IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

CLAIM NO. HCV 178 OF 2006

BETWEEN	*ERIC ANTHONY KNIGHT*	*CLAIMANT*
AND	*ARDATH FAY KNIGHT*	*DEFENDANT*

Sandra Johnson instructed by
Sandra Johnson & Co. for the Claimant

John Graham and Kharah East instructed by
John G. Graham for the Defendant

Heard: 17th March, 2009
2nd June, 2009 & 21st May, 2010

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IN CHAMBERS

MARSH J.

The Claimant Eric Anthony Knight, an Accountant and Ardath Fay Knight nee McCalla were married on the 17th day of June, 1994. The marriage had irretrievably broken down and on the 9th day of August, 2004 a decree nisi was granted consequent on the petition of the claimant.

During the currency of the marriage, while harmony still existed, the two parties acquired real estate at Townhouse #19 at L'Aventura, No. 2A Washington Boulevard, Kingston, registered at Volume 1312, Folio 796
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of the Register Book of Titles. They also acquired a Suzuki Vitara motor car 1998 model.

The marriage broke down in November 2002 and the claimant left the matrimonial home and found himself alternate accommodation. He also sought through his attorney at law a settlement with the defendant in relation to matrimonial property. This has been unsuccessful as the defendant "is not prepared to negotiate a reasonable settlement..." so deponed the claimant.

As a result, the claimant sought, in a Fixed Date Claim Form dated the 15th of November, 2005 certain orders and remedies, viz.

(1) that he is entitled to one half beneficial interest in the premises, Townhouse #19, at L'Aventura, aforesaid.

(ii) That he is also entitled to one half beneficial interest in the Suzuki Vitara Motor vehicle 1998 model.

By affidavit and oral evidence gleaned from cross examination of the claimant and the defendant by order of the Court and by appended exhibits, the claimant based his claim and the defendant her defence.

Written submissions with relevant authorities were submitted by the parties to the Court.

The central issues in this case are these:-

(a). What was the common intention of the parties before or at the time of the acquisition of the townhouse and the Suzuki Vitara motorcar.

(b). If a common intention existed at the time of the initial acquisition of the property, whether events after the initial acquisition have altered in any way the proportion in which the claimant and the defendant held beneficial interests in the property.

The Claimant contended that his interest in both the townhouse and the Suzuki Vitara motor car is 50% respectively.

Re the acquisition of the townhouse.

The Claimant deponed that he and the defendant established a joint account with RBTT Bank into which their earnings were deposited. This was to pay living expenses and all major payments. They also opened a joint investment account at Jamaica Money Market Brokers (JMMB) the purpose being to save to "purchase a home." They learnt of the construction of the aforesaid townhouse – discussed its purchase and how they would jointly finance its purchase. Money from the joint investment account at JMMB would be used to provide the down-payment; the balance of the purchase price would be financed as follows:

(i) a joint mortgage for the National Housing Trust – one Million Two Hundred Thousand dollars $1,200,000.00) and

(ii) the sum of One million Eight Hundred Thousand dollars ($1,800,000.00) from the National Investment Bank of Jamaica, the employer of the defendant.

It was further decided, the claimant, maintained, that he would service the NHT mortgage while the defendant would service that from the NIBJ by salary deduction from the defendant (that being company policy).

Regular mortgage payments, evidenced by exhibited receipts were paid by the claimant to the National Housing Trust. A copy of the mortgage deed dated 9th June, 1997, the mortgagors being the defendant and the claimant on the one hand "and the mortgagee the National Investment Bank of Jamaica on the other.

Even after the parties took possession of the said townhouse, the joint account at RBTT continued to exist for the purposes for which it had been intended.

Besides servicing the NHT mortgage monthly the claimant continued to pay into the RBTT joint account and also purchased appliances of the home.

Re the Acquisition of the Suzuki Vitara Motor Vehicle

The claimant refers to an agreement that the said motor car would be purchased by a loan from the defendant's employer NIBJ to the tune of 90% of the vehicle's value ($784,500.00) and that he would pay the remaining 10%.

