JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 93/94

BEFORE: **THE HON. MR. JUSTICE GORDON, J.A.**
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	**CAROL ELEASE LEVY**	**APPELLANT**
AND	**ANDRE KARL LEVY**	**RESPONDENT**

Lord Anthony Gifford, Q.C. and Hugh Wilson for the appellant

B. E. Frankson and Jacqueline Cummings for the respondent

March 4, 5, 6 and May 1, 1998

GORDON, J.A.:

I have had the advantage of reading in draft the judgment of Patterson, J.A. I agree with it and for the reasons he gives, I would allow the appeal in part and order the variations to the judgment of the court below as indicated.

PATTERSON, J.A.:

This appeal by Carol Elease Levy ("the appellant") is against part of the judgment of Ellis, J. dated 8th July, 1994, whereby he declared that Andre Karl Levy ("the respondent") is solely and beneficially entitled to premises at 4 Weycliffe Close, Kingston 6, and two apartments, numbers 102A and 105A (incorrectly referred to as 510A), Oxford Manor, 16 Oxford Road, Kingston 5.

The appellant and the respondent were married in 1977 and were divorced in 1990. During the subsistence of the marriage certain properties were purchased, including premises number 4 Weycliffe Close, Kingston 6, apartment number 102A, and apartment number 105A, both at Oxford Manor, 16 Oxford Road, Kingston 5. Weycliffe Close was purchased in April 1983 in the sole name of the respondent and became the matrimonial home. The two apartments were purchased in May 1984 in the joint names of the appellant and the respondent. On the 20th February, 1990, the appellant filed an Originating Summons claiming, inter alia, "to be the sole beneficial owner in respect of the above-mentioned premises." The respondent resisted the claim, and contended that he was solely and beneficially entitled to all three premises.

It is convenient to consider the claim of each party, firstly, in respect of 4 Weycliffe Close and, secondly, the apartments at Oxford Manor.

Number 4 Weycliffe Close

It is common ground that this home was purchased with furnishings for $260,000. The agreement for sale stated the purchase price to be $160,000, but the evidence showed that the additional sum of $100,000 was paid directly to the vendor for the furniture. The appellant's claim to the beneficial interest in this property is based entirely on direct monetary contributions she said she made from her own funds towards the purchase price. In her affidavit sworn on the 16th January, 1990, she said the first amount that she contributed was $10,000 that she gave the respondent towards the deposit of $26,000. She paid a further $10,000 to the vendor, Mr. Frederick Grant. The respondent denied those payments. In his affidavit sworn on 15th March, 1991, he admitted receiving the $10,000 from the

appellant towards the deposit, but said it was money from the rental of his father's premises that the appellant was holding in trust for him. He eventually repaid his father that amount. He received no other amounts from the appellant; he paid the deposit of $26,000 and the balance of the purchase price of $160,000 was secured by a mortgage from his employers, National Commercial Bank Jamaica Limited.

But since the total amount of the purchase price was $260,000, the appellant sought to explain how the amount was paid in a further affidavit sworn on 4th July, 1991, in reply to that of the respondent. She said at paragraph 16:

> "16. ...That when the house at Weycliffe Close was to be bought I borrowed the sum of US$10,000.00 at J$5.00 to US$1.00 and gave my husband. I alone re-paid the loan to Dr. Jack, my sister. I also gave other funds to my husband as stated in my previous Affidavit and this made it possible for the mortgage to be only $160,000.00"

Then at paragraph 22 she continued:

> "22. ...I gave him the money to pay on the deposit and the money borrowed from my sister, Dr. Jack as the difference between the purchase price of $260,000.00 and that was reflected on the Transfer is $100,000.00. The Transfer shows a consideration of $160,000.00 and this amount was borrowed by way of mortgage."

The appellant was cross-examined on her affidavits. She admitted collecting rent on behalf of the respondent's father and holding those amounts in trust for him while he was in the United States of America. The rent was $300 per month, but she said she did not lodge the amounts collected to her account. So, on her evidence her total contribution was $70,000 made up of US$10,000 = J$50,000 (from her sister), $10,000 from her savings and another $10,000 (from her brother) paid directly to the vendor. She produced the copy of a receipt for $10,000 which she

contended was given to her by the vendor. Ellis, J. did not accept her evidence as to the contributions. He described the copy receipt as being "of dubious authenticity."

