

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

BETWEEN LILIEETH EDWINA WHITTAKER PLAINTIFF
A N D PHILLIP MOUNTBATTEN WHITTAKER DEFENDANT

Miss Janet Nosworthy for the Plaintiff.

Patrick Foster instructed by Dunn Cox & Orrett for the Defendant.

MAY 18, 19; JUNE 12, 8; AND JULY 8, 1992

SMITH, J.

The plaintiff is a Consultant Physician and Surgeon and the defendant an actuary and a Vice-President of Life of Jamaica Limited.

By Originating Summons dated 1st August, 1990 the plaintiff seeks the determination of the following questions:

- (A) What are the respective legal estates, shares and interests of the PLAINTIFF and the DEFENDANT in ALL THAT PARCEL of land known as 8 Great House Mews in the parish of Saint Andrew;
- (b) WHAT are the respective legal estate, shares and interests of the PLAINTIFF and the DEFENDANT in ALL THAT PARCEL of land known as Apartment No. 206 Trafalgar Court in the parish of Saint Andrew;
- (C) (not pursued)
- (D) (not pursued)
- (E) WHAT are the respective estates, shares and interests of the PLAINTIFF and the DEFENDANT in ALL THAT PARCEL of land known as 3 Norbury Drive in the parish of Saint Andrew;
- (F) (not pursued)

The plaintiff also seeks the following declarations:

- (G) A Declaration that the PLAINTIFF is together with the DEFENDANT entitled to legal and beneficial estate and interest in ALL THAT PARCEL OF LAND known as No: 206 Trafalgar Court in the parish of Saint Andrew as JOINT TENANTS and that she is entitled to be registered as Joint Proprietor of the Fee Simple Estate in respect of the said premises and to have her name entered and endorsed on the Certificate of Title in respect thereof and that the Defendant holds the legal and beneficial interest in the said No. 206 Trafalgar Court as to the whole upon trust for himself and the Plaintiff as Joint Tenants and that the Plaintiff's share and interest in the said parcel of land is not less than 50% or one half share of the whole;

- (H) A Declaration that the PLAINTIFF is together with the DEFENDANT entitled to the legal and beneficial estate, interest, share, right in respect of 3 Norbury Drive in the parish of Saint Andrew as Joint Tenants and that the Defendant now holds an estate interest, share or right in respect thereof upon trust for himself and the Plaintiff as Joint Tenants and that the Plaintiff's share and interest in the said parcel of land is not less than 50% or one half share of the whole;

and the following orders:

- (I) (i) An Order that the Defendant's name be struck from the Certificate of Title in respect of ALL THAT PARCEL known as 8 Great House Mews in the parish of Saint Andrew and registered at Volume 1122 Folio 392 of the Register Book of Titles and THAT thereafter the Plaintiff hold ALL THAT legal and beneficial estate and interest therein for herself solely and absolutely to the exclusion of the Defendant, AND FURTHER THAT the Defendant sign all necessary documents of Transfer and do all necessary acts to cause the removal of his said name from the said Certificate of Title. AND FURTHER THAT the Defendant pays costs of the incident thereto;
- (ii) An Order directing the Registrar of Titles to Vest and transfer the said PARCEL OF LAND in the plaintiff's name alone;
- (J) THAT the Defendant deliver up the plaintiff possession of ALL THOSE miscellaneous items of personalty namely: Furniture Furnishings and Household Articles, Fixture and Fittings lying in and upon ALL THAT PARCEL of LAND known as Apartment 206 Trafalgar Court aforesaid upon determination of the Lease Agreement made in respect thereof on or about the 31st day of July, 1990 or so soon as the same shall lawfully determine;
- (K) THAT an Account be taken and furnished by the Defendant in respect of certain Insurance Moneys being property insurance moneys paid in respect of 8 Great House Mews aforesaid and in respect of which the Defendant has collected the sum of not less than \$40,000.00 for and on behalf of himself and the Plaintiff BUT has failed refused and neglected to render Account thereof to the Plaintiff as to its use and application or to deliver any part thereof to her;
- (L) (not pursued)
- (M) AN INJUNCTION to restrain the Defendant whether by himself or his servants or agents or otherwise howsoever from taking steps to grant or granting any further extension of the Agreement for a Lease in respect of ALL THAT PARCEL of LAND known as Apartment 206 Trafalgar Court in the parish of Saint Andrew or from taking steps to prevent or preventing the Plaintiff from taking possession or control of CERTAIN items of PERSONALTY, NAMELY Furniture, Furnishings, Household Articles, Fixtures and Fittings, lying in and upon Apartment No. 206 Trafalgar Court aforesaid upon determination of the aforesaid Lease on or before the 30th day of June, 1990 or such other date upon which the same shall determine;
- (N) Further and or in the alternative any Declaration or Order in respect of the aforesaid PARCELS of LAND and the aforesaid Items of PERSONALTY as this Honourable Court may deem just;

