JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 84/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	RITA VERONICA SYMES	PLAINTIFF/APPELLANT
AND	GUY SYMES	DEFENDANT/RESPONDENT

Dennis Goffe instructed by Myers, Fletcher & Gordon for Appellant

Dennis Morrison and Ms. Ingrid Mangatal, instructed by Dunn, Cox & Orrett for Respondent

March 10 and April 9, 1992

ROWE, P.

The respondent and the appellant (hereinafter referred to as husband and wife respectively) were married in 1963 and they separated in January, 1990. On May 18, 1990 they entered into a Separation Agreement which contained a non-molestation clause, provisions for the maintenance of a child of the marriage and the husband's father and several provisions relating to the dismantling of the joint accounts held by the parties. Clause 2(1) of that Separation Agreement was not performed at the behest of the wife and having regard to the position adopted by the husband an Originating Summons asking the question whether the husband was obliged to transfer to the wife absolutely his interest in premises known as 4 Hopefield Avenue, Kingston 10, St. Andrew, registered at Vol. 1101 Fol. 718 of the Register Book of Titles, on the terms set out in Clause 2(1) of the Separation Agreement signed by the parties on May 18, 1990 was brought. Harrison, J. answered the question in the negative and dismissed

the Summons with costs to the husband. His oral judgment was not reduced into writing, consequently this Court has derived no assistance from the fact that the case was tried in the Court below.

A multiplicity of grounds of appeal filed and argued by Mr. Goffe, resulted in the appeal being allowed, the setting aside of the Order of the Court below and the answering in the affirmative of the question posed in the Originating Summons. The husband was ordered to pay the costs of the appeal as also in the Court below. These are the reasons for our decision.

By Clause 2(1) of the Separation Agreement, the parties mutually agreed between themselves that:

> "The husband will transfer the house situate at 4 Hopefield Avenue, Kingston 10 to the wife. The wife will assume all mortgage payments and will also stand the cost of transfer."

In due course the wife submitted a Transfer of 4 Hopefield Avenue, Kingston 10 registered at Vol. 1161 Fol. 718 of the Register Book of Titles for the signature of the husband. He refused to sign, contending that the wife was only entitled to a portion of No. 4 Hopefield Avenue on which the main house stood. There was evidence before Harrison, J. that in 1982 the husband and wife as joint owners of No. 4 Hopefield Avenue had obtained subdivision approval for the premises 4 Hopefield Avenue to be divided into three lots. At that time the parties were not living at Hopefield Avenue and at no time thereafter was there any physical demarcation on the ground in keeping with the subdivision approval.

Two buildings were on the premises, viz. the main house and a block containing two flats. Both buildings were constructed prior to the purchase by the parties herein and both were in existence at the time of the subdivision approval. On the title was endorsed a restrictive covenant not to subdivide the said land into smaller lots but to keep the same intact and not to sell the same as separate and undivided lots but as one

lot or holding. No evidence was led before Harrison, J. to suggest that this restrictive covenant had ever been modified.

Two undischarged mortgages affected the land. One was registered on September 2, 1986 to secure the sum of $65,000 with interest and the other was registered on September 3, 1987 to secure a sum of $31,769.03 with interest. While the Separation Agreement acknowledged the existence of mortgages there was no indication of the outstanding amounts of the instalment payments.

Paragraphs 7 and 8 of the husband's affidavit sworn to on September 17, 1991 fully expressed his contentions. He said:

> "7. That it is my contention that at the time of the signing of the May 18, 1990 Agreement, it was the clear intention of the Plaintiff and myself that the obligation created by Clause 2(1) thereof was for me to transfer to her the lot upon which the matrimonial home stands, shown on the subdivision plan as Lot 3, and not the entire property known as 4 Hopefield Avenue.
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> 8. That it was my clear understanding that the intention was to transfer the matrimonial home only to the Plaintiff and that the other two lots shown on the plan aforesaid as Lots 1 and 2, would be mine.

A reading of paragraph 3 of the husband's said affidavit however, leaves me with the impression that the husband did not and could not have harboured the intentions which he claimed in paragraphs 7 and 8 reproduced above. He could not deny that the Agreement was his document but he tried to make it clear that he was no party to the crafting of that document and did not contribute to the ideas and statements made therein. He signed, he said, the document without discussion and without clarification. It is to be recalled that both parties were represented by Attorneys during the preparation of the Agreement yet the husband was prepared to swear tha

> "...I admit signing the Agreement. However, the Agreement was presented to me by the Plaintiff as a fait accompli and there were in fact no negotiations preceding same. That

> "was about to leave the country for an indefinite period and I consequently executed same without further discussion or clarification."

In the light of these concessions by the husband, it is difficult to rely upon his assertions as to his clear intentions at the time of the signing of the Agreement.

On the other hand the wife could rely upon the subsequent conduct of the husband to buttress her submissions that the husband intended that the entire premises should be transferred to her. He wrote to her from Rome on July 6, 1990 and made specific reference to a matter covered by Clause 2(1) of the Agreement, viz. the cost of the transfer and went on to make suggestions as to how the wife could make maximum use of the entire premises for her sole benefit. In his letter from Rome, he said:

> "You mentioned the house in your letter and the cost of transfer, etc. Maybe you should talk over the possibilities with Owen Pitter or Louis. The main problem is where would you live if you sold it! We can forget about a new townhouse at the prices they are asking these days. What are the alternatives - build? buy another old house and renovate it? An alternative is to occupy the flat, and convert the main house into 4 self-contained units for rental to YUPPIES in New Kingston. Also, to put up something on the front lawn for rental. You need to think of the future and the need for a regular income in your golden years. Hopefully, Stephen and Tonia will be able to afford their own. Do they have any suggestions? For myself, perhaps I'd like to live in the country rather than Kingston when I retire. Certainly, the costs are still less than in the City. Of course, I have no idea where (or how I'll be able to afford it!
>
> Anyway, you can start thinking of all the possibilities and we'll discuss it when I return to Jamaica. Until then, do take care of yourself and keep trying your best. Give my regards to all and sundry. Hope they're not bothering you too much. Love to Jeanine and Daddy, and yourself, of course (smile)!"