This amount comprised -

$31,500.00 personal loan from GSB Co-op Credit Union.
$15,000.00 work done by the claimant
$15,000.00 – pay in lieu of vacation from his employers
$16,278.00 salary
$1,004.00 Savings.

This 10% which Claimant listed as payable by him, when totalled, as stated by the claimant is less than the $87,255.00.

In addition to this 10% contribution that the claimant maintains he has contributed to the acquisition of the Suzuki Vitara, he also contributed to its maintenance, repairs and its insurance. The reason the car was registered in the defendant's name was that since it was financed by defendant's employer in an employee loan and it was company policy, that the vehicle be registered in her name.

The claimant further stated that the defendant had agreed, prior to his leaving the house, when the marriage broke down in November, 2002, that she would rent part of the townhouse and apply that income to servicing the N.H.T. mortgage. The defendant then unilaterally changed her mind.

The defendant has responded by affidavit to the claimant's contention. She deponed that she and the claimant on April 17, 1997 signed an agreement with the vendors to purchase part of land at 2A Washington Boulevard for $355,000.00. They also signed an agreement for the construction of a "model town house" unit on the said land as part of a project known as L'Aventura. Cost of construction was agreed at

$2,330,000.00. Both agreements dated 7th April 1997 and the 17th April, 1977 respectively were exhibited as appendages to the defendant's affidavit. Also exhibited was the copy of a transfer of land from the Calabar Trust to the claimant and defendant.

After the basic townhouse unit's acquisition was financed by the mortgages from the NHT and the NIBJ respectively, both parties realized that it was necessary to expand the basic unit by expanding the kitchen and backroom, putting on grills and a patio and change the attic. Defendant therefore borrowed a further sum of $665,890.25 from her employer NIBJ.

The defendant deponed that the final townhouse cost was financed as follows:-

(i) Deposit of $269,500.00 jointly contributed as equal portions by the parties.

(ii). Loan from NIBJ of $1,225,000.00

(iii). Loan from NHT for $1,200,000.00

(iv). Loan from NIBJ for $665,890.25

The NIBJ loans were subsequently transferred to Jamaica National.

The claimant has stopped paying the NHT mortgage since he moved out in November, 2002. The servicing of both mortgages (NIBJ and NHT) is now being done by the Defendant.

The Defendant has admitted that the claimant did borrow $87,205.00 from PKC advertising to pay the deposit on the Suzuki Vitara but that this was repaid in part by her credit union's cheque drawn in her name for the sum of $31,500.00 and another for $1004.00 drawn to her by NIBJ. Ironically both copies of these cheques were exhibited and appended to the affidavit of the claimant in support of his claim.

It is alleged by the Defendant that the Claimant not only had extensive personal use of the Suzuki Vitara but had reneged on an agreement between the parties relevant to a Corona motorcar she had sold to him. This necessitated her having to pay the balance of a loan which he had agreed to pay in satisfaction of the price of the motor car sold to him by her. She therefore claims that the claimant is not entitled to any interest in the said Suzuki Vitara motor car.

The Defendant asks the court therefore to find that the claimant has no financial interest in the Suzuki Vitara motor car.

Further, she is asking the Court to find that the respective beneficial interests in the townhouse be apportioned that there be 60% for her and 40% for the claimant. The Defendant is also asking the Court to make an order that the 40% of the total mortgage payments made since 2002 be deducted from "the claimants share of the townhouse and credited to the defendant." In addition, the defendant asks that the Court allows her 180

days to arrange financing and pay the balance which is found due to the claimant" and that carriage of sale be granted to her attorney-at-law.

Each party made lengthy written submissions to this Court.

The Claimant Eric Anthony Knight submitted that in the absence of a clearly expressed agreement as to the proportionate share held by each spouse in the beneficial interests in the property, then principles governing the Law of Trust must be involved. ***(Trouth v. Trouth (1981) 18 JLR 409).*** He contended that the common intention in the instant at the time that the subject property, the townhouse at L'Aventura, aforesaid was acquired, was that the parties should share equally in the beneficial interest; that there being no evidence to alter the common intention, the Court is powerless to alter the common intention, despite the defendant having expressed a belief that she should receive more.

