JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 78/93

COR: THE HON MR JUSTICE RATTRAY - P
THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE WOLFE J A

BETWEEN	**AUBREY FORREST**	**DEFENDANT/ APPELLANT**
AND	**DOROTHY FORREST**	**PLAINTIFF/ RESPONDENT**

Maurice Manning for Appellant

Heron Dale for Respondent

February 7, 8 and April 7, 1995

RATTRAY P

I have read the judgments of Forte and Wolfe JJA and agree with their reasoning and conclusion.

The appeal is allowed with no order as to costs and the judgment of Bingham J varied to read as follows:

> 1. Declaration that the plaintiff is entitled to a beneficial interest of 50% and the defendant to an interest of 50% in property known as 10 Rosewell Avenue St. Andrew registered at Vol 958 Folio 489 of the Register Book of Titles.
>
> 2. Order for partition and sale of the said property and distribution of the net proceeds of sale to the parties in the shares stated in 1 above.

3. That there be deducted from the Defendant's share and paid to the plaintiff the sum of $5,927.67 being half of the sum of $11,855.34 paid by the plaintiff to liquidate the mortgage.

4. That the property be valued by a competent valuator to be appointed by the Registrar of the Supreme Court.

5. That upon refusal by the Defendant to sign any documents of transfer upon sale the Registrar of the Supreme Court be empowered to sign.

6. An Account be taken by the Registrar of the Supreme Court of the receipts, payments, dealings and transactions of the Defendant in respect of the rental of the beforementioned No. 10 Rosewell Avenue since 1981 whilst the same was under the sole control of the Defendant and his agents.

7. For the purposes aforesaid all necessary accounts and enquiries be made.

8. Costs to the Plaintiff.

FORTE, J.A.:

On July 26, 1969 the appellant married the respondent in England. Both parties, who had lived together for five years before their marriage, are Jamaicans. On September 29, 1972 they purchased property - a dwelling house at 10 Rosewell Avenue in St. Andrew. They did so with the intention of returning to Jamaica at some later date, to reside therein. The purchase price of the house was $26,200. A deposit of $9,700 was paid and the balance of $16,500 secured by mortgage in their joint names. Though there was disagreement between the parties at the trial, as to the amount each contributed, it is fair to say, and this in the absence of any specific finding by the learned judge, that he accepted the evidence of the wife in this regard, that is to say, that the deposit was contributed in equal shares by both parties. The house was registered in their joint names, and the understanding thereafter was since they would not immediately return to live in Jamaica that the house should be rented and the mortgage paid fron the rental. This was put into effect, with the appointment of an agent who should oversee the property, collecting the rent, and seeing to the mortgage payments. This went well for a while, until the 1980's when problems developed in the marriage culminating in a separation and ultimately to a divorce on June 20, 1985. During this period the husband dismissed the agent

and appointed another and thereafter it appears that things went badly in respect of the mortgage payments because sometime in 1984, a notice was served on the parties by the mortgagee that the house would be put up for auction for the outstanding amount due, that is, $11,855.34. As the husband showed no sign of either ability or willingness to pay this amount, the wife paid it off and saved the house from being auctioned. She thereafter filed a Writ of Summons and Statement of Claim, claiming the following:

> "1. A Declaration that the Plaintiff is entitled to a beneficial interest of 71% in all that parcel of land now known as Number 10 Rosewell Avenue in the parish of St. Andrew being the Lot numbered 154 on the Plan of Waterhouse Pen and Bottom Maverly, egistered at Volume 958 Folio 489 of the Register Book of Titles.
>
> 2. An Order for partition and sale of the said property and the distribution of the net proceeds of sale between the Plaintiff and the Defendant in shares of 71% and 29% respectively.
>
> 3. That a valuation be obtained from a valuator to be agreed on between the parties and in the absence of an agreement, by a Valuator appointed by the Registrar of the Supreme Court.
>
> 4. That upon the refusal by the Defendant to sign any documents of transfer upon sale that the Registrar of the Supreme Court be empowered to sign.
>
> 5. An Account of the receipts, payments, dealings and transactions of the Defendant in respect of the rental of the before-mentioned No. 10 Rosewell Avenue

> since 1981 whilst the same was under the sole control of the Defendant and his agents.
>
> 6. For the purposes aforesaid all necessay accounts and enquiries be made.
>
> 7. Costs to the Plaintiff."