Weycliffe Close is registered under the Registration of Titles Act in the sole name of the respondent as beneficial owner. This is how the appellant explained the absence of her name from the title in her first affidavit:

> "17. That my husband told me that he would look after the transaction and we both went to see the Vendor's Attorney. That my husband caused the Title to be issued in his name alone and it was not until about 6 months after the transaction was complete that I found out.
>
> 18. That my husband told me that because he had got a staff loan my name could not go on the Title but that the place was for us both.
>
> 19. That on each occasion I asked him about it he kept saying he would put my name on the Title but he never did this."

The respondent gave a different story. He said that shortly before he purchased those premises, he discovered that the appellant "had indulged in an act of marital unfaithfulness" and as a consequence he informed her that, whereas he would continue the union essentially for the sake of the children of the marriage, he would not place her name on the title of any real estate acquired by him. He admitted that she was present at the offices of the vendor's attorney-at-law at the time of the transaction but said she took no part in the business transaction. The appellant did not dispute this.

Ellis, J. found that on the evidence the appellant made no contributions to the purchase of 4 Weycliffe Close. In my judgment, I would not disturb the finding of the learned judge. By far the largest amount that the appellant contended that

she contributed (the US$10,000) was omitted from her original affidavit without any explanation. The vendor was not asked to depose as to the direct payment she said she made to him, and as the learned judge found, the copy receipt she tendered was of dubious authenticity. The appellant admitted collecting rent money for the respondent's father, and she has not refuted the respondent's contention that he repaid that $10,000 to his father. Lord Gifford submitted that, on the respondent's evidence, there is no explanation as to how $74,000 of the purchase price was met, but the respondent said he paid all amounts.

The respondent provided documentary evidence which supported his contention that on the 28th March, 1983, he paid the deposit of $26,000 to Mr. Grant, the vendor. On the 11th May, 1983, National Commercial Bank paid $234,000 to the vendor's attorneys-at-law, and on that same day the respondent refunded National Commercial Bank $74,000. The mortgage was executed for $160,000. On the said 11th May, the respondent paid his half costs of the transfer. In my view, the onus was on the appellant to prove on a balance of probabilities that she contributed to the purchase price of the premises, and she has failed to do so. The learned judge, in the exercise of his discretion, refused an application by the appellant for an adjournment after several hearing days over a year and near to the close of her case to enable her to call the vendor from abroad in support of her case.

It was submitted that the learned judge erred in the exercise of his discretion and/or acted unfairly in refusing the adjournment and then making an adverse finding on the issue which the witness would have given relevant evidence. I do not agree. The appellant had ample time between the issue and hearing of the

originating summons to prepare her case. The evidence that she was seeking to bring did not arise ex improviso. Although a judge has a discretion to admit further evidence, if he is satisfied that the interest of justice requires it, or to satisfy him on a point, it was not shown in the instant case that he wrongly exercised his discretion by refusing the application. No injustice has been done.

In my judgment the decision of the learned judge that the appellant has no beneficial interest in this property is correct. It is quite clear that the appellant made no payments whatsoever towards the initial amounts expended for the purchase of the furniture, the deposit on the premises and the legal fees. The amount secured by the mortgage was repaid by deductions from the respondent's salary. The question of a resulting, implied or constructive trust does not arise. The appellant did not base her claim to a beneficial interest in these premises on indirect contributions which could be treated as contributions towards the purchase price of the premises. There is no evidence from which an inference could be drawn that there was a common intention that the appellant should have a beneficial interest in these premises.

The apartments at Oxford Manor, 16 Oxford Road, Kingston 5

Both these apartments were purchased in 1984, and the transfers were registered on the 17th May, 1984, in the names of "Andre Karl Levy and Carol Elease Levy both of 4 Weycliffe Close, Kingston 6, St. Andrew, Branch Manager and Consumer Products Manager respectively as joint tenants." The appellant explained that when these apartments came on for sale, she and the respondent discussed purchasing them and she "insisted that the apartments be purchased in our joint names and this was done." The respondent could not deny that the

