendant has agreed) that the defendant came to live with her at rented accommodation in London after she left Derbyshire County. She further stated that he was unemployed for periods of time. It is agreed that a house owned by the defendant had been conveyed to his first wife as part of their divorce settlement. Both herself and the defendant paid the rent for the house in England, they pooled their resources, bought together and jointly paid utility bills. She agreed that small amounts withdrawn from her account between 1987 and 2000 were used by her for household and living expenses.

She further stated that she worked as a practical nurse, sometimes full time and sometimes part time. This was a source of income. She last worked full time between 1998 - 1999, for one year, before she came to Jamaica.

Money Transfer from Claimant to Defendant

Mrs. Bernard exhibited several money transfer payments from herself (in the United Kingdom) to Mr. Bernard in Jamaica. Mr. Bernard stated that these sums were sent in order to pay the school fees for their daughter in May Pen, Clarendon.

The court notes that these payments were between 2003 to 2004 and, as such, do not relate to the period of construction.

Analysis of the Claimant's Case

There is no evidence of a particular sum of money contributed by the claimant towards the construction of the house. It is also quite clear that, based on her bank book, the defendant was not given a large lump sum from her settlement at any one time between 1985 and 1995.

Both herself and the defendant commenced living together in 1985. Construction started in 1985. They had a child together in 1986 and got married in 1987. From all appearances, there was a pooling of resources to meet living expenses.

The Defendant's Case

Mr. Bernard has denied that there was any agreement between himself and the claimant to build a house at Woodhall in Clarendon. He gave evidence that construction started on March 1, 1985 and he had only met Mrs. Bernard three months previously. His affidavit avers that the house was jointly owned by himself and his deceased's mother, that they both invested their resources in the project and the house was intended to be her retirement home. His mother commenced living in the house and would move out whenever the claimant visited Jamaica. He states that his mother died in 1991.

Mr. Bernard, however, shifted somewhat from this position as he said under cross-examination that the house belonged to his mother and he expects it would pass to him on her death.

Mr. Bernard has also stated that both himself and the claimant agreed (only) in 1999 to come to Jamaica to live but it was with the intention that they would be living in a house jointly owned by himself and his mother. However, in 1999, his mother would have been dead for approximately eight years.

Financial Contribution of the Defendant

Mr. Bernard is in a similar position as the claimant in relation to presenting evidence of a total sum expended by him. There is none. He has stated that he made substantial investments in the property. He has indicated that he had £4,000.00 in a bank account and that he worked as a brick layer consistently for most of the year.

However, he has also stated that he had been travelling to Jamaica since 1985 and spent at least six months per year in order to work on the construction of the house, that his brothers also assisted him in order to keep costs down.

Mrs. Bernard has not challenged this aspect of the evidence. It would, however, suggest that he would not have been employed in England for at least half of the year during the construction period. Certainly, this would be consistent with the claimant's evidence concerning his employment.

Household Expenses

Mr. Bernard has stated that he paid the rent for the premises where he lived with the claimant. He agrees that they shared the utility bills. He also stated that they were

literally 'starting from scratch,' that their furniture was minimal and that they bought as they went along.

Other Issues

He took issue with his wife's employment record. He admits that his wife was working prior to and during the marriage. However, he has also said that she was not working when he went to live with her and she only started working eight years later.

Examination of the Legal Principles to be Applied

(1) In the case of **Aubrey Forrest v Dorothy Forrest** SCCA No. 78/93, Forte, J.A. , in discussing the well known case of **Pettitt v Pettitt** 1969 2 All ER, 385, (a case dealing with the powers of the court in determining the property rights as between husband and wife) stated as follows (at pg. 7):

“Where therefore, there has been an express agreement between the parties, the court has no power to alter their respective rights in the property. Where there is no express agreement, the court is entitled to determine from the conduct and the contribution of the parties, what was their common intention at the time of the acquisition of the property.”

The circumstances of **Forrest** (supra) involved a couple who married in England in 1969 and purchased property in Jamaica in 1972. The house was registered in their joint names. A mortgage was secured in their joint names. They both contributed financially. The wife paid off the outstanding balance due on the mortgage to save the house being sold at an auction.

Under the circumstances, the court was of the view that the evidence demonstrated a common intention to share equally.

In the case for determination, the evidence does not lead one to conclude that there is any express agreement before the court in relation to the proprietary interest of the spouses in the house at Woodhall. The court will therefore have to infer the common intention of the parties from their conduct and contribution.

This process, however, is extremely difficult as there is no registered title in relation to the house. It is built on family land owned by Mr. Bernard's family. The house itself was not acquired by means of a purchase price. There is no mortgage involved. The parties agree that the house was constructed over a ten year period between 1985 and 1995.

The activity suggests that the house was built, as one would say in the Jamaican vernacular 'little by little' as money was available.

Mrs. Bernard has stated that they agreed they would pool their resources and build the house together. Mr. Bernard has denied this. Neither party gave evidence of a particular quantum contributed to the construction.