The husband in his defence claimed that the wife was entitled only to 25% of the property. Having heard the evidence, the learned judge made the following orders:

> "1. A Declaration that the Plaintiff is entitled to a beneficial interest in 60% and the Defendant an interest of 40% in property known as 10 Roseberry (sic) Avenue, St. Andrew, registered at Volume 958 Folio 489 of the Register Book of Titles.
>
> 2. An Order for the partition and sale of the said property and distribution of the net proceed of sale to the parties in shares of 60% and 40% respectively.
>
> 3. The said property to be valued by a competent valuator to be appointed by the Registrar of the Supreme Court.
>
> 4. Upon the refusal by the Defendant to sign any documents of transfer upon sale that the Registrar of the Supreme Court be empowered to sign."

There was no written judgment by the learned judge. The record indicates that an oral judgment was delivered, and that the "dicta in **Edmonson v. Edmonson**" was followed.

Before us, the only challenge made by the appellant to the learned judge's order was in respect to the declared beneficial interest of the parties at 60% for the wife and 40% for the husband.

The issue revolves around whether the payment of the outstanding balance of mortgage by the respondent to save the house from being sold at auction, gave her a greater beneficial share in the property, having regard to all the circumstances. In determing the issue in favour of the respondent, the learned judge relied on the case of **Edmonson v. Edmonson** S.C.C.A. 87/91 dated June 23, 1992 (unreported). In that case husband and wife purchased a home through securing a mortgage of 100% of the sale price. The house was thereafter rented, and the rental was sufficient to take care of the mortgage payments. The wife afterwards took out a loan to improve the property, and did so. In these circumstances the court held that "the loan balance and repayments attributable solely to the respondent would increase her beneficial interest", and upon counsel consenting an order was made giving the wife 60% beneficial interest in the home.

In my view, the factual basis that existed in **Edmonson v. Edmonson** for such a declaration, does not exist in this case. In **Edmonson v. Edmonson** there was an addition to the home which was financed solely by the wife and which must have increased its value and accordingly she was entitled to a greater share. Consequently, that case is of no assistance on the issue to be decided in this appeal.

In **Pettitt v. Pettitt** [1969] 2 All E.R. 385 at page 412, Lord Diplock in stating the powers of the court in determining the property rights as between husband and wife, stated:

> "... Ever since 1882 husband and wife have had the legal capacity to enter into transactions with one another, such as contracts, conveyancies, and declarations of trust so as to create legally enforceable rights and obligations provided that these do not offend against the settled rules of public policy about matrimonial relations. Where spouses have done so, the court has no power to ignore or alter the rights and obligations so created, though the court in the exercise of the discretion which it always has in respect of its own procedure may in an appropriate case where a matrimonial suit between spouses is pending or contemplated adjourn the hearing or defer making an order for the enforcement of the right until the spouses have had an opportunity of applying for ancillary relief in that suit under the provisions of Part 3 of the Matrimonial Causes Act 1965, which do confer power on the court to vary proprietary rights, on granting a decree of divorce."
>
> [Emphasis added]

Where therefore, there has been an express agreement between the parties the court has no power to alter their respective rights in the property. Where there is no express agreement the court is entitled to determine from the conduct and contribution of the parties, what was their common intention at the time of the acquisition of the property.

As stated by Lord Diplock in **Pettitt v Pettitt** (supra) p 413:

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

Lord Diplock also recognized that (p 413):

> "It may be possible to infer from their conduct that they did in fact form an actual common intention as to their respective proprietary interests and that where this is possible the courts should give effect to it."

Where then the common intention of the parties as to their proprietary interests can be ascertained by their conduct, the court should give effect to those intentions, and declare their beneficial interest as consistent with that to which it is clear the parties intended at the time of the acquisition of the property.

In the instant case the evidence demonstrates that both parties had a common intention to share equally, the proprietary interest in the acquired property. To begin with, they contributed equally to the deposit, and

mortgaged the house in their joint names and thereafter registered the title in both names as joint tenants.

In the cross-examination of the wife, here is what she said:

"**Ques:**	When yourself and your former husband purchased the house what you had in mind?
Ans:	Coming to Jamaica to live.
Ques:	And in your mind you would share the benefits as well as the problems with the house?
Ans:	Yes Sir.
Ques:	If money was owing on the house in your mind it would be shared equally between both of you?
Ans:	Yes Sir.
Ques:	And up to the time that you paid off the mortgage that was what you had in mind?
Ans:	No Sir because we were already divorced and the defendant was married again.
....	
Ques:	When the mortgage was obtained in 1972 your thoughts then was that you would be equally responsible for the mortgage, half for you and half for him?
Ans:	Yes Sir.
Ques:	And that the mortgage was $16,500.00
Ans:	Yes Sir.
Ques:	And you had in your mind that you would be responsible for $8,250.00?

Ans: Yes Sir.