apartments were purchased in their joint names, but he contended that "even though the Applicant had made no contribution whatsoever to the acquisition of the Oxford Manor premises, she constantly nagged me insisting that I should for convenience at least place her name on the Titles which I eventually agreed to in the interest of peace." The appellant did not allege making any direct contributions towards the purchase price of these apartments. However, at the time of purchase, it is clear that she was gainfully employed in various enterprises, which included trading in lobsters and used cars. The respondent stated that in 1984, the appellant worked for a period of nine months as a sales representative with a chemical company, "Treston", and "then as Sales Manager for the newly-incorporated company 'Ankal Limited' at a salary of two hundred and fifty dollars ($250) per week." Ankal Limited was a family business incorporated specifically to acquire and manage real estate, amongst other activities. The appellant contended that these joint ventures formed the basis for her indirect contributions towards the purchase of the apartments. The appellant denied nagging the respondent to put her name on the titles and said "I thought that since all the enterprises had made so much money and indeed he controlled all the money that all real estate investments were for us both." A mortgage was registered on each of the apartments at the time of purchase, and the respondent paid the mortgage instalments.

Ellis, J. found that the respondent is the sole beneficial owner of both apartments. In his judgment, he said:

> "Bearing in mind that the applicant was not in any way certain as to the quantum of her contribution to the acquisition of the apartments, her entitlement if any can only be based on her assertion at paragraph 21 of her affidavit dated 16th January, 1990 that 'she insisted that they be purchased in their joint names'. "

The learned judge continued by saying:

> "The husband/respondent at paragraph 18A of his affidavit of 27th January, 1992 states that the applicant's name was only placed on the titles to the apartments in order to facilitate his obtaining loans to acquire the properties outside the Bank to which he was employed."

That is not a correct statement of the facts. As I pointed out earlier on, the parties discussed the purchase of the apartments and the respondent admitted agreeing to placing the appellant's name on the title "in the interest of peace." He confirmed the truth of that statement in his evidence under cross-examination. However, in paragraph 18A mentioned above, he gave a further reason. This is what he said:

> "18A. That one of the main reasons for putting Applicant's name on the title to the two (2) apartments was so that I could borrow monies for the purchase of them both from sources outside National Commercial Bank: and in fact I obtained mortgage for same from Victoria Mutual Building Society and Life of Jamaica respectively and I exhibit hereto marked 'A.K.L. 11' and 'A.K.L. 12' respectively copies of the Titles to each apartment."

Undoubtedly, the parties agreed to purchase the apartments in their joint names, and the only reasonable inference to be drawn from that fact is that it was their common intention that both should be beneficially entitled. The question of a direct contribution to the purchase price was not asserted by the appellant, but it was contended that in the circumstances of this case, a presumption of advancement arises. It is trite law that where a husband purchases property in the joint names of himself and his wife, a gift to her is presumed in the absence of evidence to the contrary. As Campbell, J.A. (Ag.) pointed out in ***G. Harris v.***

E. Harris [1982] 19 J.L.R. 319 at 327:

> "This presumption of advancement is not based on contribution to the purchase price, it is raised by implication of law as being consistent with an intention by a husband to satisfy an equitable obligation to support or make provision for a wife or a child or a person in relation to whom he stands in *loco parentis*."

Ellis, J. found that the presumption of advancement and a resulting trust were inappropriate in the circumstances of this case, and consequently, he said he found "no other basis to justify the applicant's claim and I therefore find that she is not entitled as claimed." In coming to his conclusion, he relied on the dictum of Lord Diplock in ***Pettitt v. Pettitt*** [1969] 2 All E.R. 385 at 415, letter C, which reads:

> "The old presumptions of advancement and resulting trust are inappropriate to these kinds of transactions and the fact that the legal estate is conveyed to the wife or to the husband or to both jointly though it may be significant in indicating their actual common intention is not necessarily decisive since it is often influenced by the requirements of the building society which provides the mortgage."

I must examine the learned judge's reasoning in light of the dictum of Lord Diplock on which he relied. Lord Diplock's words ought not to be taken out of context. It seems quite clear that Lord Diplock, in referring to "these kinds of transactions", meant those considered and the views his Lordship expressed in ***Ulrich v. Ulrich & Felton*** [1968] 1 All E.R. 67 at 72. This is what was said in that case:

> "When these young people pool their savings to buy and equip a home or to acquire any other family asset, they do not think of this as an 'ante-nuptial' or 'post-nuptial' settlement, or give their minds to legalistic technicalities of 'advancement' and 'resulting trusts'. Nor do they normally agree explicitly what their equitable interests in the family asset shall be if death,

> divorce or separation parts them. Where there is no explicit agreement, the court's first task is to infer from their conduct in relation to the property what their common intention would have been had they put it into words before matrimonial differences arose between them. In the common case today, of which the present is a typical example, neither party to the marriage has inherited capital, both are earning their living before marriage, the wife intends to continue to do so until they start having children. They pool their savings to buy a house on mortgage in the husband's name or in joint names and to furnish and equip it as the family home. They meet the expenses of its upkeep and improvement and the payments of instalments on the mortgage out of the family income, to which the wife contributes so long as she is earning. In such a case, the prima facie inference from their conduct is that their common intention is that the house, furniture and equipment should be family assets..."

