IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

IN THE MATTER OF THE OWNERSHIP OF THE BENEFICIAL INTEREST for premises situate at 8 Montcalm Drive, Kingston 19 in the Parish of Saint Andrew registered at Volume 1104 Folio 310 in the Register Book of Titles

A N D

IN THE MATTER OF THE OWNER of the BENEFICIAL INTEREST for premises situate at 8 Montcalm Drive Kingston 19 in the Parish of Saint Andrew

A N D

IN THE MATTER OF THE MARRIED WOMAN'S PROPERTY ACT

BETWEEN	TERRENCE HEPBURN JOHNSON		PLAINTIFF
A N D	MYRTLE SYLVIA JOHNSON	FIRST	DEFENDANT
	FERDINAND CLAUDE SWABY	SECOND	DEFENDANT

Mr. Bert Samuels for Applicant

Mr. D. Muirhead, Q.C. and Gordon Steer for First Defendant

Mr. Anthony Pearson for Second Defendant.

19th, 20th, 21st, 22nd, 23rd June & 7th July, 1989

COOKE, J. (Actg.)

The applicant and the first defendant have been twice married and twice divorced. They were first married, apparently in England and the matrimonial home was in that country. In 1959 the first defendant's health dictated that she should return home to Jamaica. And so she did. In 1967 on the first defendant's petition this marriage was dissolved on the ground of desertion. The second trip to the alter was in 1971. Any hope of matrimonial contentment was not realized. In 1987, again on the petition of the first defendant, there was a dissolution of the marriage - this time on the ground that the parties had been living apart continuously for more than five years. Between 1967 and 1971 the first defendant acquired a lot of land at 8 Montcalm Drive, Kingston 19. A house was

built on this lot, the construction of which began in 1974, was completed in 1976. An agreed estimate is that the cost of the lot and the construction of a house thereon at the time of completion is ninety five thousand dollars. This which will be hereinafter be referred to as 'the property' was the matrimonial home. It was registered in the sole name of the first defendant who in 1981 transferred the property into the joint names of herself and her brother, the second defendant. It is in relation to the property that by way of an amended originating summons pursuant to section 16 of the Married Women's Property Act the applicant now seeks the following relief:-

(1) A declaration that the First Defendant and the Applicant are joint owners of the beneficial interest in premises situated at 8 Montcalm Drive, Kingston 19 in the Parish of Saint Andrew with the Applicant having a beneficial Interest amounting to one-half of the said property.

(2) A declaration that the Secondnamed Defendant has no beneficial interest in the property and therefore not legally entitled to any share in the property having given no consideration for the acquisition or improvement of the property.

Consequential orders were also sought.

As the legal estate in the property was vested in the first defendant the applicant in order to succeed has to be establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; (b) that the claimant has acted to his or her detriment on the basis of that common intention. These principles were stated by Sir Nicolas Browne

- Wilkinson V.C. in his judgment in Grant v. Edwards and Another [1986] 3 WLR 114 at page 127 G. They have been approved in our Court of Appeal in Azan SccA No.53/87 (unreported) and I will accordingly be guided by them. I think however, it should be recognised that although the principles are stated in a manner which might suggest there are distinct and separate "limbs", this may not in all cases be so because it may well be the acts of the claimant from which the common intention is to be inferred. In other words it is not always possible to isolate "limb" (a) from "limb" (b). In the dynamic of the circumstances both "limbs" may become inextricably intertwined. I find support for my view in the speech of Lord Diplock in Gissing v. Gissing [1970] 2 AER 780 at page 790 F & G where he said:-

> "An express agreement between spouses as to their respective beneficial interests in land conveyed into the name of them obviates the need for showing that the conduct of the spouse into whose name the land was conveyed was intended to induce the other spouse to act to his or her detriment on the faith of the promise of a specified beneficial interest in the land and the other spouse so acted with the intention of acquiring that beneficial interest. The agreement itself discloses the common intention required to create a resulting, implied or constructive trust. 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; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case - a common one where the parties are spouses whose marriage has broken down - it may be able possible to infer their common intention from their conduct.

In the instant case it is not contended that there was any express agreement between the spouses as to their respective beneficial interests. The applicant says that there was a common intention that he should derive a bene-

ficial interest in the property. Are there any guidelines in the determination of the question as to whether there was a common intention? In discussing this issue Nurse L.J. said in Grant v. Edwards and Another at pages 120 H and 121 A and B.