Over the years payments were made towards the mortgage, and over the years I still felt the same way about our obligations towards payment of the mortgage.

Ques: And when in 1984 the amount of the balance due on the mortgage was $11,855.00 you were of the view that you would be responsible for half of that?

Ans: Yes Sir."

Later in her evidence the wife stated:

"When we were together the expenses were fifty fifty."

Of significance also was that she admitted that she was "asking for a greater share of the property because I paid off the mortgage," and also that up to the time that she received the notice of the arrears of the mortgage payments, and spoke to her husband about it, she was looking for "half of the mortgage."

In his testimony, the husband admitted under cross-examination that at the time of the acquisition of the property he expected that both would share equally in the benefits of the house. He, however claimed a greater share, because as he said "most of the expenditure came from my own resources."

The reason for this, he testified was because "the rent that was being collected could not pay the mortgage, and repairs, insurance, taxes, clean the yard and pay the agent." There were times when he had to send money to agent Greaves to pay the mortgage and for repairs.

In my view, the evidence to which I have referred clearly establishes, through the mouths of the parties that each had a common intention to share equally in the beneficial interest in the house. The fact that they registered the property as joint tenants, and secured a mortgage in both names, and shared equally in the payment of the the deposit are all strong indications, that the evidence they gave as to their common intention at the time of the acquisition and indeed up until the payment of the mortgage arrears, that is, to share equally, is in fact true.

Of significance, is that each was asking for greater share in the property, because of acts allegedly done subsequently to the acquisition. On the husband's part, he claims more because he allegedly paid expenses in respect to the property out of his own pocket, and the wife on her part, because she paid the arrears of mortgage in order to save the house from being sold at auction. It is with the claim of the wife however, that this appeal is concerned.

If the court is to give effect to the common intention of the parties, the conclusion must be that they should share equally as that was their obvious intention at the time of the acquisition and at least up to the time of their separation. The question to be decided, however is whether the payment of the mortgage arrears entitles the wife to a greater share in the property, than that which they intended at the time of the acquisition. In my view, in the absence of evidence as to an agreement either expressed or implied between the parties to vary the original beneficial interest, as was clearly in the intention of the parties

at the time of the acquisition, the court can do nothing else but give effect to what was the common intention of the parties. There being no such evidence in this case, the court cannot vary the beneficial interest of the parties based on mortgage payments being paid by one of the parties. However, the wife would be entitled to recover the share of the mortgage arrears payment, to which the husband would have been liable to pay, that is, 50% thereof.

In **Cowcher v Cowcher** [1972] 1 All E.R. 943 at p 951, Bagnall, J expressed the following opinion with which I agree, and which is applicable to these circumstances. He stated:

> "...secondly that he who discharges another's secured obligation, wholly or in part, is entitled to be repaid out of the security the amount of the sum or sums paid by him [see **Pitt v Pitt** (1823) **Turn & R** 180 and **Outram v Hyde** (1875) 24 WR 268]. Again an example will illustrate the point. Suppose land be conveyed to A for L24,000, B providing in cash L8,000 and A raising on mortgage of the property the remaining L16,000; suppose A has paid off L5,000 of the mortgage and B (although under no obligation) has paid off a further L2,000 leaving L9,000 outstanding; finally suppose the property to be sold for L60,000. The shares under the resulting trust are one-third to B and two-thirds to A; but A must account for the outstanding mortgage of L9,000 and B is entitled to be reimbursed the L2,000 paid by him in part discharge of the mortgage. Thus out of L60,000 realised L9,000 goes to the mortgagee, B takes L22,000, his one-third share of L20,000 together with L2,000 paid off the mortgage, and A takes L29,000, that is his two-thirds share of L40,000 less L9,000 outstanding on the mortgage and

> L2,000 repayable to B. This must be the result even if A and B are husband and wife if my third initial proposition, that the same principles apply as between husband and wife as between strangers, is sound [see also **Re Sims** (1946) 2 All E.R. 138]."

As per the example given above, the wife would be entitled to recover that portion of the arrears which the husband was liable to pay.

In **Wilson v. Wilson** (1963) 2 All E.R. 447, Russell, L.J., with whom the court agreed expressed a similar opinion.

At page 454 he stated:

> "In the result in my judgment the appeal should be allowed and it should be declared that the wife is entitled to half of the net - proceeds of sale of the house. I think, however, that there must be some adjustment in respect of mortgage instalments paid by the husband, between the time when the wife left the matrimonial home in July 1959 and the sale of the house in March 1961: I do not think that the presumption of gift can continue to apply after the separation, nor consequently that the husband can be taken to have given to the wife the benefit of half these post separation payments; he is in respect of these payments in the ordinary position of a joint mortgagor redeeming a mortgage and entitled to contribution from the co-mortgagor in proportion to their interests, and from her half of the proceeds of sale, half of such payments should be deducted and added to his half. If necessary, there must be an inquiry to ascertain the amount."

