JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL 4/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A
THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE BINGHAM, J.A (AG.)

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| BETWEEN | CAROLINE MCGANN | PLAINTIFF/APPELLANT |
| A N D | CALVIN MCGANN | DEFENDANT/RESPONDENT |

Mrs. Arlene Harrison-Henry for Appellant

Mrs. Pamela Benka-Coker instructed by
Robinson, Phillips and Whitehorne for Respondent

3rd and 4th June, and 29th July, 1991

FORTE, J.A

The appellant and the respondent were married on the 23rd March, 1958, and thereafter resided in several homes in the parish of St. Mary until 1960 when they purchased a home at 7 St. Mary Street in their joint names, contributions to which were shared equally. While both parties cohabited at these premises, the respondent purchased in the early 1970s property situated at 64 Stennett Street, and registered it in his name only. It was conceded by the appellant that she did not know when this property was acquired or where the money was obtained for its purchase. They, however, removed from 7 St. Mary Street between 1975 and 1976, to 64 Stennett Street, which thereafter became the matrimonial home. When the latter property was acquired, there was on it an old board building. It was not to this building

that the parties removed, however, but to a two bedroom cottage which was built after the acquisition of the property. A second house containing three bedrooms and three bathrooms was built on the property in 1976, and then in 1978/1979 the old building was demolished, and another house was built in it's place. Another house - a one room apartment - was also built on the property in 1985. The marriage, however, broke down in 1984 when the appellant removed from Stennett Street to a house acquired solely by her in Cromwell Lands in the same parish. In fact during the subsistence of the marriage, the appellant acquired several properties, all registered solely in her name.

Arising out of the history briefly outlined above the appellant brought an action in the Resident Magistrate's Court for the parish of St. Mary under the provisions of sections 16 and 17 of the Married Women's Property Act petitioning the Court inter alia to conduct an inquiry under these provisions and to:-

> "Grant an Order that the Real Property at 64 Stennett Street be sold and the proceeds of this sale be divided between the plaintiff and the defendant in such proportion as the Court may deem just and equitable."

An additional claim concerning the beneficial ownership of the personal estate, that is, several items of furniture, was dealt with amicably, and called for no determination by the Court.

The respondent, however, filed a counterclaim in which he claimed a beneficial interest in the premises situate at Cromwell Lands, Highgate in the parish of St. Mary, as a result of extensive work done thereon by him at his own expense. However, during the course of his testimony in the trial, he stated in that regard:-

> "I did the work for my wife as a husband and because I love her. I was not looking any benefit on the house. I felt I was doing my husbandly duty."

Based on that testimony, the learned Resident Magistrate found as follows:-

> "This in my judgment operated as an advancement to the plaintiff and in any event I find as a fact that the improvements carried out by the defendant ..... were insubstantial and not enough to give the defendant a benefit."

He therefore found against the respondent on the counterclaim, a decision from which no appeal has been taken. He, however, found for the respondent on the claim and in so doing, after exhaustive reasoning concluded:-

> "I find that there is no sufficient evidence for which the Court can infer that the defendant holds the premises in trust for the plaintiff."

The appellant, not satisfied with that judgment brought before this Court, several grounds of appeal filed in two separate documents of different dates. In argument, however, the grounds of appeal were confined to the following:-

1. That the learned Resident Magistrate failed to consider and/or evaluate the evidence of the defendant/respondent to the following effect:-

   "We built the houses at 64 Stennett Street for both of us"

2. That the learned Resident Magistrate erred in finding:-

   "I do not therefore accept her evidence that she did not receive her half share or any of the proceeds from the sale"

   as he grounded this finding on the plaintiff/appellant's evidence in cross-examination that

"both of us had lawyers acting for us"

3. That the learned Resident Magistrate failed to evaluate or properly evaluate the evidence of the plaintiff/appellant that she contributed $4,000 towards one of the buildings at 64 Stennett Street."

All these grounds are clearly related to the appellant's attempt at the trial to establish (in a case where the legal title to the house was solely in the husband), contribution by her to the construction of the buildings, so as to establish a beneficial interest in the ownership thereof.