> "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: see per Fox L.J. in Burns v. Burns [1984] Ch.317 328H - 329C. If it is found to have been incurred such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted upon it.
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> There is another rearer class of case, of which the present may be one, where, although there has been no writing the parties have orally declared themselves in such a way as to make their common intention plain. Here the court does not have to look for conduct from which the intention can be inferred, but only for conduct which amounts to an acting upon it by the claimant. And although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so."

Nurse L.J. at page 122 in discussing the quality of the conduct to qualify in the second category (supra) is of the opinion that it would be conduct which no one could reasonable have expected the claimant to embark on unless such claimant was to have an interest in the property. I adopt these guidelines.

Here the applicant straddles both situations. He says he has contributed to the purchase price of the lot and to the cost of the construction of the house and he further relies on acts which, he says, he embarked on because he was to have

an interest in the property.

Before going to examine the evidence I wish to state that the test to be applied in respect to the inferences to be drawn is that:-

> "Which is reasonable man would draw from their words or conduct and not to any subjective intention at the time of the transaction itself. Per Lord Diplock in Gissing v. Gissing at page 790."

No doubt because of the influence of the concept of proprietary estoppel on this branch of the law it seems that there is a burden on the legal owner to negative the contention that the applicant's acts were not acts done because he was to have interest in the property. (See Grant v. Edwards and Another per Sir Nicolas Browne - Wilkins V.C. at page 130D). And now to the evidence.

The applicant asserts that he sent two thousand pounds as his contribution to the purchase price of the lot. The first defendant denies this. It is more than remarkable that no where is such a significant factor mentioned in his affidavit in support of his summons. I am of the view that this assertion was a mere afterthought. He said so in re-examination when by leave of the Court his counsel asked him to list the financial contributions to which he made reference in paragraph twenty of his affidavit. It was the last item he enumerated. He was sufficiently bold to make this asertion even after in cross-examination he admitted (a nd only admitted after controntation) that in June 1972 he had written to the first defendant from England pertaining to the lot saying that because of commitments he could not fall in right away and would explain later. In the context of the cross examination the only meaning attributable to not being able to fall in right away is that he could not undertake any financial obligations. Let me state that there is no evidence that any request was ever made of the applicant by the first defendant for any financial

assistance in respect of the property. I reject this assertion that two thousand pounds was sent to the first defendant. The applicant also contended that he contributed six thousand dollars towards the construction of the house. He swore as follows in paragraph fifteen of his affidavit:-

> "That I recall during the construction of the premises and close to its completion I borrowed six (6) thousand dollars ($6,000.00) from the firm of Attorneys Judah, Benoes, Lake Nunes Limited on Duke Street, Kingston using property owned jointly by myself and the first defendant as security. However, I was solely responsible for its repayment and have since on my own repaid the loan inclusive of interest."

To support this contention which was also denied by the first defendant the applicant says that a mortage was taken on premises at 3 Favorita Avenue. A copy of this title was by consent tendered as Exhibit 2. Indeed that property was at the material time registered in the names of the applicant and the first defendant. It is true that a mortgage is endorsed thereon. But the date is 1970 and the completion of the construction of the house was in 1976! Further the mortgagees were Evelyn Maud Cox and Patricia Dorothy Cooke. This mortgage endorsed on the title which the applicant puts forward as proof of his sincerity was discharged at the time of sale of the said property in 1980. I reject this contention. I therefore find that there was no financial contribution by the applicant which is referrable to the acquisition of the property. Accordingly he has failed to show any expenditure which could perform the twofold function of establishing a common intention and showing that he has acted upon it. But the applicant is also entitled to a beneficial interest if his conduct is such that it can be said that he had embarked on that course because he was to have an interest in the property. To this we now turn.

The applicant relies on the following factors:

(i) The first defendant had written to him while he was in England telling him about the lot she had acquired. When he repatriated in 1973 he was taken and shown the lot and told that that was where the matrimonial home would be built "for both of us".

(ii) He planted orange and ackee trees and had the orange trees sprayed at his expense.

(iii) The front wall to the property was once broken down and he had it replaced at his expense.

(iv) He had built a thirty-eight foot walkway beside the house at a labour cost of two hundred dollars.

(v) While the house was being built he resided in the watchman's hut.

(vi) He cooked for the workmen daily at his expense.

(vii) He distributed paints and other materials.

(viii) He, while he was living in the matrimonial home that is up until 1986, paid the utility bills which were in his name.