This was also the manner in which the English Court of Appeal dealt with mortgage payments by one spouse, in **Leake v Bruzzi** (1974) 2 All E.R. 1196, and again in **Suttill v Graham** (1977) 3 All E.R. 1117.

In conclusion, it is my view that the payment of the arrears of the mortgage by the wife cannot entitle her to a variation of her interest in the property, that interest having been clearly established in the evidence, as one of 50%. She would however, be entitled to be repaid by the appellant half of the amount she paid, as that was money advanced on his behalf. As there is an order for accounts, which was not challenged on appeal, it would be appropriate for the deduction of the mortgage payment from the husband's share, be dealt with as a part of that exercise. I would allow the appeal and set aside the order declaring the proprietary interest of the parties as 60% in the wife and 40% in the husband and substitute therefore an order declaring that the parties are entitled to equal shares in the property, but an amount equal to half of the amount paid as arrears of the mortagage payments be deducted from the husband's share and paid over to the wife after the house has been sold. I agree with Wolfe, J.A. that there should be no order as to costs.

WOLFE, J.A.:

The appellant and the respondent were married to each other on July 29, 1969. Prior to being married, they lived together for five years. The marriage was dissolved on June 20, 1985.

In September 1972 they bought premises known as 10 Rosewell Avenue in the parish of Saint Andrew and known as Lot 154 on the plan of Waterhouse Pen, Bottom Maverly, registered at Volume 958 Folio 489 of The Register Book of Titles.

There is no dispute that both appellant and respondent contributed to the down payment of the purchase price. There is, however, dispute as to the amount contributed by each party. Be that as it may, the property was registered in the joint names of the parties. At the time of purchase both parties lived in England but intended to return to Jamaica to live. It was agreed that in the meantime the house would be rented and the rental used to liquidate the mortgage. In 1984 the respondent received a notice advising that the mortgage payments were in arrears and that the property would be sold by auction. The appellant was contacted by the respondent concerning the intended sale of the property. He showed no interest in the matter, whereupon the respondent paid a sum of $11,855.34 to redeem the property.

The respondent commenced legal proceedings in which she sought the following reliefs, inter alia:

> 1. A Declaration that the Plaintiff is entitled to a beneficial interest of 71% in all that parcel of land now known as Number 10 Rosewell Avenue in the parish of St. Andrew being the Lot numbered 154 on the Plan of Waterhouse Pen and Bottom Maverly, registered at Volume 958 Folio 489 of the Register Book of Titles.
>
> 2. An Order for partition and sale of the said property and the distribution of the net proceeds

> "of sale between the Plaintiff and the Defendant in shares of 71% and 29% respectively.
>
> 3. An Account of the receipts, payments, dealings and transactions of the Defendant in respect of the rental of the before-mentioned No. 10 Rosewell Avenue since 1981 whilst the same was under the sole control of the Defendant and his agents.

On the 6th October, 1993, Bingham, J. ordered, inter alia:

> "...that the Plaintiff is entitled to a beneficial interest in 60% and the Defendant an interest of 40% in property known as 10 Roseberry Avenue, St. Andrew, registered at Volume 958 Folio 489 of the Register Book of Titles."

One ground of appeal was argued before us, to wit:

> "That the Order of the Learned Judge of the Supreme Court on the 6th day of October 1993 giving a division of 60%-40% in favour of the Applicant to the interest in property registered at Volume 958 Folio 489 of the Register Book of Titles, was unreasonable having regard to all the circumstances."

COMMON INTENTION

What was the common intention of the parties when the purchase was made?

Mr. Manning submitted that it was clear from the evidence of the plaintiff that the parties intended that they would have an equal beneficial interest in the property. He stated the following propositions:

> 1. Where parties are joint tenants who contributed equally to the deposit the inference to be drawn in the absence of evidence to the contrary is that the parties intended to share equally the beneficial interests.
>
> 2. The subsequent conduct of the parties may strengthen or weaken the inference at (1)

> 3. The liquidation of the mortgage by the respondent was to be regarded as a loan to the appellant rather than as an act which had the effect of increasing her interest in the property.
>
> 4. Where there is no clear evidence as to the interest held by the parties then their interest must be ascertained with reference to their contribution in the acquisition of the subject matter.

