JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 69/2006

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

BETWEEN BARRINGTON STERLING APPELLANT

AND ZELTA GAYLE STERLING RESPONDENT

Mr. Audel Cunningham instructed by Mrs. Arlean Beckford, for the Appellant.

Mrs. Judith Cooper-Batchelor instructed by Chambers, Bunny & Steer for the Respondent.

January 14, 15 and February 22, 2008

SMITH, J.A.:

I have read the draft judgment of Cooke, J.A. and agreed with his application of the relevant law and his conclusion that the appeal should be dismissed and the order of Dukharan, J. be affirmed.

These proceedings were initiated pursuant to S 16 of the Married Women's Property Act (M.W.P.A.)

The factual background is concisely set out in the judgment of my learned brother Cooke, J.A.

By a Fixed Date Claim Form dated 24th of June, 2004, Mrs. Zelta Gayle Sterling sought among other things, an Order that she is the sole beneficial owner of property situated at Lot 92 Tanglewood, St. Ann's Bay, in the parish of St. Ann, registered at Vol. 993 Folio 148 of the Register Book of Titles.

By an affidavit sworn to on the 15th March 2005, her husband, Mr. Barrington Sterling, prayed for an Order that both parties are entitled to fifty percent (50%) each of the beneficial interest in the said property. On the 4th of April, 2006, Dukharan J., in a written judgment, made an Order that Mrs. Zelta Sterling was entitled to seventy-five percent (75%) of the beneficial interest in the property and her husband to twenty-five percent (25%). This appeal is against that Order.

Two (2) grounds of appeal were filed. The second ground which concerns findings of fact and credibility, was not pursued and correctly so in my view.

Ground One States:

> "The Learned Trial Judge erred in failing to find that there was a common intention between the parties that the property would be held jointly between them in equal shares. Having so erred, the Learned Trial Judge therefore failed to find that the appropriate order was that the parties were both entitled to a fifty percent (50%) share of the property".

Mr. Audel Cunningham in his usually erudite manner submitted that in cases such as the instant one, the beneficial interests of the parties are to be determined in accordance with the principle identified by **Rowe, P.** in **Patricia Jones v Lauriston Edmund Jones** 27 JLR 651 At p 67 **Rowe P.** said:

> "The law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal the law leans towards the view that the beneficial interest is held in equal shares. See Cob v Cob (1955) 2 All E. R. 696":

Founding himself on this passage, Mr. Cunningham submitted that the learned trial judge failed to consider whether the parties were acting pursuant to a joint enterprise intending to acquire the property as continuing provision for their joint future.

He further submitted that, there being no evidence from which to infer the respective entitlements of the parties, the learned trial judge erred in not leaning towards the maxim "equality is equity". He referred to **Davis v Vale** (1971) 2 All E. R. 1021, **Lorraine Kinnock v Fitzroy Pinnock** SCCA 52/96 delivered March 26, 1999; and **Robinson v Robinson** Suit No. E284 of 1997.

Mrs. Judith Cooper-Batchelor, for the respondent, submitted that there is no evidence that there was a common intention to hold the property in equal shares. This, she said, gave the trial judge the discretion to examine all the

evidence before him and to make a finding as to the percentage held by the parties. She relied on **Goodman v Gallant** (1986) 1 All E. R. 311 at 314; **Bernard v Josephs** (1983) 4 F.L.R. 178 at 187 and **Robert Stephenson v Carmelita Anderson** SCCA No. 55/00 delivered June 12, 2003.

Both Counsel cited **Dorret Trouth v Lauriston Trouth** 18 J L R 409.

UNDISPUTED FACTS

(1) Both parties decided to purchase a lot of land in Tanglewood, St. Ann, on which to build their matrimonial home.

(2) The property was bought and conveyed into their joint names as joint tenants.

FINDINGS OF FACTS

The trial judge made the following findings of fact:

(i) There was no express agreement as to how the beneficial interest in the property was to be held.

(ii) The claimant, Mrs. Zelta Sterling, was the only person who provided money for the purchase of the land and the construction of the house.

(iii) The defendant, Mr. Barrington Sterling, made no monetary contribution to the building of the matrimonial home.

(iv) The defendant did the electrical work and supervised the workmen.

It is important to bear in mind that Section 16 of the Married Women's Property Act does not confer a power enabling the court, in its discretion, to grant to a spouse a beneficial interest in property.