There being no claim for the claimant to reimburse the defendant for almost seven (7) years of mortgage, there being no claim for occupational rent, both should be set off against the other. The defendant, it was further submitted, had agreed that the claimant leave the matrimonial home, that the defendant would remain in the house where a settlement between them be worked out. The defendant, by agreement had in exchange, taken on the payment of the entire mortgage. This was in exchange for the claimant remaining out of the matrimonial house and renting a place.

The defendant, in response to claimant's submission, made the following submissions:

> "From the beginning, it was the defendant who paid the larger mortgage and so she thought that hers would be the bigger share. When the second mortgage was taken out, the NIBJ mortgage to expand the house, it was defendant who paid the monthly installments."

The court is asked by the defendant to find that the substantial improvement to the townhouse was made solely by the defendant and that this fact entitled her to a 60% share in the property.

It is true that the mortgage documents to secure this improvement loan was signed also by the claimant. However, this did not automatically transfer into any interest in the increased value of the property. (***See Lynch v. Lynch (1991) 28 JLR 8 at 13F.*** Here Carey JA. (as he then was) stated "the fact that a wife agrees to be a party to a mortgage loan granted to her spouse does not inevitably mean that she expects a piece of the action." The claimant has not made any mortgage payments since leaving the matrimonial home in 2002 despite the agreement he had made to pay on the N.H.T mortgage. All monthly mortgage payments since the claimant left home in 2002, have been paid by the defendant.

With regards to the Suzuki Vitara, the claimant deponed that his contribution to the acquisition of this vehicle amounted to 10% i.e.

$87,205.00 and sought to itemize how this 10% was made up. However, the details totaled the sum of $78,782.00. He admitted that the 90% of the cost $784,500.00 was paid by the defendant's employer NIBJ. The vehicle was registered in the defendant's name even though it was purchased with 10% of the value of acquisition provided by the claimant.

The defendant denied that the Suzuki Vitara motor car was acquired for use as a family vehicle, although both parties used the vehicle. She was a travelling officer which afforded her payments of allowances, upkeep and travelling expenses.

There was no common intention between the parties, at the time the Suzuki Vitara was being acquired that the claimant would have a beneficial share in it.

The Court should therefore find that the defendant is entitled to a 60% share of the townhouse and 100% interest in the Suzuki Vitara.

There are certain essential aspects of the evidence in which both claimant and the defendant are in agreement.

Both agree that the townhouse was acquired and financed as follows:-

(i) There was a deposit of $269,000.00 contributed equally between the parties.

(ii) A mortgage from the National Investment Bank of Jamaica (NIBJ) in the sum of $1,225,000.00 (the townhouse provided the security);

(iii) Another mortgage from the National Housing Trust in the sum of $1,200,000.00, in the security of the townhouse.

It was agreed that the mortgages would be serviced monthly by the defendant paying the NIBJ mortgage was finance (NIBJ being her employer); the claimant would pay the installments (monthly) on the NHT mortgage.

There was also agreement that a subsequent expansion of the townhouse was financed by a second mortgage to the parties in the sum of $655,000.00 from the NIBJ.

It is also not in dispute that the parties moved into the townhouse in 1999, the marriage broke down the following year and the claimant left the house in 2002.

It is agreed that the purchase of the Suzuki Vitara was funded partially by a loan to the defendant by her employer NIBJ of $784,500.00 and $87,205.00 paid as deposit by the claimant.

The defendant contended that the amount paid by the claimant as a deposit was repaid to him by her. The defendant claimed that the claimant had borrowed the said sum of $87,205.00 from his employer PKC Advertising. This sum was repaid to his employer in part by a cheque from claimant's credit union in the sum of $31,500.00 (drawn in her name) and from a cheque for $1,004.00 drawn by her employer NIBJ in her name. Copies of these two cheques are exhibited in the affidavit of the claimant.

The defendant is contending that she purchased the vehicle by way of the loan from her employer as she was a travelling officer, vehicle was licensed in her name and that there was no intention to purchase the Suzuki Vitara as a joint asset.

