JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 60 OF 1999

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**WARREN IZETTE PRESTWIDGE**	**APPELLANT**
A N D	**VALARIE ST. ELAINE PRESTWIDGE**	**RESPONDENT**

Dennis Morrison, Q.C., and Yolande Whitely, instructed by Dunn, Cox, Orrett and Ashenheim, for the appellant

Andre Earle, with Maliaca Wong, instructed by Rattray, Patterson, Rattray, for the respondent

November 10, 1999 and July 31, 2000

FORTE, P.:

I have had the opportunity to read in draft, the judgment of Bingham, J.A., which follows. I agree with the reasoning stated therein, and have nothing to add.

BINGHAM, J.A.:

In this appeal the appellant sought to challenge a judgment of Mrs. Justice Harris, delivered on May 3, 1999. Following a hearing in Chambers in respect of an originating summons brought under section 16 of the Married Women's Property

Act and lasting over two days, in a carefully and well-reasoned judgment the learned trial judge gave judgment in favour of the respondent and ordered that:

> "**(a)** It is declared that the Applicant is entitled to a one half interest in Real Property registered in the joint names of the Applicant and the Respondent: 81 Dumbarton Avenue, Kingston 10 in the parish of Saint Andrew registered at Volume 1266 Folic 347 of the Register Book of Titles;
>
> **(b)** It is declared that the Applicant is the owner of a fifty percent (50%) interest in the partnership known as V. W. Cleanaway."

There were several orders made by the learned judge as a consequence of these declarations.

Having heard submissions from counsel, we dismissed the appeal, affirmed the judgment of the learned judge below and ordered costs to the respondent to be agreed or taxed. At the time of handing down our decision we promised to put our reasons in writing at a later date. This we now do.

The appellant relied upon the following grounds of appeal:

> "**(1)** The Learned trial Judge erred in finding that the Appellant/Respondent is entitled to a half interest in premises 81 Dumbarton Avenue, Kingston 10 as such a finding is unreasonable having regard to the following evidence;
>
> **(a)** The evidence that the purchase price of this property was $60,000.00 which was fully financed by a mortgage from the Saint Mary Benefit Building Society.
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> **(b)** The evidence that for at least four years from 1982-1986 the mortgage instalments for the said property were paid from the profits of the business V.W. Cleanaway in which both parties had a share but during this period the Applicant/Respondent had ceased working in the said business full time.

(c) The evidence that between 1986 and 1991 the Applicant/Respondent made absolutely no contribution to the payment of the mortgage instalments.

(2) The Learned trial Judge erred in finding and declaring Applicant/Respondent is entitled to a fifty percent (50%) share in the business known as V.W. Cleanaway as such a finding is unreasonable having regard to the following evidence:

(a) The evidence that whereas the Applicant/Respondent worked in the business V.W. Cleanaway from 1969-1982 a period of thirteen years, the Respondent/Appellant has worked in the business from 1969 to the present, a period of thirty years.

(b) The evidence that the Applicant's/Respondent's only contribution to the business of V.W. Cleanaway was working in the business for the said period of thirteen years during which she worked full time at first and then part time."

At this stage it may be appropriate to summarise the factual situation which was rehearsed before the learned judge below.

The Facts

The appellant and the respondent are husband and wife. The parties were married in 1969 but have been separated since 1986. Shortly after their marriage the parties started a business known as V.W. Cleanaway, a partnership encompassing the first initial of each of their Christian names. This business was capitalised with a joint loan of £700 obtained from the Bank of London and Montreal (BOLAM) in respect of which the loan agreement was signed by both parties. The business was one for providing janitorial services to offices and homes.

The loan was repaid from the revenue earned by the business. The respondent was fully employed in the operation of the business between 1969 and 1982 and part-time between 1982 and 1986. The appellant worked part-time in the business during the years 1979 to 1981 as he was then for the most part out of Jamaica, working in Canada.

While the appellant was abroad in 1981 the respondent found the property 81 Dumbarton Avenue, registered at Volume 1266 Folio 347. The agreement for sale was signed by both parties as joint tenants. The purchase of the property in 1982 was fully financed by a 100% mortgage obtained from St. Mary Benefit Building Society (now incorporated as a part of Jamaica National Building Society). This mortgage was obtained through the efforts of the respondent through Mr. Chester Touzalin, then the Manager of the Building Society. Both parties executed the mortgage agreement. The purchase price was $60,000. The mortgage was repaid in 1991 from the profits of the partnership business. Since 1986 substantial improvements have been carried out on the property at 81 Dumbarton Avenue.