This section is purely a procedural section – See **Pettit v Pettit** (1969) 2 All E.R. 385 at 392 I. The procedure was devised as a means of resolving a dispute or a question as to title rather than as a means of giving some title not previously existing – p 392 I (ibidem). In an application under S. 16 the question for the court is – "Whose is this"? and not – "To whom shall this be given"? – p 393 A (ibidem). Accordingly the decision as to the respective beneficial interests of a spouse must be more in accordance with established legal principles.

I should mention that the Matrimonial Proceedings Act 1970 has changed the situation in England. By that Act, the English Courts are empowered to adjust the beneficial interests of spouses. The courts in this jurisdiction have no such power.

Where the legal estate in land is vested in two or more persons as joint tenants, there is a presumption of fact that the beneficial interest is held in equal shares. However, the authorities clearly show that this presumption may be displaced if it is shown that the "common intention" was otherwise.

The question is, how does a court ascertain the "common intention" spouses have as to their respective proprietary interests in a family asset when at the time of its acquisition they failed to formulate it themselves?

Where there is no express agreement as to the respective beneficial interest of each spouse as the learned trial judge found in the instant case, it may be possible to infer from their conduct that they did, in fact, form a common intention as to their respective beneficial interests.

In this regard, the respective contributions made towards the purchase price of the property and the cost of construction may be relevant. However, as **Lord Diplock** said in **Pettit v Pettit** (1969) 2 All E.R 385 at 413 G:

> "But in the case of transactions between husband and wife relating to family assets their actual common contemplation at the time of its acquisition or improvement probably goes no further than its common use and enjoyment by themselves and their children, and while that use continues their respective proprietary interests in it are of no practical importance to them. They only become of importance if the asset ceases to be used and enjoyed by them in common and they do not think of the possibility of this happening. In many cases, and most of those which come before the courts, the true inference from the evidence is that at the time of its acquisition or improvement the spouses formed no common intention as to their proprietary rights in the family asset. They gave no thought to the subject of proprietary rights at all"

Indeed Mrs. Sterling in an affidavit sworn to on the 24th of June, 2004 stated at para. 14:

> "The defendant and I never had any discussions about how the property was to be held".

And at para. 21 she said:

> "I believe I am entitled to all the interest in the said property".

Mr. Sterling admitted para. 14 of his wife's affidavit. However, (no doubt on advice) he added:

> "It is my opinion, however, that given the fact that we had taken the joint decision to acquire the land and pooled our resources so to do and that we were acting in the context of acquiring an asset for our life together as man an wife, it would have been understood that we would hold the property jointly in equal shares. The rigid calculation of numerical percentages of our respective shareholding would have been inconsistent with the then happy state of our marriage, a marriage which we always deemed to be a true partnership".

It seems reasonably clear to me that, on the evidence, at the time of its acquisition the parties formed no common intention as to their proprietary rights in the property. They were happily married and were concerned only with their enjoyment of the property. They gave no thought to the eventuality of their marriage breaking down.

In **Pettit v Pettit** (supra) at 398 D-F, **Lord Morris** said:

> "The mere fact that parties have made arrangements or conducted their affairs without giving thought to questions as to where ownership of property lay does not mean that ownership was in suspense or did not lie anywhere. There will have been ownership somewhere and a court may have to decide where it lay. In reaching a decision the court does not find

> and, indeed, cannot find that there was some thought in the mind of a person which never was there at all. The court must find out exactly what was done or what was said and must then reach conclusion as to what was the legal result. The court does not devise or invent a legal result. Nor is the court influenced by the circumstances that those concerned may never have had occasion to ponder or to decide the effect in law of whatever were their deliberate actions. Nor is it material that they might not have been able – even after reflection – to state what was the legal outcome of whatever they may done or said. The court may have to tell them. But when an application is made under s. 17 there is no power in the court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the court thinks that the parties would have agreed had they discussed the possible break-down or ending of their relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated. In my view, these powers are not given by s. 17".

In **Springette v Defoe** (1993) 65 P & C .R. 1 the English Court of Appeal held that:

> "In the absence of any express declaration of the beneficial interests, joint purchasers will hold property on a resulting trust for themselves in the proportions in which they contributed directly or indirectly to the purchase price unless there is sufficient specific evidence of their common intention that they were entitled to other proportions".

