Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HIGH COURT DIVISION

CLAIM NO. HCV 3700 OF 2007

BETWEEN	*EVADNEY MURRAY*	*CLAIMANT*
A N D	*VINCENT MURRAY*	*DEFENDANT*

Appearances

Mr. Gordon Steer instructed by Chambers, Bunny & Steer for the Claimant.

Miss Sheila Tomlin instructed by Sheila Tomlin and Associates for the Defendant.

Heard: October 9, 2008 and April 3, 2009

Matrimonial property – Declaration of interest - whether doctrine of Adverse possession applicable – Whether subject to Property (Rights of Spouses) Act 2004 Sec. 6 and 7 or 13 and 14.

P. A. Williams, J.

Evadney and Vincent Murray were married on the 19th of April, 1980. While they were living and working in England they decided to acquire a home in Jamaica. They planned to return to live in this home. A property located at 33 Greenvale Housing Scheme, Mandeville, Manchester was purchased in 1986 for one hundred and twenty-five ($125,000.00) thousand dollars.

The deposit and closing costs for the purchase were taken from the parties' joint saving account at Jamaica National Building Society. A mortgage was obtained from the same institution to finance the balance for the purchase of this property.

The parties moved in and thereafter began commuting between Jamaica and the United Kingdon.

The marriage broke down and the parties separated.

Mrs. Murray has bought these proceedings under the Property (Rights of Spouses) Act 2004 ("the Act") asking for a determination of the beneficial interest of the parties in respect of the property. She seeks the following order:-

> "that she is entitled to the entire beneficial interest in 33 Greenvale Housing Scheme, Mandeville in the parish of Manchester registered at Vol. 1167 Folio 623 of the Register Book of titles."

The claimant asserts that she has taken care of the property and has paid the mortgage. She went on subsequently to assert that the defendant had in effect abandoned the property for a period in excess of twelve (12) years making her entitled to ownership by way of adverse possession.

The defendant denies her assertions and ask for a declaration that the property be sold and that the proceeds be shared equally between them.

Her story

The claimant said that they separated in 1991. She subsequently learnt that relatives of the woman with whom the defendant was co-habiting had been allowed to live at the property.

She retained the services of an attorney and recovered possession of the property. On her return to England she again learnt he had rented the property and again she recovered possession with the assistance of an attorney.

The property was in need of repairs and she fixed it up at her sole expense. She paid off the mortgage in 1995 through her sole efforts. She exhibited copies of bank drafts drawn on her account in England and sent to Jamaica National to discharge the mortgage in 1995. She also exhibited a letter dated June 8, 1995 from that institution acknowledging the receipt of $75,396.50 from which sum a withdrawal was made to close a mortgage account.

She asserted that the defendant has abandoned the property and has made no claim in respect of an interest in the property for more than twelve (12) years.

Under cross-examination the claimant conceded that the parties' intention was to make the property their home when they retired. She acknowledged that the house was in fact purchased from their joint funds.

She explained that upon the relatives of the defendant's "mistress" moving out of the house in 1994 other tenants were living there and this went on till 1994 to 1995.

She recognized that the defendant may have continued commuting to and from the United Kingdom but she didn't know how often or for how long he may have stayed. She later conceded he may well have visited the property without her knowledge.

She insisted that she was unaware of him doing anything to the property since 1991. Attempts to get his assistance to pay the mortgage she said proved futile. It was she who found a tenant in 1994 and rented for $3000.00 a month. Eventually it was she who effected repairs to the property in 2000 or 2001.

She admitted that she visited Jamaica every (1) one or two (2) years and since her retirement she now spends up to two (2) months. She stays at the property as well as in Chapleton, May Pen, Clarendon.

She was aware that he had served her tenant with a notice to quit the property in 2007.

His story

The defendant said that they had separated prior to 1991. He pointed to the fact that he had a child out of wedlock in 1989. He subsequently divorced the claimant in 1999 and then married the mother of the child in December of the same year.

As far as he is aware the claimant does not reside at all at the property but now lives in England and stays at Buckner Road, May Pen in Clarendon when in Jamaica.