After the separation of the parties, a management business, known as Tweedside, was commenced at 81 Dumbarton Avenue. Following the improvements to the property, the management company has occupied most of the building for carrying out its operations rent free.

The appellant sought to contend below that since Tweedside was responsible for the improvements carried out on the property he was entitled to a much greater interest in the property than the respondent. He further contended that since 1986 when the parties separated the respondent has taken no active part in the running of the partnership business. His efforts in continuing the business in the

circumstances ought to be rewarded with a larger interest in the proceeds of the partnership when it is wound up.

As the learned judge declared that the respondent was entitled to a half share in both the partnership business, V. W. Cleanaway, as well as 81 Dumbarton Avenue, it will be necessary to consider how she went about her task in coming to her determination in this regard.

Ground 1

The appellant submitted that when property is conveyed into the joint names of the parties this did not of itself conclusively determine that they are entitled to equal shares in the property. Where the contribution of one party is much greater than the other, then the parties may be entitled to share in the property proportionate to their contribution.

As the respective interest of the parties in the property, taken in their joint names, is usually determined at the time the property is acquired the onus of proving that the intention of the parties in the instant case was otherwise than the manner in which the property was acquired by them rested on the appellant to adduce evidence of a contrary intention to that formed by the learned judge. Here the undisputed facts disclosed that the property was located by the respondent in 1981 while the appellant was abroad working in Canada. On being informed of the existence of the property, he joined with the respondent in signing the agreement for sale. The mortgage obtained from St. Mary Benefit Building Society was a 100% mortgage covering the entire purchase price of $60,000. This mortgage was obtained mainly through the efforts of the respondent. At no time did the appellant raise any objection to the manner in which the property was being acquired.

For the appellant in the face of such compelling evidence to have contended before the learned judge below that he had intended that the title to the property, 81 Dumbarton Avenue, was to be put in his name only is without any foundation, either in fact or in law. The very manner in which the agreement for sale and mortgage agreement was signed and executed, fixing both parties with the joint responsibility to carry out the obligations created by the mortgage for meeting instalments under the agreement would, without more, have made clear the intention of the parties from the very outset of the purchase of the property.

The learned judge was not unmindful of the legal implications arising from these facts. This is how she went about her task. At page 4 of the judgment she said:

> "I will now give consideration to the applicant's claim to an entitlement in 81 Dumbarton Avenue. It is a perfectly settled principle of law that in the absence of evidence to the contrary, the conveyance of property in the joint names of a husband and wife gives rise to the presumption of a creation of a joint beneficial interest of such property. Where evidence of a common intention between the parties is ascertainable, the court will give effect to that intention."

Given the clear and undisputed facts leading up to the judgment below and this present appeal, it is without question that there was evidence not only that the documents relative to the purchase of the property was signed by both parties, thus evidencing a common intention in the parties to take the conveyance in their joint names, but both equally in so doing acted to their detriment in undertaking the joint obligation for repayment of the mortgage debt.

The question arises: What was the intention of the parties? The learned judge below approached the matter in this way. She said at page 6 of the judgment:

> "At this point, it becomes necessary to determine whether a common intention that the parties should share in the property, can be imputed. The applicant contends that an intention for the parties to enjoy equal shares in property exists. The respondent asserts that the applicant is not entitled to a share, as, there was an agreement between them that the property would be conveyed to him only and the applicant had her name endorsed on the certificate of title without his knowledge and consent." [Emphasis supplied]

This underlined assertion was being made against the background of the factual situation to the contrary which was previously narrated. It also came against the background that established that prior to the acquisition of the Dumbarton Avenue property each party had bought properties in their respective names. Of significance also was that while the appellant was abroad in Canada property was purchased in the name of the respondent on behalf of the appellant in Cherry Gardens. This property was subsequently transferred to the appellant on his request for the respondent to do so. This also fortifies the view that 81 Dumbarton Avenue was bought by the parties with an intention that both should have an interest therein.

In the instant case the evidence has established beyond peradventure that not only was the property purchased in the joint names of the parties but the mortgage debt which was repaid in 1991 was met from the profits of the partnership business to which both parties made a joint contribution. Even if their contributions were unequal, in the absence of a contrary intention at the time the property was acquired, it follows that the order of the learned judge declaring the

wife/respondent's entitlement to be an equal half share was correct. Such a finding has support in a number of decided cases. In ***Josephs v. Josephs*** R.M.C.A. 13/84 (unreported) delivered on October 13, 1985, a unanimous judgment of this court, Ross, J.A. cited with approval the dictum of Lord Denning, M.R. in ***Nixon v. Nixon*** [1969] 3 All E.R. 1133 where the learned Master of the Rolls, having examined the rights of respective spouses to share in the beneficial interest in property which is in the name of one of the spouses, went on to say that the principle in such cases was that:

> "...when husband and wife, by their joint efforts, acquire property which is intended to be a continuing provision for them both for their future, such as the matrimonial home or the furniture in it, the proper inference is that it belongs to them both jointly, no matter that it stands in the name of one only. It is sometimes a question of what is the extent of their respective interests, but if there is no other appropriate division, the proper inference is that they hold in equal shares." (Page 1137).