Lord Diplock, referring to and confirming his adherence to the view, went on to say:

> "I think it fairly summarises the broad consensus of judicial opinion disclosed by the post-war cases (none of which has reached your Lordships' House), as to the common intentions which, in the absence of evidence of an actual intention to the contrary, are to be imputed to spouses when matrimonial homes are acquired on mortgage as a result of their concerted acts of a kind which are typical of transactions between husband and wife today." (See ***Pettitt v. Pettitt*** {supra} at page 415, letter B).

I think these "kinds of transactions" are easily distinguishable from that in the instant case. Here the parties agreed that the apartments should be purchased in their joint names. This could be contrasted with the purchase of 4 Weycliffe Close just a year earlier, when that property was purchased in the sole name of the respondent. It confirms my view that the common intention of the parties at the time of the transaction must have been that both should be beneficially entitled.

The evidence does not support a finding that the wife's name was placed on the title because of a requirement of the mortgage companies.

The nature of the presumption of advancement, as stated in ***Snell's Principles of Equity*** 27th Edition, pages 176 et seq., was approved by their Lordship's Board in ***Neo Tai Kim v. Foo Stie Wah (m.w.)*** (unreported) Privy Council Appeal No. 30 of 1982 (delivered 4th March, 1985) and I make particular reference to the following qualification expressed therein:

> "However, under modern conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened."

Lord Brightman, who delivered the opinion of their Lordships' Board said this:

> "The qualification expressed in the final sentence of this quotation reflects views which had been expressed four years earlier by Lord Diplock in ***Pettitt v. Pettitt*** [1970] A.C. at page 824. Sir Robert Megarry rightly referred to 'this presumption of advancement, as it is called' because, as Lord Upjohn pointed out in ***Pettitt v. Pettitt*** at page 814, 'it is no more than a circumstance of evidence which may rebut the presumption of resulting trust' i.e., a trust resulting to the husband if he is the provider of the money."

His Lordship went on to say:

> "In the opinion of their Lordships the presumption is not an immutable rule to be applied blindly where there is no direct evidence as to the common intention of the spouses. It is rather a guide to be followed by the court in an appropriate case when it searches for the intention which ought, in the absence of evidence, to be imputed to the parties. It is proper for the trial judge to review the background of the case and to decide in appropriate circumstances that the guideline is not one which can sensibly be followed in the case before him."

In the instant case, the learned trial judge had clear evidence that the legal estate in the apartments vested in the joint names of the spouses. The wife made no direct contributions to the purchase price of the apartments, it was the husband who made the payments, but her name was placed on the title. In my view, those circumstances are sufficient to give rise to a presumption of advancement, and that is quite independent of the question of a mutual agreement between the parties. In so far as the learned trial judge found otherwise, I cannot agree with him.

I must now examine the evidence to see whether the presumption has been rebutted, for if it has, then the question of a resulting trust could arise in favour of the respondent. In finding that the presumption did not arise, the learned trial judge seemed to have placed great reliance on the evidence of the respondent, contained in paragraph 18A of his affidavit of the 27th January, 1992, which I have already quoted. However, it appears that he did not take into consideration the evidence of the respondent agreeing with the appellant's assertion that her name was placed on the title by mutual consent. As I have already said, there was no evidence to support the respondent's assertion that the mortgage companies required the name of the appellant to be placed on the certificates of title. Mortgage companies do not usually dictate whose name should be included in the title - that is left to the purchaser or purchasers. The onus was on the respondent to rebut the presumption, and in my view, he has not done so. Accordingly, I hold that both the legal estate and equitable interest in the apartments vest in both parties as joint tenants.