He it is who exhibits a photocopy of the duplicate certificate of title for the property showing the transfer to them both as joint tenants for consideration of one hundred and twenty-five thousand dollars. ($125,000.00)

He asserted that the claimant was not the sole "payer" of the mortgage since 1991. He paid the building society a lump sum of approximately three hundred pounds (£300) and the balance of the mortgage of forty thousand dollars ($40,000.00) was paid from state benefits he received in the United Kingdom. It is his contention that they held two joint mortgages in the amount of eighty thousand dollars ($80,000.00) and twenty-five thousand dollars ($25,000.00) respectively which were discharged either by him or using his money.

It is useful to note that the title exhibited speaks to these two mortgages, one obtained in 1986, the other in 1987, both of which were discharged on the 4th of July, 1995.

The defendant acknowledged that relatives of his present wife, Isadore, were invited to occupy the property in 1991 as he did not want to leave the property vacant.

He also stated that the claimant rented the property since 1991 and has been in receipt of rent monies.

He indicated that he is aware of an 'existing tenant" who he discovered in 2007 when he was prevented access to the property by this person. He served a notice to quit on this tenant.

The defendant further asserted that he was unable to locate the claimant for a period of time. He insisted that he maintained the property by inter alia:- installing new windows jams, fitting "burglary bars", repairing the ceiling, painting the interior and exterior and repairing the garage.

The defendant found it prudent to exhibit a copy of the marriage certificate evidencing his marriage to Isadore Williams on December 15, 1999.

Under cross-examination the defendant conceded that the claimant had been collecting rent from the property since 1991. He stated that Isadore lived at the premises until 1988 – his reference point is when "Gilbert blow". He had a son with Isadore born in 1989 and they lived together for a short time until she joined him in England in 1989.

He insisted that he contributed to the mortgage even after "they mash up".

Apart from being barred entrance to the property from one tenant in 2007, a similar incident had occurred in 1996. The defendant, however, was insistent that he had been to the property several times between 1996 and 2007.

He at one point seemed to be challenging the purchase price as recorded on the title, insisting that it was actually two hundred and twenty-two thousand dollars ($222,000.00). He seemed to however acknowledge that this figure represented the total cost including removing one Mrs. Jones from the house.

He ended up agreeing that the purchase price was in fact one hundred and twenty-five thousand dollars ($125,000.00).

He accepted that after Isadore and their son left the property a tenant of the claimant lived there until 1994. He thereafter went in and did repairs. He named two (2) persons who assisted. He said it was while he was so engaged that the claimant came there, this being the first he was seeing her for a long time.

He stated that after he completed the repairs, the claimant rented it out again without giving him any of the rent.

He agreed that it was the claimant who has been in control of the house since Isadore moved out in 1989. He however expressed the view that she was doing it behind his back. He pointed out that he has been in Jamaica full time since 1991.

The Submissions

For the Claimants

Mr. Steer submitted that this property cannot be considered the family house. He opined that since the parties separated prior to the coming into effect of the Act on April 1, 2006 and since the Act has no retrospective effect it would mean there can be no family house. If one existed it would be in England as the intention was for the parties to retire in Jamaica which never happened. In any event the house was never the principle place of residence.

It is submitted that sections 14 (1) a - b and 14 (2) (a) (c) and (e) of the Act would however be applicable to the matter.

It is highlighted that the defendant's contribution towards the property is as follows:-

(i) contribution towards the deposit and closing costs

(ii) contributions towards the mortgage from 1986 to 1989.

(iii) the payment of £300 in 1989 towards the mortgage.

This, it is urged, would be far less than that of the claimant who would have paid her portion of the mortgage up to 1989 and thereafter was solely responsible for the payments until she paid a balance lump sum amount of $77,948.12 to discharge the mortgage in 1995. She would have paid the major portion of the cost of acquisition while the defendant contribution was so insignificant it amounted to a nil interest in the property.

It is pointed out that the marriage lasted from 1980 to 1991 according to the claimant or 1988/1989 according to the defendant.