The parties were married on the 7th August, 1976. At the time of the marriage the plaintiff was a final year medical student on scholarship valued at \$2,000 p.a. The defendant was then an actuarial student employed to Bacon Woodrow and Desouza. Shortly after the marriage the defendant went to London to pursue actuarial studies and returned to the island around March/April 1977. Thereafter the parties resided at 14 Wishaw Avenue the home of the plaintiff's mother without paying rent. It was a happy family. The parties and the plaintiff's mother pooled their financial resources. From this common pool all their expenses, personal and domestic would be met. Towards the end of 1977 the parties operated a joint savings account with the Barclays Bank and saved for their joint use and benefit and in particular to purchase a dwelling house for their enjoyment and benefit. They also opened and operated a joint savings account with the Teachers Credit Union.

8 Great House Mews:

During this time i.e. the latter part of 1977, the plaintiff observed certain houses under construction. She made enquiries and then discussed with the defendant the "possibility of (their) purchasing one of the said Units."

They decided to purchase one - a three bedroom town house situate at Mona, St. Andrew, and known as 8 Great House Mews. The purchase price was \$50,000. At the time of the Agreement which was signed around February of the following year the consensus was that the said town house was to be purchased and owned by both parties. They jointly secured a loan in the sum of \$10,000 from the then Barclays Bank. This loan was secured by way of a mortgage of premises 5A Eastwood Park Road the property of the plaintiff's mother, Mrs. Esmie Johnson. This loan was repaid by monthly instalments from a joint current account which the parties operated at Barclays Bank. The understanding was that both parties would draw cheques on this account for "joint as well as personal use."

This loan of \$10,000 was used to pay the deposit of \$5,000.00 as well as transfer fees, costs and other charges.

The property was registered in the names of both parties as joint tenants.
for
The plaintiff and defendant then jointly applied/and received a mortgage loan in the sum of \$45,000.00 from Citibank on the security of 8 Great House Mews.

This sum was used to pay off the balance of the purchase price. It was convenient to the parties and they thus arranged that monthly mortgage payment of \$500 would be made by deductions from the defendant's salary.

The parties took possession of the aforesaid town house in or around March, 1978. Between them "they developed a system of servicing the household bills." By this the plaintiff would from their joint savings account buy food and groceries for the family, pay household help, pay utility bills and purchase furniture to supplement those which she owned before marriage.

In 1979 the defendant's employer Life of Jamaica Insurance Company Limited came to the assistance of the parties. As an employment benefit, the defendant was granted a staff mortgage loan in the sum of \$55,000.00. This sum was applied to discharge the mortgage in favour of Citibank as well as to discharge a loan of \$11,000.00 which the parties obtained from Barclays Bank.

In March 1982, the parties secured a mortgage loan in the sum of \$30,000.00 from Life of Jamaica. They had intended to use this to effect repairs and extensions to their town house. But this was frustrated by the expenses incurred by the sickness and death of their daughter Nadine.

This loan was repaid by way of monthly deductions from the defendant's salary.

In 1983 the parties obtained an additional loan from the defendant's employer. This was to the tune of \$50,000.00 and was, as before, repaid by deductions from the defendant's salary.

In 1984 the plaintiff installed a water tank at a cost of \$16,000.00 which she earned during part-time private practice. She also installed carpets from such earnings.