As the case developed, that was the only issue that remained for determination by the learned Resident Magistrate who so recognized when he stated in his reasons:-

"The one problem therefore which remains is whether the plaintiff (on whom the burden rests) has satisfied the Court albeit on a balance of probabilities that the defendant holds the property at 64 Stennett Street, Port Maria in trust for her."

Ground 1

In advancing this contention, Mrs. Harrison-Henry argued that the words "We built the houses at 64 Stennett Street for both of us" amounted to a clear statement of intention and was also an admission by the respondent of the appellant's contribution to the construction of the buildings.

Mrs. Benka-Coker in reply, contended that such an interpretation was contrary to the evidence, as throughout his testimony, the respondent always maintained that he acquired the property and built the houses from his own funds. She relied on the following passages of his testimony.

Page 23 of the Notes of evidence:-

> "While I was living at 7 St. Mary Street, I bought property at 64 Stennett Street in my name with my money. There was no agreement between my wife and I to put her name on the title. She did not know when I acquired this property."

The content of this passage was in accordance with the testimony of the appellant, and consequently was not an issue in the case, the issue being whether any contribution was made by the appellant thereafter to the construction of the houses subsequently erected on the property.

Mrs. Benka-Coker, however, also relied on the following (at page 23):-

> "When I acquired this property it had a board building with about four bedrooms upstairs and four bedrooms downstairs ..... There is a two bedroom cottage there now. I built this with my money. My wife had no contribution to this.
>
> We pulled down the old upstairs board building and put up a concrete structure. My wife did not help with the construction of this work. There is also a little one room cottage on these premises with toilet fixtures. My wife did not contribute to this. She was living at Cromwell Lands then."

In so far as the one room apartment is concerned the appellant conceded that she had no interest in that, as it was built after the marriage had broken down, and without any contribution from her.

Reference was also made to the following passage:-

> "When I acquired premises at 64 Stennett Street, I demolished the house which was there and rebuilt another house. I constructed the house between 1970 and 1979. Most of the money came from my earnings. I borrowed some money from the Bank of Nova Scotia. My Insurance Company paid back the money to the bank.

> "I obtained money from the Insurance Company on a long term mortgage for $19,000."

It appears, however, that the learned Resident Magistrate in his judgment made no reference to the testimony relied on by the appellant, and on the face, it could be said that he did not consider its effect.

He, however, gave an indepth analysis of the evidence on the question of contribution and in the end concluded thus:-

> "I agree with Counsel for the Defendant that there was not sufficient evidence before the Court from which the Court could find that the plaintiff made substantial contributions to the improvement of the matrimonial home which would give her a beneficial interest apart from the sale of the joint property at 7 St. Mary Street which I find as a fact that the proceeds therefrom were shared between the parties, there was only evidence of one Four Thousand Dollars which the plaintiff said she gave to the Defendant. This was denied by the Defendant. He stated that he only guaranteed a loan to her which she repaid and that she used this money to buy equipment for her Beautician business. I accept the Defendant's evidence as the plaintiff admitted in cross-examination that she at some time borrowed money to purchase equipment for her Beautician business."

In so far as the intention of the parties was concerned the learned Resident Magistrate found:-

> "I find from the conduct of the parties that there was a clear intention for them to own separate properties."

No doubt he was influenced by the many acquisitions of the appellant during the subsistence of the marriage, for he later stated:-

> "Here in this case the plaintiff during the subsistence of the marriage acquired some six separate assets with either her own money or what she obtained as a gift."

The learned Resident Magistrate, therefore, though not specifically alluding to the statement of the respondent relied on by the appellant, did demonstrate that he considered all the evidence advanced in the attempt to prove contribution, and examined what evidence there was to determine the intention of the parties when the construction of the two major units took place, and in the end found against the appellant.

In any event, the statement made, was in answer to a question asked in cross-examination and one ought to look at the context in order to determine, what exactly the respondent meant to convey. Immediately, the answer was given, the learned Resident Magistrate apparently investigated that very question, for his notes of the evidence record that the respondent in answer to the Court stated immediately thereafter the following:-

> "When she was living there she would occupy it, but after she left and went to her own home it would be finished there."