The claimant's application had been made under the provisions of the Married Women's Property Act.

This Court will have to consider whether at the time that the parties acquired the property what was the common intention. If that common intention existed then, what was it?

Did anything happen subsequent to the acquisition of the townhouse that would alter the beneficial interests of the parties, from the interests which existed at the time the townhouse was acquired?

Where one party pays the monthly installments of a mortgage (when these installments are to be paid by each, then the mere payment by one of the mortgage installment, does not have the effect of increasing the beneficial interest of the paying party. The paying party may however reclaim the amount of mortgage paid by him or her from the interest of the non-paying party. In ***Forrest v. Forrest (1996) 32 JLR 128 at p.131***, Forte, JA (as he then was) expounds it in this way.

> ***"Where 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 contribution of the parties, what***

> ***was their common intention at the time of the acquisition of the property."***

In ***Pettit v. Pettit (1969) 2 AER 385 at p. 413,*** Lord Diplock stated, inter alia -

> ***"When a 'family asset' is first acquired..... the title to it must vest in one or other of the spouses, or be shared between them, and when an existing family asset is improved, this too must have some legal consequence even if it is only that the improvement is an accretion to the property of the spouse who was entitled to the asset before it was improved. Where the acquisition or improvement is made as a result of contributions is in money or money's worth by both spouses acting in concert the proprietary interests in the family asset resulting from their respective contribution depend on their common intention as to what these interests should be."***

Baroness Hale of Richmond in delivering the principal judgment in the recent decision of the ***United Kingdom House of Lords in Stack v. Dowden (2007) 2 ALL ER 929*** exhibited a detailed and exhaustive examination of the law relevant to cases where spouses acquire property and later the Court is charged with the task of deciding, usually on the application of one party, what are the respective interests of each party. The consideration with regards to spouses (married) is the same as where the parties are unmarried.

Baroness Hale identifies the questions in a case where the property in question is transferred in joint names to be different from where the property is transferred in a single name.

The question, in a case in which the transfer is in joint names, is –

> ".....Did the parties intend that beneficial interests to be different from their legal interests, and if they did, in what way and to what extent?"

There are differences between sole and joint name cases when trying to divine the common intentions or understanding between the parties. She (Baroness Hale) opined that "a court may well hold that joint legal owners there being no declaration of trust, are also beneficial joint tenants.

> ***".... It will almost always have been a conscious decision to put the house into joint names."***

The burden of proof will be on the party "seeking to show that the parties did intend their beneficial interests to be different from their legal interests."

Each case will turn on its own facts.

The true intentions of the parties may be decided by factors other than financial contributions e.g. the reasons why the house was acquired in their joint names, the nature of the parties' relationship whether they had children for whom there existed a joint responsibility to provide a home, how the purchase was financed, how the parties' finances were arranged, whether separately or together, how they discharged their outgoings on the property and their other household expenses.

These were some but not all of the considerations suggested by Baroness Hale.

In the instant case the parties Eric and Ardath Knight were married on the 17th June, 1994. They moved into the subject property in 1999. The claimant moved from the townhouse in the year 2000. It was almost three (3) years into the marriage that both parties took steps to acquire this townhouse #19, L'Aventura 2a Washington Boulevard, Kingston 20. All the relevant agreements - agreement to purchase the land, agreement to construct the townhouse were signed by both parties. The transfer of the land was made to both parties.

The defendant's evidence is that the decision to own the property as joint tenants was made on the same day as the sale agreement in the developer's office. It was, she deponed, the suggestion of the claimant and she did not understand the full implication of so doing, that they would be sharing the house equally. It is agreed that the parties owned a joint account at RBTT.

The defendant "went along with the decision", i.e. the decision to be owning the property as joint tenants. She admitted that she discussed and understood that she would be paying the greater part of the mortgage and that other expenses would come from a joint account at RBTT.