The parties are ad idem that their intention was that both should have a beneficial interest in this townhouse. Based on the circumstances of the acquisition it is abundantly clear that the parties intended to share this townhouse equally.

Indeed both attorneys-at-law submitted that the parties are equally entitled to the beneficial interest.

However Mrs. Nosworthy for the plaintiff stated that the plaintiff's request for an Order in terms of paragraph 1 (i) and (ii) of the Originating Summons is predicated on the assumptions that:

- (1) A Declaration will be made in terms of paragraph 'G'; and
- (2) The defendant's consent to the plaintiff getting the townhouse and the defendant the apartment.

I will return to this.

I must however answer the question at paragraph 'A' by saying that both parties are the legal owners of 8 Great House Mews and both are equally entitled to the beneficial interest therein.

Apartment 206 Trafalgar Court:

In respect of this property the parties do not agree as to what their intentions were at the time of the acquisition. The wife is claiming one half share of the beneficial interest - whilst the husband is claiming the whole beneficial interest. This property is registered in the defendant husband's name alone. Thus the legal estate is in the **defendant** and prima facie this carries with it the whole beneficial interest. There is no evidence of an express trust. The plaintiff wife therefore will not be entitled to a proprietary interest unless she can establish the existence of a resulting, implied or constructive trust - Gissing v. Gissing (1980) 2 All E.R. p. 780 at 789 (g). The crucial question therefore is whether or not the plaintiff has established on a balance of probabilities, that the defendant holds the legal estate in the property as trustee to give effect to her beneficial interest.

I must therefore scrutinise all the evidence placed before me in order to ascertain the parties' intention.

This will involve "a consideration of all the circumstances, including the contributions which have been made by each party in cash or in kind or in services."

On such a course I must now embark. The plaintiff in her first affidavit stated that in 1986 she obtained a fellowship from the Pan American Health Organisation valued at Can. \$900 p.m. to pursue post graduate studies in Canada.

The parties agreed to the leasing of 8 Great House Mews to the U.S. Embassy at a rental of U.S.\$1000 per month. The tenants requested certain improvements to the premises. The cost of such improvements was approximately \$12,000.00. This was secured by way of a "joint loan" from the National Commercial Bank in the sum of \$30,000.00. The plaintiff claims that the monthly repayments of \$1,250.00 were made

from their joint savings account with the said National Commercial Bank. The defendant does not deny this but says that the plaintiff had ceased to make lodgments to "our 'joint' account" from early 1980 and that the repayments were made from his deposits only. In her second affidavit the plaintiff seeks to refute the defendant's claim that she had ceased to make lodgments to the joint account. She contends that there was an arrangement between the parties whereby for their convenience her salary cheques were often times encashed to service "the parties joint domestic and other bills and responsibilities." She is also saying that money earned by her in private practice were also lodged to their joint account. There is a preponderance of evidence that the plaintiff did not cease to make lodgments to the joint account in the early 1980s. I accept the plaintiff's evidence in this regard.

As said before both parties agreed that \$30,000.00 was borrowed from the N.C.B. - \$12,000.00 went towards improvements of 8 Great House Mews. What of the balance i.e. approximately \$18,000.00? The plaintiff's evidence is that before she left for Canada her husband and herself agreed to purchase a two bedroom Apartment viz. No.206 Trafalgar Apartments. The purchase price of this Apartment was \$280,000. Her evidence is that they intended this apartment to be an investment as well as an alternative matrimonial home if 8 Great House Mews was not available when she returned from Canada.

Just before she left for Canada, the parties and their children vacated 8 Great House Mews and went to 206 Trafalgar Apartments.

Further her evidence is that it was "expressly agreed" that the apartment would be jointly owned by the parties as joint tenants. She claims that they agreed that the balance of the aforesaid loan of \$30,000.00 namely \$17,000.00 was "to be applied as payment for transfer and closing and other costs of and concerning the purchase of 206 Trafalgar Apartment." The defendant is denying that there was any such agreement.