In the same case, Wright, J.A. referred to the dictum of Romer, L.J. in the earlier case of ***Rimner v. Rimner*** [1952] 2 All E.R. 863 where the learned Lord Justice expressed the view that:

> "...cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and, secondly that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of that before us, where the facts, as a whole, permit of its application." (Page 870).

Carey, J.A., while agreeing with his brethren as to the division of equal shares in respect of the three properties acquired after the marriage of the parties, having regard to the contributions made by the wife/respondent, chose to rely on

the dictum of Lord Reid in ***Gissing v. Gissing*** [1970] 2 All E.R. 780 at 782, who in more guarded language observed that:

> "It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a rough and ready evaluation. I agree that this does not mean that she would as a rule get half a share. I think that the high sounding board 'equality is equity' has been misused. There will of course be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or even more than a half."

Carey, J.A., while no doubt realising that each case had to be examined and determined on its own particular facts, then declared:

> "In the absence of express agreement on the part of the spouse the court will preserve or impute that having jointly contributed they intended to share equally. That proportion will be altered only where either share can be precisely ascertained or the contribution is trifling."

The property was purchased by the parties with the intention that it was to be a means of providing for them during their joint lives. This can clearly be inferred from the fact that it was purchased to provide the base of the operations of the partnership business, V. W. Cleanaway. This janitorial service had been started shortly after the marriage in 1969. There being no express agreement as to the interest which each should hold, therefore, it was only fair and reasonable that they should hold in equal shares.

In the face of what, on the facts was compelling evidence supporting the declaration of an equal division found by the learned judge, learned Queen's Counsel submitted that the appellant was entitled to a greater interest in the property as:

(1) The wife/respondent did not contribute to the mortgage instalments.

(2) She did not contribute to the substantial improvements carried out on the property.

In so far as to how the mortgage instalments were met, the evidence is clearly to the contrary as certainly up to 1986 when the parties separated, after which the wife/respondent was no longer actively engaged in the partnership business, both parties had been actively engaged working in the business. The instalments for the mortgage debt were met out of the profits of the partnership. Moreover, whereas the appellant was paid management fees for his part in running the business, the respondent for her part received no income from the partnership. In any event, as the decided cases show, unequal contributions towards meeting the mortgage instalments would not alter the beneficial interest of the parties where the common intention of the parties at the acquisition of the property establishes that it was intended to be a continuing provision for them during their joint lives.

In so far as the improvements to the property are concerned, the evidence is that these were carried out by the appellant after the parties had separated in 1986 without the consent of the wife/respondent. The appellant contends that these improvements were done by Tweedside, a management company which was formed in 1989 and of which he is a director. Tweedside has no interest in 81 Dumbarton Avenue. The question which arises, therefore, is as to whether in those circumstances the appellant, by virtue of the improvements, would be entitled to a greater interest in the property. The learned judge below answered this question in the negative. In her determination of the matter she said:

> "Proceeding on the assumption that the improvements were in fact done by Tweedside, the question which emerges, is whether the respondent can benefit from an increased share. Tweedside is a separate legal entity from the respondent. Tweedside has no legal interest in Dumbarton Avenue. There is no evidence of any agreement between the parties, expressed or implied, certainly not with the applicant and Tweedside, for effecting these improvements at any time after the property was acquired. Tweedside could not have secured any interest in the property nor could any right to an augmented share accrue to the respondent."

I would regard the approach taken by the learned judge as unexceptionable. She went on to rely in support on ***Pettit v. Pettit*** [1969] 2 All E.R. 385 at 389 where Lord Reid declared:

> "...but as regards improvements made by a person who is not the legal owner, after the property has been acquired, that person will not, in the absence of agreement, acquire any interest in the property or have any claim against the owner."