Unfortunately, this court has not had the benefit of the oral judgment delivered by Bingham, J. Once again, this court underscores the importance of counsel appearing below reducing into writing the oral judgment delivered by a trial judge and submitting same to the judge for approval in the event of an appeal. The approved judgment should then form a part of the record of appeal so that this court can be privy to the reasoning of the learned trial judge rather than being left to grope in the dark. This is, indeed, a most unsatisfactory situation.

The notes of evidence revealed that in coming to his decision Bingham, J. relied upon the dicta in S.C.C.A. 87/91 ***Edmondson v. Edmondson*** (unreported) delivered June 23, 1992. Rowe, P., delivering the judgment of the court, said:

> "It is now necessary to address the share in the beneficial interest in the property to which each party is entitled. Earlier it was stated that generally where Title is issued in the names of both parties and there is no direct evidence of down payments, the Court would lean towards declaring that the parties have an equal interest.
>
> In the instant circumstances the fact that the respondent took out a loan to improve the property is relevant to determine the respective interests.
>
> The evidence disclosed that the rental income from the house was Nine Hundred Dollars ($900.00) monthly. The mortgage payments were Six Hundred and Thirty-Two Dollars Twenty-Nine Cents ($632.29) per month. Thus there was an excess of over Two Hundred and

> "Sixty Dollars ($260.00) after the mortgage payments were made each month. This excess could be used to cover periods when the unit was not rented to effect decoration, eg. periodical painting and as assisting with the repayment of the loan acquired by the respondent. However the contributions made from the excess rent would not be sufficient for the entire repayment of the loan. In the circumstances the loan balance and repayments attributable solely to the respondent would increase her beneficial interest.

As a member of the court in ***Edmondson v. Edmondson*** (supra), my understanding of the dicta of Rowe, P. is that it was never intended to lay down a general principle of law that where a common intention is manifest one party can by payment of the mortgage or by the repayment of a loan affect the beneficial interest of the other party. The decision in ***Edmondson's*** (supra) case must be seen in the light of the peculiar facts of that case. There the wife had obtained a loan which she used to substantially improve the house and which she was charged with repaying. By so doing, she improved the value of the house. In the instant case, the respondent was equally liable along with the appellant to ensure that the mortgage payments were made. She was protecting her interest in the property.

The unequivocal evidence of the respondent is that her former husband and herself were each responsible for half of the expenses related to the property which clearly shows that the parties intended to hold the property in equal shares.

In ***Turton v. Turton*** [1987] 2 All E.R. 641 at page 684 Nourse, L.J. concluded:

> "It must always be remembered that the basis on which the court proceeds is a common intention, usually to be inferred from the conduct of the parties, that the claimant is to have a beneficial interest in the house. <u>In the common case where the intention can be inferred only from the respective contributions, either initial or under a mortgage, to the cost of its acquisition it is held</u>

> that the house belongs to the parties beneficially in proportions to those contributions."
> [Emphasis supplied]

Once the interests of the parties are defined at the time of acquisition, it is my view that the unilateral action of one party cannot defeat or diminish the proportions in which the parties hold the property. The payment to redeem the mortgage cannot, therefore, diminish or increase the proportions in which the parties intended to hold at the time of acquisition. In the redemption of the mortgage the respondent must be regarded as having made a loan to the appellant to the extent of the proportion of his interest in the property. That amount is a debt recoverable on the order for accounts to be taken, made by the judge.

The basis on which Bingham, J. ascertained the proportions to which the parties are entitled is not maintainable in law. It arose out of a misunderstanding of the decision in ***Edmondson v. Edmondson*** (supra). Consequently, the decision cannot be allowed to stand. I would, therefore, allow the appeal and vary the judgment of the court below to read as follows:

> Judgment for the plaintiff in the following terms:
>
> 1. A declaration that the plaintiff is entitled to a beneficial interest of 50% and the defendant 50% in the property known as 10 Rosewell Avenue, St. Andrew, registered at Volume 958 Folio 489 of the Register Book of Titles.
>
> 2. Order for partition and sale of the said property and distribution of the net proceeds of sale to the parties in equal shares.

The judgment of the court below is affirmed in all other respects.

On the question of costs, section 19(5) of the Court of Appeal Rules, 1962, enacts that:

> "...the court may make such order as to the whole or any part of the costs of an appeal as may be just..."

Wide though the discretion be, it must be exercised on fixed principles. It is recognized, however, that where the appellant and respondent are both partly successful in an appeal, the court has a jurisdiction to order that there be no costs of the appeal, or that a party shall pay a stated proportion of the costs of the proceedings in the Court of Appeal. In the circumstances of this case, it is just to order that there be no costs of the appeal.