Counsel for the appellant did not place full reliance on the presumption of advancement which was sufficient to dispose of the contention as to the beneficial

interests in the apartments, but advanced an alternative argument which I must now consider. It is based on the common intention of the parties expressed in their mutual agreement to purchase the apartments in their joint names. The evidence clearly established that the parties agreed to take the transfer in their joint names. The respondent deposed that his wife had been unfaithful and that was the reason why he decided to purchase number 4 Weycliffe Close in his sole name. However, by the time the apartments were to be bought, their relationship had improved. This is what he says at paragraph 27 of his affidavit sworn on the 15th March, 1991:

> "27. That paragraphs 20-21 of the Applicant's Affidavit is admitted but that at the time of the acquisition of the apartments known as 102A and 510A Oxford Manor the relationship between myself and the Applicant had improved to some extent over and above what it had been when 4 Weycliffe Close was acquired and even though the Applicant had made no contribution whatsoever to the acquisition of the Oxford Manor premises she constantly nagged me insisting that I should for convenience at least place her name on the titles which I eventually agreed to in the interest of peace.'

For completeness, I should quote paragraphs 20-21 referred to above, which are contained in the appellant's affidavit sworn on the 16th January, 1990:

> "20. That I am presently residing at 102A Oxford Manor which is in the joint names of my husband and myself.
>
> 21. That when these apartments came on for sale I discussed purchasing them and I insisted that the apartments be purchased in our joint names and this was done."

Counsel contended that evidence supplied the reason why the husband placed his wife's name on the certificate of title. It disclosed the common intention at the time of purchase. That is undoubtedly so in my view. There was a clear

agreement that they should both hold the apartments as joint tenants. The learned trial judge stated that the appellant's "entitlement if any can only be based on her assertion at paragraph 21 of her affidavit dated 16th January, 1990 that 'she intended that they be purchased in their joint names'." It seems to have slipped his attention that the respondent agreed with the appellant's "assertion", as shown in paragraph 27 of his affidavit quoted above. After the marriage broke down in April, 1987 the appellant left the matrimonial home and took up residence at apartment 102A. The respondent continued paying the mortgage instalments until January, 1991 when a discharge of the mortgage was registered on the title. However, the evidence does not disclose that he took any action to remove his wife's name from the title, and the fact that he may have paid all the purchase price is irrelevant to his wife's claim.

What then is the law to be applied in the circumstances? Lord Morris in ***Pettitt v. Pettitt*** (supra) answers the question when he said (at page 393):

> "It appears to have been generally accepted that if in a question as to the title to some property a judge is able after hearing evidence to come to a conclusion that there was a clear agreement between husband and wife in regard to ownership he must give his adjudication accordingly. He cannot then make an order which withdraws title from the party to whom on his finding it belongs."

His Lordship's opinion, expressed further on, seems to sum up the position in this case. This is what he said (at page 394):

> "The emphasis on ascertaining what the parties intended at the time of a transaction shows that the mention of changed conditions did not mean that changed conditions altered property rights: property rights once ascertained, and ascertained by reference to what was the intention of the parties at the time of a

> transaction, had to be honoured and fairly given effect to even though conditions had changed."

In my view, the learned trial judge fell in error when he failed to give effect to the clear agreement of the parties which the evidence disclosed. They agreed to purchase the apartments in their joint names, and this was done. It is my judgment that both the appellant and the respondent hold title to the apartments jointly at law and beneficially. The legal estate as well as the beneficial interest is vested in them both as joint tenants. The interest of each is the same in extent and nature and that obtains until the death of one, when the doctrine of the *jus accrescendi* applies, and the survivor becomes the sole owner. However, the joint tenancy may be severed, in which case each party would be beneficially entitled to one half share, since there was no agreement and no inference to the contrary can be drawn from the evidence as to the quantification of interests.

For the reasons given, I would allow the appeal in part and order that the judgment of the learned judge be varied so that the order reads that:

> (a) The appellant and the respondent are the beneficial owners jointly of apartment number 102A at 16 Oxford Road.
>
> (b) The appellant and the respondent are the beneficial owners jointly of apartment number 105A at 16 Oxford Road (also referred to as Apartment 510A in parts of the proceedings).

The judgment of the court below is affirmed in all other respects. The appellant shall have the costs of the appeal.

BINGHAM, J.A.:

I too have read the judgment of Patterson, J.A. and I agree with his reasons and the conclusions reached and I have nothing further to add.