In any event it is submitted that the defendant had abandoned his claim to the property as more than twelve (12) years have elapsed since he has done anything to or shown any interest in the property. In reviewing the evidence Mr. Steer highlighted the following:-

a) The defendant states the claimant rented the property and been in receipt of all rent monies.

b) Although the defendant outlined things he did maintaining the property, he did not put a time on these jobs and only in cross-examination the time seemed to be 1994.

c) The defendant has expressed that the claimant has been in control of the house since 1989 – even though it was behind his back and he has been in Jamaica in the nineties full time.

d) The defendant states that he has never taken the claimant to court.

e) A tenant, Mr. Burke, refused the defendant entrance to the property because he was not the one rent was paid to.

f) From 1996-2000, the defendant claims he had been to the house several times but was barred by the tenant.

It was not until 2007 that the defendant served a notice to quit on the tenant but the matter was not pursued through the courts.

Mr. Steer also pointed to what he referred to as a fact namely that the defendant has taken no steps to assert his right to ownership over this property despite having full knowledge of tenants and the claimant's collecting the rent while the tenant barred him from the premises. This is to be contrasted with the actions of the claimant when she discovered persons living on the property without her consent – they were evicted.

The case of **Wills v. Wills PCA 50/2002** is relied on as the authority in relation to the application of the principle of adverse possession to matrimonial property.

It is concluded that the defendant would have no beneficial interest in the property and that the Registrar of the Supreme Court be empowered to sign any and all documents if either party refused to or is unable to so do.

For the defendant

Miss Tomlin identified the following as the issues to be determined:-

A) Whether the claimant is entitled to the entire beneficial interest in the property in Greenvale on the grounds that as joint tenant, her husband abandoned the property.

B) Should the claimant and the defendant share the beneficial interest in the property equally or proportionally in accordance with the Property (Rights of Spouses) Act.

C) Should the equal share rule be departed from on the grounds the defendant abandoned the property since 1991 and his interest therefore has been extinguished by way of adverse possession.

Miss Tomlin opened her submission by stating that "the claim was initially made under the Act but on an application made at the first hearing on the 1st May, 2008, the claim was amended and an alternative claim for adverse possession".

The relevant sections of the Act in Miss Tomlin's view are 13 (1); (6) and (7). She submitted that if the property is deemed to be a family home held by spouses as joint tenants, the claimant would have to prove that it is unreasonable or unjust for the defendant to secure his entitlement either by the equal share rule, survivorship rule or severance of the joint tenancy.

It is advanced that the basic principle of the law of limitation is that a claimant cannot bring proceedings for the recovery of land more that twelve (12) years after his cause of accrued.

J. A. Pye (Oxford) Ltd. and Anor. v. Graham and Anor. [2002] 1 AC 422 is referred to for this principle and section 3 of the Limitation Act as the relevant law.

It is opined that the critical question must therefore be at what point the claimant could have first sued the defendant for possession.

The interpretation of the law as set out on **[Archer Et Ux v. Georgiana Holdings Ltd.] [1974] 12 JLR 1412** is relied on.

In reviewing the evidence Miss Tomlin expressed the opinion that it be became evidently clear that the claimant was not in possession or in control for a clear twelve (12) years period. It was the defendant who rented the property between 1994-1995. It wasn't until the year 2000 that she first carried out repairs. She returned to England in 1990, 1991, 1994 and 2000. She stayed about two month on her visits to Jamaica and when here she would either stay at the property or in Clarendon.

Miss Tomlin assessed this evidence as fleeting visits to Jamaica by the claimant. Further it is pointed out that the claimant admitted that the defendant could have visited the property while she was in England and she would not have known.

It is also noted that the claimant had been collecting rent since 1991 and the defendant never saw a cent of the rent and never took the claimant to court.

The fact that two mortgages were attached to the property is also noted and it is stated that the defendant paid the mortgage even when he and the claimant "mash up".

The case of **Forrest v. Forrest 1995 32 JLR** at page 136 is referred to and the dictum of Wolfe J.A as he then was, is quoted.