In his only affidavit the defendant deponed that before the plaintiff left for Canada in 1986 she asked him to find alternative accommodation so that 8 Great House Mews would be made available for rental to the U.S. Embassy in order to "generate U.S. dollars income to her." He asked his company to provide him with 100% financing to purchase 206 Trafalgar Apartment. He borrowed a further sum of \$20,000.00 from L.O.J. Limited to cover all the purchase costs which totalled \$16,539.00.

agreed that the balance of the \$30,000.00 loan from N.C.B. i.e. approximately \$17,000.00 should be applied to the transfer and closing costs.

Mr. Foster for the plaintiff submitted that the reasonable inference given the extent of the mortgage is that the defendant would not require any financial assistance from the plaintiff. Clearly, he argued, the defendant did not require \$17,000.00 to cover closing costs.

The undisputed evidence is that the parties moved into the apartment during August 1986 - just before the plaintiff left for Canada. It is also not disputed that when the transfer was signed and the mortgage stamped the plaintiff was off the island. It is a fact that the mortgage was registered on 3/10/86. It would seem to me therefore that the fact that the defendant obtained over 100% mortgage would not necessarily mean that at the time when the decision to purchase apartment 206 was taken, there was no perceived need for money to cover closing costs.

The undisputed evidence before me is that the parties jointly borrowed \$30,000.00 and that approximately \$12,000.00 was used to effect repairs to 8 Great House Mews. The defendant is silent as to what was done or agreed to be done with the balance of this loan. The only evidence before me in this regard is from the plaintiff. It is interesting to note that neither party made mention of a deposit. This is probably so because the certificate of Title indicated that the defendant's employer was the Vendor. On a careful perusal of the evidence I am satisfied that on the balance of probabilities there was an understanding between the parties that the balance of the N.C.B. loan was to be applied towards the transfer and closing costs as stated by the plaintiff.

The Express Agreement:

The plaintiff said it was expressly agreed between them that the apartment would be jointly owned and that the Certificate of Title in respect thereof would be issued in their joint names. She left the island shortly after they had moved into the apartment and was not present when the transfer was signed and the registration effected. She said when she returned she enquired of the defendant why contrary to their agreement he had not placed her name on the title. He replied that with her being off the island it was more convenient to have his name alone on the title but that "in reality the apartment was jointly owned by both parties and that he had no ulterior motive....."

The defendant asserted that there was no such agreement. His evidence is that the plaintiff was in Jamaica throughout the negotiations for the purchase of the apartment and knew her name was not on the Title and raised no objections.

Now it is not disputed that the plaintiff left the island in August 1986, and was off the island until around September 1988. As said before the transfer was registered on 3rd October, 1986. Obviously the defendant's assertion cannot be correct. I accept the plaintiff's evidence that she was off the island at the material time and so could not have effectively objected to the defendant's name alone being placed on the Certificate of Title.

A scrutiny of the evidence discloses that up to the time of the plaintiff's departure for Canada the parties had consistently applied a system of meeting expenses. Because of the loan facility made available to the defendant by his employer as an employment benefit the parties not infrequently arranged for loan repayments to be made by way of monthly deductions from the defendant's salary whilst other expenses were met mainly by the plaintiff.

The pattern of the conduct of the parties over the years must be relevant to the quest for the common intention of the parties. This of course is not conclusive, but it seems to me to afford an argument that barring evidence to the contrary there should be a presumption of continuity. I find, on the balance of probabilities, that there was an agreement between the parties for the plaintiff to take the three children with her and to be mainly responsible for them whilst the defendant would repay the mortgage by means of monthly deductions from his salary. This agreement, I find clearly support the claim that there was a common intention that both should have a beneficial interest. This arrangement together with the conduct of the parties and the understanding that the balance of the N.C.B. "joint loan" should be applied to transfer and closing costs support the plaintiff's contention that there was an express agreement that the apartment was to be jointly owned.