This answer in my view, shows that the respondent in explaining what he meant, clearly indicated that in so far as he was concerned, quite apart from giving the appellant any beneficial interest in the house, it was merely for their accommodation so long as the marriage subsisted, but thereafter she would relinquish all connection with it.

In my view, the statement, in the context in which it was made, and given the other evidence (supra) accepted by the learned Resident Magistrate could not have the effect that the appellant would have us place on it, and therefore I came to the

conclusion that the judgment of the learned Resident Magistrate should not be disturbed for the reason that he did not specifically refer to it in his reasons.

Ground 2

The issue complained of here, relates to the question of whether all the proceeds of the sale of the property at 7 St. Mary Street, went into the erection of one of the buildings at Stennett Street, or as the respondent contended, was shared equally between the parties, the appellant having been given her share which she used for her own purposes, that is, to purchase land at Kingsfarm in her own name.

The learned Resident Magistrate found as follows:-

> "The premises at 7 St. Mary Street was sold in 1979. The claimant admitted in cross-examination that both she and her husband were represented by lawyers at the time of the sale. Further that premises was in their joint names and she must have agreed to the sale for that sale to be completed. I do not therefore accept her evidence that she did not receive her share or any of the proceeds from the sale."

The determination of the truth in this regard depended on which of the two versions the learned Resident Magistrate believed, having seen and heard the witnesses. In other words, his finding did not necessitate any indepth analysis of evidence to determine by logical process where the truth lies. In the end, he reasoned that because both parties were legally represented, and the property was registered in their joint names, the appellant therefore having to agree to the sale, the lawyer would have protected her interest in seeing that she was given her share of the proceeds. In those circumstances he accepted the evidence of the respondent that the proceeds were not all used in the construction of the building, but that the appellant

had been given her share to do with as she pleased. Indeed the evidence revealed that the appellant alleged that the very property the respondent maintained that she bought with her share was used by her as collateral for a loan of $4,000 which was used to assist in the construction of another building, and which is the subject of complaint in another ground of appeal.

I am of the view that having regard to all the evidence concerning the sale of the property at 7 St. Mary Street, it was reasonable for the learned Resident Magistrate to come to the conclusion in favour of the respondent, and I see no reason to disturb that finding.

Ground 3

This ground concerns the question of whether a sum of $4,000 borrowed by the appellant was for the purpose of purchasing equipment for her beautician business, as the respondent maintained, or whether it was given by the appellant to the respondent to help in the construction of the two bedroom cottage as was contended by the appellant. This also was purely a question of fact which had to be decided on the basis of whom the learned Resident Magistrate believed. The $4,000 loan was evidenced by a promissory note dated 16th August, 1974 (Exhibit 4) The learned Resident Magistrate accepted the evidence of the respondent that he guaranteed a loan of $4,000 for the appellant to purchase equipment for her business. The appellant having conceded that she at times borrowed money to purchase equipment the learned Resident Magistrate concluded:-

> "... there was only evidence of one four thousand dollars which the plaintiff said she gave to the defendant. This was denied by the defendant. He stated that he only guaranteed a loan to her which

> "she repaid and that she used this money to buy equipment for for beautician business.
>
> I accept the defendant's evidence as the plaintiff admitted in cross-examination that she at some time borrowed money to purchase equipment for beautician business."

The appellant contended at the trial that it was to this two bedroom house that the parties removed in 1975 or 1976. There was, however, no specific evidence of the time when the house was constructed. The promissory note, being dated in 1974, it was open to the learned Resident Magistrate to evaluate the evidence, as I found he did, in the above quoted passage, and come to the conclusion that the respondent's testimony in that regard was more credible.

In conclusion, this was a case based solely on questions of fact relating to the issue of whether the appellant made any substantial contribution to the construction of the buildings. The learned Resident Magistrate demonstrated by his reasoning that he appreciated the evidence involved for the proper determination of that issue, and came to his conclusions based on reasons which in my view cannot be faulted.

These then are my reasons for agreeing at the end of the hearing of the appeal that it should be dismissed and that costs fixed at $500 be awarded to the respondent.

BINGHAM, J.A. (AG.)