It is further noted that the claimant rented the property to a Mr. Burke in 1996 and subsequently the defendant was barred from the property. Miss Tomlin expressed opinion that Mr. Burke would have left the property in or after 1997. It was after the property was vacated that the defendant is alleging he did repairs to it. The fact that the defendant was detailed about the repairs done and named the two workmen is pointed to and Miss Tomlin submitted "it would be perjury for the defendant to have been so clear and explicit if indeed he had never visited the property at this time and had never regained possession"

The case of **Wills v. Wills** [supra] is distinguished on the grounds that the defendant in the instant case had not divested himself of the property as the first wife in Willis' case had done.

Secondly he had rented the property until 1995 or thereabout whereas the first wife in Wills' case had never rented nor received rental income from either property. The claim in Wills was made by the second wife who was in constant possession for more that twelve (12) years whereas in the instant case the defendant never entirely abandoned the former matrimonial home.

In conclusion it is submitted that the claimant is out of time for bringing the action. Miss Tomlin expressed an opinion that can only be restated in the terms given.

> "The law is overwhelmingly conclusive when ownership of a property is endorsed on a registered certificate of title as joint tenants. It would be an injustice to displace a registered proprietor's undivided share by way of adverse possession or by equal share rule on the grounds that the defendant's visits to the property may be deemed interspersed.
>
> Abandonment means to leave without intending to return or to give up. (Oxford Dictionary)"

She pointed out the acts relied upon by the claimant as acts of possession and control as - (a) collection of rent 1995 upwards (b) court proceedings to evict the defendant's tenants in the mid 1990's (c) lack of repairs to the property carried out by the defendant.

The acts of the defendant relied on as proof that he did not abandon the property for the statutory period of twelve (12) years were (a) putting his relatives in possession under his control for a period of at least 4-5 years during the 1990's (b) renting the property for a period thereafter (c) carrying out repairs between 1996-2000 (d) serving a notice to quit on an existing tenant in 2007.

It is submitted that the claimant has not discharged the burden that before the expiry of the limitation period she performed acts amounting to dispossession of the squatter and resumption of her possession.

The issues

Given the different approaches in the submission made for the parties it is necessary to indicate what the issue is deemed to be. It is necessary to begin by reviewing the history of the matter.

The claim was made under the Property (Rights of Spouses) Act 2004. This claim was dated September 19th 2007 and the accompanying affidavit bears the same date.

In his response dated March 4th 2008 the defendant revealed that he had been divorced from the claimant in 1999 and had married Isadore Williams in December of the said year.

This revelation seemingly came as a surprise to the claimant as she responded in a subsequent affidavit claiming she was not aware she had been divorced.

The Act provides at section 11 inter alia –

(1) Where during the subsistence of a marriage or cohabitation, any question arise between the spouses as to title or possession of

property either party .....may apply by summons or otherwise in a summary way to a Judge of the Supreme Court.....

(2) The judge of the Supreme Court.....may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.....

This would have been the relevant section allowing the claim to have been brought.

The claimant having brought the action under this section could not now proceed as she was no longer married – no marriage subsisted when the matter was instituted.

The Claimant made an application on the 16th of April 2008 for the following:

1. An order for leave to present the application for division of the matrimonial home out of time.

The ground on which it was sought was that under Section 13 (2) of the Act allowance for application to be brought after the requisite time for filing applications have passed, is given.

Since it was recognized that she was now divorced the claimant was clearly seeking to proceed under section 13 of the Act. It states inter alia:-

1. A spouse shall be entitled to apply to the court for a division of property-

   (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation.....

   (b) .....

2. An application under subsection 1 (a), (b), or (c) shall be made within twelve (12) months of the dissolution of a marriage, termination of

cohabitation.....or such longer period as the court may allow after hearing the applicant.

3. For the purposes of subsection 1 (a) and (b) of this section and section 14 the definition of spouse shall include a former spouse.

It is noted that in her affidavit in support of her application for the order outlined above, the claimant stated she found it "necessary to amend my fixed date claim form to include an application that the defendant has abandoned the property and has made no claim in respect of the property for more than twelve (12) years".

It is also in her affidavit that she ultimately sought an order that time be extended to the 20th of September 2007, the date of the filing of the application and that she be allowed to plead in the alternative that by reason of his abandoning the property since 1991 whatever interest he may have would have been extinguished by way of adverse possession.