(ix) He employed a full time gardener

It is most instructive to look at the property acquisitions of the applicant and the first defendant and wherein lay the beneficial interest in each of those properties.

(1) Before the first marriage the first defendant had her own property at 4 Stanfield Road London S W 9.

(2) In 1957 both parties acquired a matrimonial home in their joint names at 24 Gately Road

London S W 9.

(3) Sometime after 1959 the applicant acquired property at Brailsford Road in London as sole beneficial owner. This property was sold prior to his repatriation in 1973.

(4) While the applicant was in England he acquired property in Harbour View in his name.

(5) After the first defendant came home in 1959 she sold her Stanfield Road property and using the proceeds as a start she proceeded to buy lots and having built on those lots sold the same. Among the properties she acquired were

(a) 2 Lawrence Avenue
(b) 46 " "
(c) 25 Woodland Drive
(d) 33 Red Hills Boulevard
(e) 38 " " "
(f) 9 Sharp Road
(g) 59 Roehampton Close

All those properties were in her name.

(6) Two properties at 3 Favorite Avenue and 2 Whitehaven Place were acquired in the joint names of the parties.

Now, when the applicant was asked why he did not put the first defendant's name on the title to the properties he acquired his blunt reply was to the effect that the purchase money was his and there was no contribution from the first defendant. If this is his state of mind it is quite difficult to accept that he not having contributed to the

purchase price of the property can now maintain his position. As for the first defendant she said that the Favorita and Whitehaven properties were bought with money sent to her by the applicant and that she had put her name on the title to those properties because "he never sent anything for myself and in case of anything I would be the beneficary." Her state of mind is indicative that if she intended for the applicant to have a beneficial interest she would have put his name on the title to the property. It is clear therefore that on the evidence just alluded to, both parties understood that the beneficial interest would follow the legal estate. The first defendants evidence is that she did write to the applicant about the lot merely to inform him of what she was doing. She says further that by saying the home to be built onn the lot was the matrimonial was not intended as a promise of any proprietary interest therein. Against the background just described the applicant can find no comfort in these two factors. The epithet "matrimonial" when used to describe the place of habitation of spouses is merely descriptive and by itself is silent as to any benericial interest therein. The impression I have is that since the purchase of Gately Road each party took the general position: What I buy with my money is mine. What you buy with your money is yours. If this is so, then the applicant cannot be heard to say he has acted to his detriment on the faith that he was to have an interest in the property.

In any event what has he done? I accept that he planted some orange trees and that he has had them sprayed. I accept that he stayed in the watchman's hut during a significant part of the construction period.

I accept that the utility bills were in his name. I do not accept the other factors relied on by him. His insincerity has been conclusive in krespect to his alleged financial contribution. His demeanour did not bring conviction to the mind. In contrast the first defendant, now in the winter of her years and wheel chair bound, impressed me as a woman of strong character with a spirit of independence and achievement to be admired. When she tells me that the domestic bills were shared I believe her. The applicant strikes me as just the type who would insist on this. The applicant has stated that he took no part at all in the construction of the house yet he would have me believe that he distributed paints and materials. He says he cooked everyday for the workmen yet he does not deny that the first defendant brought him his meals everyday twice per day while he was in the watchman's hut.

The conduct on the part of the applicant, which I accept is not conduct concerning which it could be said that he could reasonably be expected to embark on because he was to have interest in the property. Neither the planting or spraying of orange trees nor the fact that the utility bills were in the applicant's name is helpful. The former is a common function of any responsible husband; The latter as he did not have sole responsibility for payment is not even of marginal significance. I accept the first defendant when she says that the applicant refused to stay in the matrimonial bedroom at 33 Red Hills Boulevard. My view is that his choice of residence in the watchman's hut was incidental to the construction of the house. Accordingly no reasonable man would draw the inference he seeks. The necessity for the first defendant to show that his conduct

was not consistent with an interest does not arise.

In his closing address, which was the last, counsel for the second defendant submitted that section 71 of the Registration of Titles Act is a bar to the relief sought in respect to his client. This section reads as follows:-

> "Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease mortgage or charge, shall be required or in any manner concerned to enquire of ascertain the circumstances under, or the consideration for, which proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

In view of the decision I have arrived at that the applicant is not entitled to any beneficial interest in the property it does not fall to me to pronounce on the interpretation and effect of this section. The declarations sought are refused. The first and second defendants will have their costs to be agreed or taxed.