In **Grant and Edwards and Another** 1986 3 WLR pg 114, Nourse L.J. also discussed the case of **Pettitt v Pettitt** (supra) as well as that of **Gissing v Gissing** 1971 AC 886 and summarized the principles (at pages 120 and 121) as follows:

“In most of these cases the fundamental and invariably the most difficult question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively. In this regard the court has to look for expenditure which is referable to the acquisition of the house: ----- . If it is found to have been incurred, such expenditure will perform the two fold function of establishing the common intention and showing that the claimant has acted upon it.”

In the above case, the court found, firstly, that there was evidence that raised the clear intention that the plaintiff/wife should have an interest in the house. This was inferred from an excuse given by the first defendant/husband to the plaintiff/wife concerning her interest in the house.

Secondly, it was held that her contribution to the general household expenses had been in excess of what would be expected as a normal contribution and without that substantial contribution, the first defendant's means would not have been sufficient to keep up the mortgage payments. The court found that these indirect payments demonstrated detrimental conduct on the part of the wife and that it would not have been expected that she would so conduct herself unless she had an interest in the property.

In relation to the present case, the issue of indirect payments do not arise at all.

Mrs. Bernard stated that both herself and Mr. Bernard paid the rent for the house in England and they jointly paid utility bills. She also stated that she would take money from her account sometimes to meet her portion of the expenses.

The only issue for the court to consider is whether Mrs. Bernard incurred any expenditure referable to the acquisition of the house so as to establish a common intention for both to have a beneficial interest in the property.

Reasons for Judgment

In determining whether Mrs. Bernard has proved on a balance of probabilities that she is entitled to any proprietary interest, the court takes into account the following factors:

- i. Mrs. Bernard has not supplied any documentary evidence to the court in relation to a large quantum of money being given to Mr. Bernard

towards construction during the period 1985 - 1995. However, the evidence reveals that the construction took place periodically.

- ii. Mrs. Bernard did have an amount of £12,000.00 available to her during the relevant period.
- iii Mr. Bernard spent time away from any employment in England to build the house in Jamaica. He took pictures and brought to Mrs. Bernard.
- iv. Mr. Bernard's mother died in 1991, four years before construction was completed. Although he gave evidence that she lived in the house prior to her death, she would leave when his wife visited from England.

Neither Mr. or Mrs. Bernard have been totally candid with the court, however, I do find Mr. Bernard to be somewhat unreliable. In his affidavit, he stated that the house was owned jointly by himself and his deceased's mother and that they both contributed financially. However, while being cross-examined, he expressed the view that the house belonged to his mother and he expects that it would pass to him since her death.

He also stated that it was in 1999 that he and his wife agreed to come to Jamaica to live with the understanding that they would be living at the house jointly owned by himself and his mother. However, his mother would have died eight years earlier.

I do prefer the evidence of Mrs. Bernard that she did make contributions towards the construction of the house over a period of time even if I am not prepared to accept that they had discussed the issue before

construction started in 1985. I accept that the contributions establish a common intention between the parties which developed during the construction period. I accept that Mrs. Bernard acted upon the common intention to her detriment.

The amount contributed by Mrs. Bernard is not quantifiable. There is no evidence that a huge portion of the £12,000.00 was used in the construction. I do accept that she contributed various sums from time to time to assist and that the decision to move to Jamaica in 1999 was made previously and reflected an intention that she should have some interest in the house.

I bear in mind also that Mr. Bernard spent time and energy as well as money in the construction.

In all the circumstances, the court makes an order that Mr. Bernard is entitled to 65% interest in the value of the house and Mrs. Bernard to 35%. The court is also aware that there are difficulties surrounding Mrs. Bernard's interest in the house. Mrs. Bernard is therefore being awarded the monetary equivalent of her interest of 35%.

Re Furniture

Mrs. Bernard is seeking a declaration that she is entitled to half of the furniture as exhibited in a list attached to her affidavit. She has stated that the furniture was bought jointly by herself and Mr. Bernard and shipped to Jamaica. The bill of lading reflects both names.

Mr. Bernard has stated that he bought the fittings and furniture with no assistance from his wife. I prefer the evidence of Mrs. Bernard as the evidence suggests a pooling of resources by both parties in relation to living expenses in England.

He has admitted that the spin dryer washing machine, christmas tree fittings and accessories belong to the claimant. Mr. Bernard has also stated that the freezer and standing lamp are no longer on the premises and in fact that the freezer has broken down. He has also claimed that the pick-up truck is totally depreciated.

The court therefore makes the following orders:

- i. That the furniture and fittings are to be shared equally by both parties.
- ii. The spin dryer washing machine, christmas tree fittings and accessories are to be delivered to the claimant.
- iii. That there should be disclosure in relation to the location of the freezer and the pick-up truck by the defendant to the claimant.

The claimant is to decide whether she will pursue an order in relation to the pick-up truck.

- iv. A valuation is to be done on the house to ascertain the value of Mrs. Bernard's interest.
- v. Both parties are to agree on a valuator within 120 days, failing which one will be appointed by the Registrar of the Supreme Court.
- vi. The costs of the valuation are to be borne by both parties.
- vii. Liberty to apply.
- viii. Costs to the claimant to be agreed or taxed.