This "application to amend" does not appear on the actual notice of application for Court Orders.

Both attorneys were present when the application was heard. The minutes of Order indicate that hearing was on the 23rd of April 2008 and not on the 1st of May as the perfected order filed indicates.

It was ordered inter alia:-

(1) Extension of time granted to the claimant as per application dated to [sic] the 16th April, 2008.

It appears from this order, that having not brought her claim within the requisite twelve (12) months of the dissolution of marriage pursuant to the Act, the claimant was now at liberty to present it out of time, without more.

Therefore I understand it to mean the claim was to proceed as originally filed. There was no amendment with an alternative claim for adverse possession from the records.

The issue before me therefore remains as per the fixed date claim form namely:-

in a determination as to the ownership of the property is the claimant entitled to the entire beneficial interest?

Before considering the issue as I perceive it to be I need mention that in any event the submission made by Miss Tomlin that it is the basic principle of law that a claimant cannot bring proceedings for recovery of land more than twelve (12) years after his cause of action accrued is a clear misstatement. It is after twelve (12) years has passed that such a matter is to be brought – section 3 of Limitation Act states inter alia:-

> "No person shall make an entry or bring an action or suit to recover any land .....but within twelve (12) years next after the time at which the right to make such entry or bring such action or suit shall have first accrued....."

If the court was satisfied the defendant has been disposed of or had abandoned his interest in the property in 1991, the claimant was at liberty to bring an action within twelve (12) years next after that time i.e from 2003.

Application of the law to the facts found

The first matter to be resolved in whether the property is to be regarded as the family home.

As defined at section 2 (1) of the Act the family home is inter alia:-

> "the dwelling house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal residence .....and used wholly or mainly for the purposes of the household.....".

In **Shirley-Stewart v. Stewart HCV 0327 of 2007 SC 6.11.07** Mr. Justice Sykes attempted to give an interpretation to this section.

I find his analysis useful. At paragraph 23 he states inter alia:-

> Thus family residence means the family's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses.

At paragraph 24 he continues:-

> The legislature, in my view was trying to communicate as best it could that the courts when applying this definition should look at the facts in a common sense way and ask itself this question, "Is this the dwelling house where the parties lived?"

In the instant case the claimant in her affidavit, stated that after the property was purchased in 1989, they moved in and commuted between Jamaica and the United Kingdom. In his response, the defendant merely admitted to the truth of this fact. Under

cross-examination the claimant explained it was their intention when they retired they would come back to Jamaica and make Jamaica their home.

There is no further evidence concerning the use of the house. In particular it is not clear what this commuting between Jamaica and the United Kingdom actually entailed – how often were they here staying at the house, how much time did they spend at the house when they came. It is not expressed from the evidence presented from either side that this property was wholly or mainly used for the purposes of the household. It cannot be said that it was the permanent or usual abode of the spouses.

The property is therefore not determined to be the family home instead it falls within the definition of property which the same section 2 of the Act defines as inter alia:-

> "any real or personal property any estate or interest in real or personal property.....whether in possession or not to which the spouses are either of them is entitled".

Hence it is section 14 (1) (b) (2) and (3) of the Act that becomes relevant.

Section 14 (1) Where under section 13 a spouse applies to the court for a division of the property the court may:-

(b) subject to section 17 (2) divide such property, other that the family home, as it thinks fit, taking into account the factors specified in subsection (2);

.....

(2) The factors referred to in subsection (1) are_

(a) the contribution financial or otherwise directly or indirectly

made by or on behalf of a spouse to the acquisition, conservation or improvement of any property whether or not such property has since the making of the financial contribution ceased to be property of the spouses or either of them;

(b) .....

(c) the duration of the marriage or the period of cohabitation

(d) .....

(e) such other fact or circumstance which in the opinion of the court, the justice of the case requires to be taken into account.

(3) In subsection 2 (a) contribution means –

(a) the acquisition or creation of property including the payment of money for that purposes;

(b) .....

(c) .....

(d) .....

(e) .....

(f) the payment of money to maintain or increase the value of the property or any part thereof.

(g) the performance of work or services in respect of the property or part thereof.