I have read in draft the judgment prepared by Forte, J.A. in this matter. He has summarised the facts and dealt fully with the arguments raised. I agree with his reasoning and the conclusions arrived at. I shall however, add a short contribution of my own.

It is clear from the facts and circumstances leading up to this appeal that for the twenty nine years during which the parties lived and cohabited together it was never their common intention, as the learned Resident Magistrate found, and in my view correctly so, to acquire property together. The weight of the evidence was against any such conclusion being arrived at.

The factual situation was that the appellant, a successful beautician acquired some six landed properties during this period in her own name including a spacious dwelling house at Cromwell Lands, Highgate in which she now resides. 64 Stennett Street, the property in respect of which she now claims a beneficial interest in two of the houses, was acquired by the husband/respondent in 1974 in his own name, without any knowledge on the part of the appellant.

In so far as at least three of the properties acquired by the appellant are concerned, it is agreed that the respondent, a contractor and builder, voluntarily carried out improvement works to these houses including the Cromwell Lands residence without seeking any monetary benefit and except for the latter, making any claim to an interest in them. But he destroyed his claim to a beneficial interest in the Cromwell Lands property when he frankly admitted that he did the improvements to these premises:

> " As a husband because I lover her. I was not looking for a benefit in the house."

It was on this evidence that the learned Resident Magistrate had no difficulty in concluding that such contribution as made by

the respondent was in the circumstances insubstantial and done by way of a gift to the appellant and so rejected his claim.

At this point the only unresolved issue was the appellant's claim to a share in two of the three houses at 64 Stennett Street, Port Maria. She founded her claim on the following:-

1. That she borrowed $4,000 from a Bank by way of a demand loan in 1974 and that this money was used in the building of a two bedroom house at Stennett Street into which the parties removed in 1979.

2. That when a dwelling house which jointly owned by the parties and in which they had lived at 7 St. Mary Street, Port Maria was sold in 1979, the respondent used the proceeds of sale remaining after discharging the mortgage and other charges in the construction at 64 Stennett Street.

3. That when the respondent constructed the main building, a three bedroom house at Stennett Street he said - "we build the house for both of us."

The respondent denied receiving any money from the appellant towards the construction of any of the houses at Stennett Street. He said that the $4,000 borrowed by the appellant from the bank by way of a demand loan was used by her to purchase equipment for her hair-dressing establishment. It would be highly improbable that a loan negotiated in 1974 would be applied toward the construction of a dwelling house erected in 1979.

As regards the proceeds of sale from 7 St. Mary Street, the evidence is that both parties were each represented by their attorneys-at-law in the conduct of the sale. In those circumstances it would be consistent to hold that they each received, as the respondent said, their respective shares from the balance of the purchase price.

The learned Resident Magistrate having seen and heard the parties, accepted the account of the respondent as being the more reliable of the two versions. On the material he had before him his conclusions were, on a balance of probabilities, correct.

I see no reason for interfering.

This leaves the alleged statement attributed to the respondent relating to the construction of the dwelling house on these premises. Given the fact that the land was acquired by the respondent unknown to the appellant and the evidence accepted by the Resident Magistrate that she made no contribution to it, was there any evidence adduced to give rise to a presumption of trust in her favour?

The evidence of the respondent was that:-

> "We built the house at Stennett Street for the both of us. When she was living there she would occupy it but after she left and went to her own home it would be finished there."

Moreover, the conduct of the parties was decidedly against the appellant's contention. The acquisition by the appellant during the period that the parties lived and cohabited together of six properties solely in her name and by the respondent of 64 Stennett Street unknown to the appellant was clear evidence upon which the learned Resident Magistrate could properly conclude in his reasons for judgment that (page 3):-

> "I find from the conduct of the parties that there was a clear intention for them to own separate properties."

I was accordingly satisfied that there was no basis for disturbing the decision of the learne. Resident Magistrate and so concurred in dismissing the appeal with the order for costs as set out in the judgment of Forte, J.A.

WRIGHT, J.A.

I have read the reasons for judgment in draft of Forte, J.A., and Bingham, J.A (AG.), and am satisfied that the relevant issues have therein been adequately dealt with. Accordingly, there is nothing that I can usefully add.