As I have stated earlier, there had been no discussion between the parties as to their respective beneficial interests. Consequently, no common intention could be established. Dukharan J. was correct in concluding that the parties held the property in proportion to which they contributed directly or indirectly to the purchase price.

In the absence of any evidence quantifying the indirect contribution by Mr. Sterling, the learned trial judge did the best he could, having regard to the available evidence.

I see no reason to interfere with his finding that Mrs. Zelta Sterling is entitled to seventy-five percent (75%) of the beneficial interest in the matrimonial home and that Mr. Barrington Sterling is entitled to twenty-five percent (25%) thereof.

Accordingly, this ground fails. As I stated at the outset, I agree that the appeal should be dismissed with costs to the respondent.

COOKE, J.A.

1. The parties were married in 1987. The appellant is an electrician and the respondent a registered nurse. Apparently the newlywed couple lived at the respondent's mother's home in Lime Hall in St. Ann. Entirely through the financial efforts of the respondent, additional rooms were added to this maternal home. In 1989 the respondent secured employment on the Cayman Islands. Then in mid 1991 the parties started discussions about getting a matrimonial home. The initiative was the respondent's. This was her evidence under cross-examination as to the genesis of the acquisition of the disputed property situated

at Lot 92 Tanglewood in St. Ann registered at Volume 993 and Folio 148 of the Register Book of Titles.

> "Between 1990 and 1992 it was my ambition to own a house in Jamaica. My salary was much better in Cayman. I did not discuss with Defendant about getting a home with him then. In mid 1991 we started discussing about getting a house. We spoke about getting a nice lot, good location and price range. I could afford. We knew that I would be doing the payment.
> I was taking care of my son Kevin financially. I was also maintaining the Defendant.
> We had discussions about his salary. He said he does not make much money and he had a lot of bills. He did not give an account of how he spent his money. Bills came to me for payment."

The purchase price of the lot on which the house was to be constructed was J$400,000.00. The respondent provided this sum and all the attendant costs. The appellant's contention that he provided J$120,000.00 towards the purchase price was roundly rejected by the learned trial judge. It was the appellant who located the lot and he played a significant role in the architectural design of the structure. He also supervised the construction and deployed his expertise in providing the electrical work. In order to do this he resigned his job with the Government of Jamaica and opened his own small business, concerning which, the capital outlay was satisfied by the respondent. All the costs of the construction were borne by the respondent.

2. The lot was conveyed to the parties as joint tenants. It was the intention of the parties that the house under construction was to be the matrimonial

home. As yet the house is unfinished, as when relationship between the parties soured the respondent ceased providing any more financing.

3. The respondent by way of a Fixed Date Claim Form sought an order that she was the sole beneficial owner of the disputed property. On the 4th April, 2006, Dukharan, J. decided that the respondent was entitled to a seventy-five percent interest in the property and the appellant twenty-five percent. It is from this order that this appeal now lies. The ground of appeal was couched thus:

> "The learned Judge erred in law in failing to find that there was a common intention between the parties that the property would be held jointly between them in equal shares. Having so erred, the Learned Trial Judge therefore failed to find that the appropriate order was that the parties were both entitled to a fifty percent share of the property."

4. As earlier stated the legal interest in the lot was conveyed to the parties as joint tenants. Construction of the intended matrimonial home begun after this acquisition. However, the parties treated the purchase of the lot and the partial construction of the house as a single acquisition. In determining the respective beneficial interests, the fact that the legal interest was to be held jointly is merely a factor which in the totality of the evidence has to be evaluated. In **Whitter v. Whitter** S.C.C.A No. 16/88 delivered June 1, 1989, this court per Wright, J.A. said:

> "It is common knowledge that the beneficial interest does not inevitably follow the legal interest otherwise the operation of a resulting trust would be precluded

> where the legal estate or interest is in one person but the beneficial interest is really in another."