(h) The provision of money including the earnings of income for the purpose of the marriage or cohabitation.

From the evidence, it is accepted that both parties contributed to the purchase of the property. Indeed this is agreed although the defendant at one stage sought to challenge the amount paid for the property as stated on the title.

It is also clear from the title that two (2) mortgages were in fact obtained on the property.

It is perhaps useful to note here that under the Act, the payment of mortgages must now be seen as one of the factors to be considered when seeking to determine how to divide the property. The pronouncements of Wolfe J.A. (as he then was) in **Forrest v. Forrest SCCA 78/93** are now not as relevant. It is necessary to either increase or decrease any interest a spouse may have in a property dependent on the contributions through mortgage payments which were made.

In this case the mortgage was eventually discharged in 1995. The defendant asserts that these mortgages were discharged by him or using his money. This assertion seems vague and uncertain especially as to when and exactly how much money was actually paid.

The claimant exhibits a bank draft and a letter from the mortgage institution acknowledging receipt of it and indicating it being used towards closing the account. In light of this, the assertion of the defendant cannot be accepted.

Further the parties had separated; from 1989 on his account or 1991 on hers; on less than amicable terms. It seems to be doubtful that in 1995 his money solely would have been used to discharge the mortgage.

I am satisfied it was the claimant who paid the requisite amount to discharge the mortgage.

Both parties assert that they effected required repairs to the property.

From his evidence, it appears she has been renting out the property from at least 1994 – 1995. The defendant claims he repaired it around that time and thereafter was barred from entering. It seems therefore more likely that the claimant was responsible for the property since that time. While she cannot speak to whether he may have visited the property while she was absent, it is from him we learn if he visited he did not gain admission.

Hence I find that where this factor is concerned, it is apparent that the claimant would have made a greater contribution to property through repairs.

The duration of the marriage need also be considered. She said they separated in 1991. He said it was from before then pointing to the fact that he had a child out of wedlock in 1989. Given the character of the claimant as I assessed it, I am forced to doubt that she would have remained with him if she learnt of this child.

In any event the duration then would be at most eleven (11) years and at least nine (9) years. While neither can be said to be very lengthy neither can it be said to ultimately affect the determination of interests in the property which was acquired in 1986.

It is significant to note that the claimant gives 33 Greenvale Housing Scheme as her true place of abode and postal address. In the evidence she said she stays there as well as in Clarendon when in Jamaica. The defendant challenges this and claim she resides only in Clarendon. Given his assertion of his inability to locate the claimant, it is questionable when he learnt of her address to be that in Clarendon and if he can say with certainty she does not say at the property in dispute.

In any event he has lived in Jamaica since 1991 and while it may be accepted that he visited the premises occasionally, his failure to pursue any actions against the claimant or her tenant demonstrates he had no interest in residing there.

I accept the claimant's evidence that she habitually stays at the property.

I am satisfied that even if the parties shared equally the beneficial interest in the property when it was acquired, what has taken place over the years must change that position.

After careful consideration of all the relevant factors in making this determination, I find the claimant is entitled to 75% of the beneficial interest in respect of the property and the defendant to 25%.

I therefore make the following declarations and orders:-

(1) The claimant's application that she is entitled to 100% interest in the subject property is denied.

(2) The defendant's claim to a 50% interest in the property is also denied.

(3) The court declares that the claimant is entitled to 75% and the defendant to 25% interest in the subject property.

(4) A valuation of the property is to be done by a valuator to be agreed between the parties with the cost of valuation to be shared proportionately with their interest in the property as determined above. If the parties fail to agree to a valuator, the Registrar of the Supreme Court is empowered to appoint one.

(5) The claimant is given the first option to purchase the share of the defendant as determined above; such right is to be exercised within four (4) months upon receipt by both parties of the valuation report.

(6) Should this option not be exercised, then the property shall be placed on the open market for sale by private treaty and failing that by public auction.

(7) The net proceeds of sale are to be divided in accordance with the interest determined above.

(8) The Registrar of the Supreme Court is empowered to sign any or all documents to give effect to any or all orders made herein if either of the parties is unwilling or unable to do so.

(9) Liberty to apply.