This express agreement provides for the plaintiff to do something to facilitate the acquisition of the apartment viz. to contribute to the transfer and closing costs and "to make some other material sacrifice by way of contribution to or economy in the general family expenditure." To such an agreement the court will give effect notwithstanding the absence of writing. In this regard let me quote

Lord Diplock in Gissing v. Gissing (1970) 2 All E.R.780 at 790(e):

"What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interest in the matrimonial home shall be held as they have agreed."

I accept the evidence of the plaintiff that before her departure to Canada "the defendant and I jointly agreed to lease the premises 8 Great House Mews and we jointly agreed that if 8 Great House Mews was available then an alternative matrimonial home would be required for the parties as well as their children and thus to this object as well as for investment was No.206 Trafalgar Apartments agreed to be purchased by the parties and that the premises were agreed and intended and bought for the enjoyment of the defendant and me his lawful wife as our joint property....."

Obviously the passage quoted above from the plaintiff's second affidavit do not contain the exact words used to communicate their intention to one another. The plaintiff's recollections of the exact words used may be imperfect. The court however should not be deterred by the difficulty of finding the exact words of the oral agreement. It will not "refuse to decide a case on the ground that the path to conclusion is not flood-lit by clear evidence" of the exact words of the express oral agreement.

In answering the question at 'B' of the Originating Summons I hold that the plaintiff is entitled to one half the beneficial interest in Apartment No.206 Trafalgar Court, Caribbean Close in the parish of St. Andrew registered at Volume 1188 Folio 178 of the Register Book of Titles.

The Declaration sought at paragraph 'G' of Originating Summons is thus granted.

3 Norbury Drive:

The plaintiff's claim in respect of this property is very interesting. It is the plaintiff's evidence that sometime in March 1988 the defendant telephoned her in Canada and requested her "to come and select our dreamhouse" which was to be provided by his employer. Because of commitments she could not do so but told him to go ahead assuring him that she would be happy with whatever selection he made. She understood from him that this 'dreamhouse' would be the new matrimonial home. The defendant selected 3 Norbury Drive.

On the plaintiff's return to Jamaica, the parties and their children lived in this 'dream house.' Unfortunately the dream ended. In June 1989, the plaintiff left the matrimonial dream house. She deponed that she was forced to do so because of the defendant's cruelty and other matrimonial offences.

Now neither of the parties is the legal owner of this house. The legal owner is Life of Jamaica Limited, the employer of the defendant. As a benefit of his employment as Vice President the defendant may elect to live in a house owned by his employer. After 10 years he will have the option to buy the house he chose to live in at 50% of the cost. After 20 years living in the house he may opt to buy it for a nominal sum.

As regards the plaintiff's claim Miss Nosworthy submitted that the defendant has been given an option to purchase. That right, she continued, is assignable and can pass and devolve on his death. If and when the defendant exercises the option to purchase the house, the beneficial interest in the land should be held in trust for himself and the plaintiff, she argued.

Mr. Foster on the other hand submitted that the defendant does not have any interest whether legal or equitable in 3 Norbury Drive. He has a right grounded in a contract of employment to opt to purchase the property under certain conditions. This right he submitted cannot be assigned. He referred to In re Ellenbough Towry Law v. Burne (1903) 1 Ch. 697. In that case Miss Towry Law executed a voluntary settlement by deed by which she granted to trustees the real estate and assigned the personal estate to which she, in the event of the deaths of her brother and sister in her life time, might become entitled under their respective wills or intestacies. At that time she had no property in the real or personal estate of her brother or sister, but she had an expectation that she might become entitled to their property. The sister first died and Miss Towry Law received a share of her estate which she handed over to the trustees. The brother died a few years after. Miss Towry Law became entitled to all his property. She did not desire to transfer this to the trustees. She took out a summons to decide the question whether she could refuse to do so. It was held that her interest was not effectually assigned to the trustees by the deed and the trustees could not call upon her to grant, assign, transfer or pay over to them her brothers residuary, real and personal estate.

The point is that the assignment was not of property, but of a mere expectancy. It seems to me that the plaintiff's claim is completely misconceived.

I agree with Mr. Foster that the expectancy referred to by Miss Nosworthy cannot be the subject matter of a trust. I must confess inability to think of any principle of law on which the plaintiff can rely to support her claim in respect of 3 Norbury Drive.