It is the task therefore of the trial court to make findings of fact and apply thereafter the applicable judicial principles. In **Dorrett Trouth v. Mauriston Trouth** [1981] 14 – 18 J.L.R. 409 Campbell J.A. at page 419 B – C said:

> "It is clear from the principles of law enunciated in the opinion expressed in Gissing v. Gissing (supra) that in the absence of a clearly expressed agreement covering both the basis on which property is acquired by spouses and the proportionate shares of the beneficial interest therein to which each is entitled, their common intention in relation to these matters must be ascertained and given effect to by invoking the principles of law governing implied, resulting or constructive trusts. In invoking and applying these principles of law the principal consideration is the existence and quantum of financial contribution direct or indirect made by the spouse who is seeking to establish in his or her favour a resulting trust." (Gissing v. Gissing [1970] 3 W.L.R.)

In **Bernard v. Josephs** [1982] 3 All E.R. 162 Griffiths, L.J. said at page 170 f:

> "In the absence of any express declaration as to the beneficial interest, the judge must look to see the respective contributions made towards the purchase price. In the unlikely event that the house was bought without a mortgage, their respective contributions to the purchase price will determine their share in the equity."

5. In **Patricia Jones v. Lauriston Edmund Jones** [1990] 27 J.L.R. 65 Rowe, P. in his judgment on behalf of this court said at page 67 G:

> "The law applicable to a case of this nature is well settled. Where husband and wife purchase property

> in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal the law leans towards the view that the beneficial interest is held in equal shares. See Cobb v. Cobb [1955] 2 All E.R. 696. That was exactly the position in the instant case and the order of Panton, J., that the property is to be divided in equal shares is plainly right."

The appellant sought to rely on this statement. I shall in due course examine this stance of the appellant. Before so doing, I will turn to basis of the learned trial judge's decision.

6. This basis is found at pages 4 – 5 of his judgment. He said:

> "With regards to husband and wife when property is in joint names and there is no declaration of trust, the shares are usually to be ascertained by reference to their respective contributions, just as when it is in the name of one or other only. The share of each depends on all the circumstances of the case taking into account their contributions at the time of the acquisition of this property. As Pearson, L,J. said in the case of Hine vs. Hine [1962] 3 AER 345 at page 350.
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>> "In my judgment, however, the fact that the husband and wife took the property in joint tenancy does not necessarily mean that the husband should have a half interest in the proceeds of sale now in contemplation. The parties agreed, expressly or by implication from the creation of the joint tenancy, that the house should be the matrimonial home and should belong to both of them ... They did not, however, make any agreement or have any intention, what should happen in the event of the marriage breaking up and the property

> then being sold. The proper division of the proceeds of sale in that event is left to be decided by the court ...".

The view of Pearson L.J. was adopted by Lord Denning M.R. in the case of Bernard v. Josephs [1982] 3 AER 162. In that case Lord Denning was of the view that justice would require that the courts should have discretion to apportion the shares, and that there should not be a rigid rule of equal shares. He addressed this question when he said:

> "When the house is conveyed into joint names, the question arises: What are the shares of the two parties in the house? And at what date are those shares to be ascertained? If the conveyance contains an express declaration of the shares, that is decisive, ... But often there is, as here no such declaration ...".

It is quite clear from the authorities that where there is a written declaration as to the beneficial interest that will conclude the matter. However in the instant case there is no such express declaration as to the beneficial interest. It clearly means that enquiries can be made by the court to determine the issue.

The credibility of the parties becomes very important in determining where the truth lies as to contribution."

I am of the view that neither the approach of the learned trial judge nor his apportionment of the respective beneficial interests can be faulted.

7. The **Jones** case can be readily distinguished from the circumstances which here obtain. In that case the purchase price was $61,000.00. In respect of the deposit of $6,100.00 the husband contributed $3,555.00 and the wife

$2,545.00. There was a mortgage of some $45,000.00. In addition the husband paid a substantial amount of $11,021.59 which was for incidental costs and charges. Both contributed to the payment of the mortgage obligations. In this case the appellant did not contribute any money at all to the costs of purchasing the lot – nor to the construction of the house. There was no evidence express or implied that the prospective matrimonial home was to be "a continuing provision for them during their joint lives". It was the respondent's evidence that:

> "Between 1990 and 1992 it was my ambition to own a house in Jamaica." (See para. 1 above)

The purchase of the lot and the construction of the house was to be the realization of that ambition. The **Jones** case does not assist the appellant.

8. I would dismiss this appeal and award costs to the respondent.

G. SMITH, J.A. (Ag.)

I agree.

SMITH, J.A.

ORDER

The appeal is dismissed and costs are awarded to the respondent.