The truth seems to be that the marriage was going well at this time. The decisions to finance the acquisition of the townhouse by one party being responsible for paying the NHT mortgage and the other for the payment of that other mortgage with NIBJ (although each mortgagee was

in their joint names) were founded on the fact that as a member of staff at NIBJ the defendant was in a position to access funds from her employer NIBJ. The claimant's professional qualifications as an accountant were inadequate as he was pursuing studies since 1994, and having been exempted from the first of three parts, he had not passed the other two levels which would qualify him as an ACCA (Chartered Accountant). The defendant was employed at NIBJ, was a travelling officer and a position which in her own words, entitled her to certain benefits – benefits which a non-employee of NIBJ could not get. It is her evidence in cross examination that no non-employee of NIBJ could have got mortgage from them at the rates that she, an employee, did.

I accept that at the time before and at the acquisition of the townhouse, the defendant lived in wedded harmony with the claimant and they discussed and decided how to approach funding the acquisition of the townhouse, that they would both obtain mortgages from NHT and from NIBJ but that he would pay the NHT mortgage while she would pay the NIBJ mortgage.

I therefore find that the proportion of the beneficial interests of each party at the time the townhouse was acquired was 50% each.

The expansion of the townhouse two years after the parties had signed agreements was financed by a loan from the NIBJ of $665,890.52 –

besides financing the expansion, it also covered the cost of escalation (see defendant's evidence in cross examination).

It is not contested that the second NIBJ mortgage used to refurbish the townhouse and for escalation was applied for by the defendant although the document was signed by the claimant as well.

The defendant has opined that the cost of the townhouse before refurbishing being equal to $2,694,500.00, the increase to the value to the townhouse, by its refurbishing would be by some 25%. This gives her now a share of the house equal to 60%.

Both the Jamaican case of ***Forrest v. Forrest (1995) 32 JLR 131*** and the House of Lord's decision ***Stack v. Dunston (2007) 2 All ER 929*** support the proposition, that the initial beneficial interest in property may change when an improvement which alters the value of the property is made by one party only.

In ***Forrest v. Forrest (supra), Forte JA*** (as he then was) referred to the case of ***Edmondson v. Edmondson*** SCCA 87/91 dated June 23, 1992 (unreported), with approval and stated "In ***Edmondson v. Edmondson***, there was an addition to the house which was financed solely by his wife and which must have increased its value and accordingly she was entitled to a greater share."

Baroness Hale of Richmond in ***Stack v. Dunston (supra) at. P. 953*** puts it like this, "There may also be reason to conclude that the parties'

intentions at the onset, have now changed. An example may be where one party had financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.

The second loan from NIBJ Intended for the expansion of the townhouse and escalation was the result of the employer NIBJ.

The fact that the mortgage documents here were signed also by the claimant, this did not without more, translate into an interest for the claimant in the increased value of the townhouse after its refurbishment. His Lordship Mr. Justice Carey in ***Lynch v. Lynch (1991) 28 JLR 8 at 13F*** stated it in this way

> ***"The fact that a wife agrees to be a party to a mortgage loan granted to her spouse does not inevitably mean that she expects 'a piece of the action'."***

In the instant case the defendant explained that the claimant also signed the mortgage documents, as he was already a part owner of the property mortgaged and that this was a requirement of the mortgagee NIBJ.

In his affidavit dated April 29, 2008 the claimant deponed that the second mortgage from the NIBJ was 90% of the amount expended for refurbishing and the additional 10% came from a joint account. He also

deponed that he did the sketch plan for the modification and was liaison with the builder the defendant's brother.

This had not affected the conclusion that the "soft loan" which amounted to $665,890.25 is a substantial amount secured and made to the claimant. There is no contest that the repayment was the responsibility of the defendant.

The claimant has not denied that the second mortgage was obtained by the defendant, nor has he questioned the manner of the funding of the cost of the townhouse and its refurbishing.

The claimant has maintained that prior to his leaving the townhouse, he had had an agreement with the defendant that she would pay all the mortgage installments. He was unable to identify when this agreement was made. In fact, from answers given by the claimant in cross examination he stated "in our discussions she did not indicate that she could not pay." In answer to the Court as to whether it was because she did not indicate otherwise why he felt that she had agreed, the claimant said that he believed she agreed.

The defendant denied agreeing that she would pay all the mortgage payments because she was remaining in the house.