I must answer the question at paragraph F by stating that the plaintiff has no beneficial interest in 3 Norbury Drive.

The declaration sought at paragraph 'H' of the Originating Summons is accordingly refused.

Furniture etc.

Miss Nosworthy informed the court that the plaintiff is not pressing her claim in respect of the long list of furniture, fixtures, fitting and household articles which she said are jointly owned by the parties.

However the plaintiff is desirous of pursuing her claim in respect of items of furniture which she, said are solely hers.

These are:

- One Antique dresser and stool;
- One Antique reproduction Hunt Board;
- One Antique reproduction desk;
- One Queen Ann chair;
- One Realistic AM/FM radio and amplifier;
- One Antique mirror;
- One Painting;
- One Corner chair.

It is the plaintiff's evidence that these items of furniture etc. are in Apartment 206 Trafalgar Court. The defendant denies this and asserts that only a what-not, a dresser, a mahogany bed and an upholstered livingroom suite which are jointly owned by the parties remain in his possession. Is the defendant saying that the others were in his possession but no longer are? If so, what has become of them?

I am of the view that it would be manifestly fair to order that the defendant deliver up to the plaintiff the items of furniture listed above or failing that, that he accounts to the plaintiff for them.

Account:

The plaintiff has given evidence that the defendant collected insurance money totalling \$40,000 and expended same without rendering an account. The defendant is not disputing receipt of this sum of money. In his affidavit he attempted to state how this money was expended. As I understand it, the plaintiff is entitled to insist on a proper rendering of account. Accordingly I make the order sought in terms of paragraph 'K' of Originating Summons.

Injunctive Relief:

The plaintiff's application for injunctive relief at paragraph 'M' of the Originating Summons is two fold. Firstly the plaintiff seeks to restrain the defendant from granting any further extension of the lease agreement in respect of Apartment 206. However on the plaintiff's evidence this lease would have expired on the 30th June, 1990. Clearly the Court cannot properly entertain this application at this time. Secondly the plaintiff seeks to restrain the defendant from preventing her from taking possession or control of certain items of furniture, furnishings etc. at Apartment 206.

In light of my ruling in respect of the furniture listed above, it seems to me that my discretion should be exercised in favour of the plaintiff in granting the relief in this regard.

Paragraph I of Originating Summons:

Here the plaintiff asks for an order to have the defendant's name removed from the Certificate of Title in respect of 8 Great House Mews and that the title be vested in her solely. What in effect the plaintiff is seeking is to set off her share in Apartment 206 against the defendant's share in 8 Great House Mews. She deponed that the value of each property is the same. However I could only do this if the defendant consented. If I understand Mr. Foster the defendant's position is that in the event that the Court should find that the plaintiff has beneficial interest in Apartment 206 the defendant would not consent to a set-off as contemplated by the plaintiff.

This order is therefore refused. However this is not the end of the matter, the plaintiff may return to the Court for certain orders re settlement of the properties.

Conclusion

I will conclude with a summary. In respect of the following paragraphs of the Originating Summons:

- A. The parties are each entitled to one half share and/or interest in 8 Great House Mews;
- B. The parties are each entitled to one half share and/or interest in Apartment 206 Trafalgar Court. The defendant to pay the fees, duties, and costs of and incidental to any transfer of the said property in favour of the plaintiff;
- E. The plaintiff has no legal or beneficial estate in 3 Norbury Drive;
- G. Declaration in terms of this paragraph granted;
- H. Declaration denied;
- I. Orders sought denied;
- J. It is hereby ordered that the defendant deliver up to the plaintiff the items of furniture etc. listed herein or failing which that he accounts to the plaintiff for each of them;
- K. Order made in terms of this paragraph;
- M. Injunction granted restraining the defendant from preventing the plaintiff from taking possession and/or control of the item of furniture, furnishings, household articles, fixtures and fittings listed herein and referred to in paragraph J above and which are in Apartment 206 on the determination of the current lease, if any.

Defendant to pay one half the plaintiff's costs to be taxed if not agreed. Execution stayed for six weeks.