In this passage the husband acknowledged the wife's right over the whole of 4 Hopefield Avenue and gratuitously tendered advice which expressly covered the three inchoate lots of the subdivision.

There was still another ex-post-facto piece of information from which the intention of the parties on May 18, 1990 could be derived. Attorneys for the husband wrote to the wife's Attorneys on November 29, 1990 saying in part:

> "Our client wishes to negotiate a new arrangement and we should be grateful if you would take some instructions and advise us what your client proposes. Our client also indicates that, prior to the May 18, 1990 agreement, sub-division approval was granted in respect of 4 Hopefield Avenue. He wishes any renegotiated agreement that we might arrive at to reflect the intention of the parties that Mrs. Symes should have the lot with the main house, which was the matrimonial home, transferred to her, while the other two lots should be transferred to him. He regards this as a more equitable rationalisation of the matter in the light of the respective interests of the parties. The mortgage would have to be adjusted accordingly."

When this letter is compared with the terms of Clause 2(1) of the Separation Agreement it becomes apparent that, for the very first time, the question of the subdivision of the land was surfacing via the letter of November 1990. Clearly the Attorneys had no prior instructions thereon otherwise the letter would have been written in an entirely different style. Equally clearly the rationale for the division then being propounded was what the husband called "a more equitable rationalisation" of the interests of the parties as they stood in November 1990 and had nothing to do with the Agreement of May of that year. Even more transparently clear is the husband's realization that he was obliged to transfer the entire premises to his wife subject only to her consent to re-negotiate their Agreement. He realized, too, that if a new Agreement was reached this would necessitate an adjustment in the mortgage payments.

Before I turn to look at the true construction of Clause 2(1) of the Separation Agreement, I pause to state that counsel on both sides contented themselves in saying that the law on the construction of terms in a written contract is correctly stated in Volume 1 of the 26th Edition of Chitty on Contracts beginning at paragraphs 809. Extrinsic evidence as an aid to the interpretation of the written document was admitted before Harrison, J. in support of the contention that the word "House" in Clause 2(1) was ambiguous and could not have the meaning of premises in the context used in the said clause. I quote from paragraph 809 of Chitty (supra), to legitimize this approach:

> "Intention of the parties.
>
> The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself. 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.' However, no contract is made in a vacuum. In construing the document, the court may resolve an ambiguity by looking at its commercial purpose and the factual background against which it was made."

It was recognized by counsel that the word "House" when used to denote a place of human habitation can mean a building of any size, however constructed, and may include out-houses within its curtilage and occupied therewith. Mr. Goffe submitted that in the context of the instant case the word "House" ought to be given a special meaning in order to effectuate the immediate intention of the parties to the contract. This special meaning, he said, was co-terminus with the word "premises".

Support for this interpretation was obtained from the provision that the wife should assume all mortgage payments and should be responsible for the cost of transfer. The two mortgages referred to earlier were in respect of the entire premises and no attempt was made to re-negotiate or apportion the

mortgages as between husband and wife. If then the intention of the parties was that the husband should assume immediate ownership of two lots including the block of flats, would the document provide that the wife should assume the mortgages for the entire premises without consideration? If the husband were to receive two of the lots in the subdivision would the wife have agreed to pay for the cost of the transfer? Of course, these costs would include the application for modification of the restrictive covenant, presumably the transfer tax and the cost of registration. It is inconceivable that the parties would make a simple statement that the husband would transfer the house, meaning one lot of the land with house thereon, to the wife, without at the same time making provision for the wife to transfer two lots of the land to the husband. It is also inconceivable that there would have been no apportionment of the mortgages if the wife had agreed to make such a transfer to the husband.

Money which came to the wife under Clause 2(vii) B of the Agreement to be used to effect needed repairs to "the house at 4 Hopefield Avenue" was used by her to do repairs on the main house and on the flats, without permission or objection from the husband. In these circumstances, one must ask why did the husband not assume the management and control of the flats or appoint agents on his behalf, or effect necessary repairs from his separate funds?

This Court has had the opportunity to examine the original of the Separation Agreement signed by the parties. This examination has revealed that the document was altered in six separate respects and initialled by the parties. Five of the amendments were undoubtedly for the benefit of the husband indicating that he had carefully read the document and had made such changes as he had desired.

I was of the opinion that the parties clearly expressed their intention in the Separation Agreement of May 18, 1990 in Clause 2(1) that the entire premises No. 4 Hopefield Avenue,

Kingston 10 was to be transferred by the husband to the wife on the terms set out in that clause. I was convinced that the evidence subsequent to the making of the agreement was all one way, indicating that both husband and wife treated Clause 2(1) of the Agreement as intended to transfer to the wife the entire interest in No. 4 Hopefield Avenue, Kingston 10, and I consequently concurred in the decision that the appeal should be allowed which, in effect, meant that the wife is entitled to have No. 4 Hopefield Avenue, Kingston 10 transferred to her by the husband under and in accordance with Clause 2(1) of the Separation Agreement.

WRIGHT, J.A.:

I agree.

GORDON, J.A.:

I agree.