I find that the claimant suggested it and that she concluded that as she was staying in the house, she had to pay the mortgage.

I also rejected the claimant's evidence that the defendant had agreed to let out a bedroom to obtain additional income to pay the mortgage installments.

The defendant having contributed the substantial amount raised from her employer NIBJ by way of the second mortgage for refurbishing and escalation of the townhouse, I find that the beneficial interests of each party in the townhouse has altered since the signing of the agreements, earlier mentioned.

The onus of proving that she is entitled to a beneficial ownership which is different from the legal ownership rests on the defendant. Baroness Hale of Richmond, at paragraph 56 in ***Stack v. Dowden (supra)*** stated, inter alia ***"... the starting point is where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership....."***

The defendant has satisfied that onus of proof and I accept that she is entitled to a 60% share in the beneficial interest by her substantial contribution to the expansion and refurbishing of the townhouse.

It is without dispute that the Suzuki Vitara was purchased with money, the bulk of which came from the defendant's employer NIBJ. This amounted to 90% of the cost. It is agreed that the claimant contributed, at least initially an amount which is 10% of the vehicle's cost.

The claimant has deponed that it was agreed that he would pay the 10% $87,205.00) made up as follows:-

A personal loan from GSB Co-op Credit Union	$31,500.00
Additional income from work done by me	$15,000.00
Pay in lieu of vacation from my employers	$15,000.00
Salary	$16,278.00
Savings	$ 1,004.00

This total does not amount to $87,205.00

He exhibited a copy of a GSB Credit Union Ltd. cheque for $31,500.00.

Also exhibited by the claimant is a copy cheque for $1,004.00.

Both of these are made out to the defendant with no explanation as to why they are made payable to her.

It is the defendant's position that the claimant did in fact borrow money from KPC Advertising, to pay the deposit but that that loan was partly repaid by the proceeds of the 2 cheques earlier mentioned.

I am not convinced that the vehicle was purchased as a family asset, although it was used extensively by the claimant.

The amount paid by the claimant re the deposit of 10% was repaid to the claimant and the 2 cheques, copies of which he exhibited, are indicators that he had no financial interest in it as the defendant had repaid him. I accept the defendant's evidence that she had obtained the loan for the vehicle as she was a travelling officer.

The vehicle was registered solely in the defendant's name. the claimant has not satisfied me on a balance of probabilities that he was entitled to any interest in the said Suzuki Vitara.

There be Judgment for the Defendant in the following terms.

1. A declaration that the claimant is entitled to a beneficial interest of 40% and the defendant 60% respectively in the property known as Townhouse #19 L'Aventura, 2a Washington Boulevard, Kingston 20.
2. An account to be taken by the Registrar of the Supreme Court of the payments made by the defendant by way of mortgage installments on the said premises since November, 2002. That 40% of such capital sum when arrived at to be paid to the defendant by the applicant as a debt due by him as his portion of the said mortgage installments.
3. That the property be valued by a competent valuator to be appointed by the Registrar of the Supreme Court if the parties cannot agree such a valuation within sixty (60) days hereof.
4. Costs of the valuation report are to be bourne equally by the Claimant and the Defendant.
5. That the Defendant purchase the claimant's interest in the said #19 Townhouse, L'Aventura, 2a Washington Boulevard, Kingston 20, St. Andrew within six (6) months of the date of this order.

6. A declaration that the claimant has no interest in the motor vehicle, a Suzuki Vitara – SE 416JLXJLP – Blue.

7. In the event that the defendant fails to purchase the claimant's interest in the said townhouse #19, L'Aventura, 2a Washington Boulevard, Kingston 20 in the parish of the St. Andrew; within six (6) months of the date of this order, that the said townhouse be placed on the open market for sale by public auction or private treaty and the net proceeds of the sale be divided in the following manner, 40% for the claimant and 60% for the defendant.

8. That upon the refusal of the claimant to sign all or any documents of transfer upon Sale, the Registrar of the Supreme Court be empowered to sign.

9. For the above purposes all necessary accounts and enquiries are to be made.

10. Costs to the defendant to be agreed or if not to be taxed.