Lord Upjohn at page 409 in a similar vein expressed a similar view when he said:

> "It has been well settled in your Lordships' House ...that if A expends money on the property of B, *prima facie* he has no claim on such property. And this, as Sir William Grant, M.R., held as long ago as 1810 in ***Campion v. Cotton*** ...is equally applicable as between husband and wife. If by reason of estoppel or because the expenditure was incurred by the encouragement of the owner that such expenditure would be rewarded, the person expending the money may have some claim for monetary reimbursement in a purely monetary sense from the owner or even, if explicitly promised to him by the owner, an interest in the land ...But the husband's claim here is to a share of the property and his money claim in his plaint is only a qualification of that. Plainly, in the absence of agreement with the wife (and none is suggested) he could have no monetary claim against her and no estoppel or mistake is suggested so in my opinion, he can have no charge on or interest in the wife's property." [Emphasis supplied]

It is of significance to observe in passing that Tweedside, by occupying about three-quarters of the space available in the building including all the improved structure rent free, has benefitted wholly or substantially from the improvements carried out on the property. This tends to support the fact that these improvements were done by the appellant to accommodate the business carried on by Tweedside, a company in which the wife/respondent has no interest.

Ground 2: V. W. Cleanaway

The appellant submitted that when there is an express or implied agreement as to the shares in a partnership the agreement may be subsequently varied, expressly or by implication, by the conduct of the parties. Further or in the alternative, where one partner devotes his whole time and attention to the management of the partnership with the acquiescence of the other partner he is entitled to just remuneration for the management of the partnership.

Learned Queen's Counsel for the appellant relied in support of the above-mentioned principles on paragraphs 117 and 99 of ***Halsbury's Laws of England***, 4th Edition and paragraphs 3629-3640 of the ***English and Empire Digest***, 2nd re-issue. He further submitted that the evidence disclosed that:

> **(1)** The wife/respondent's only contribution to the partnership business was her work in the business between 1969 to 1982 on a full-time basis and thereafter between 1982 to 1986 on a part-time basis.
>
> **(2)** The appellant on the other hand has worked continuously in the business from 1969 to the present time.

Having regard to the above, he submitted that as the wife/respondent withdrew from the business in 1986 and took no active part in t since then, the

initial agreement between the parties that they would have equal shares was varied by this conduct. Alternatively, the appellant is entitled to remuneration for the full-time management of the business and this should be taken into account in the valuation of their respective shares.

Learned counsel for the wife/respondent submitted that, subject to any agreement express or implied between the parties, all the partners in a business are entitled to share equally in the capital and profits of the business. Even where one partner does much more than another the rule of equality applies in the absence of any previous arrangement between the partners. The general rule is that the partners are entitled to share in the profits made by any one or more of them from transactions arising out of the business. But the salary received by a partner in respect of an official position held by him is not to be treated as profits to be shared by the other(s). Counsel cited in support ***Halsbury's Laws of England***, 4th Edition Vol. 35, paragraph 117; ***Lindley and Banks on Partnership***, 17th Edition 1995 paragraphs 19-18, 19-19, 19-22 and also the following cases: ***Fanar v. Beswick*** 174 E.R. 162; ***May Hew v. Herrick*** 137 E.R. 92; ***The Digest*** Vol. 32(2) at paragraphs 3507 and 3508; ***Robinson v. Anderson*** 52 E.R. 539; ***Peacock v. Peacock*** 33 E.R. 902.

Counsel submitted that in this case, although the wife/respondent did not work in the business since 1986, that fact does not as a matter of law affect her entitlement to a 50% share of the profits. This is so as the entitlement to share in the profits of the partnership business is determined at the establishment of the partnership. This was a 50/50 partnership with both partners agreeing to share equally following its formation.

I find that there is much merit in the submissions made by learned counsel for the wife/respondent. There is also support for this view in the uncontroverted evidence contained in the affidavit of the wife/respondent sworn to on November 4, 1999, that the appellant received management fees from the partnership. This being so there is no factual basis for altering the agreed share of each of the partners, as separate and apart from the said agreement the appellant has been adequately compensated for his active involvement in the business since 1986 when the respondent ceased to be involved.

The submissions of learned Queen's Counsel for the appellant also failed to take into account the appellant's absence from the Island from 1979 to 1981 in Canada during which period the wife/respondent was solely responsible for operating the business, supervising workers, obtaining new contracts, including one for "providing janitorial services at the Ministry of Education." On occasions she was also responsible for carrying out the janitorial tasks herself. Moreover, since 1986 had the appellant felt that the claim of the respondent to an equal share in the profits was an unreasonable one it was open to him to dissolve the partnership by serving a notice on the respondent to that effect. Not having done so, he cannot now successfully complain.

It was for the above reasons that I joined with my brethren at the end of the submissions of learned counsel to dismiss the appeal in terms of the order as set out at the commencement of this judgment.

PANTON, J.A.:

I agree.