

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHMT 2018/0022

BETWEEN:

THOMAS EMMANUEL FYFIELD PEATS

Respondent /Petitioner

and

ANN JOCELYN JOSEPH PEATS

Applicant/Respondent

Appearances: Ms. Nelcia St. Jean, Counsel for the Respondent/Petitioner
Mr. Richard Rowe, Counsel for the Applicant/Respondent

2020: 24th March

JUDGMENT

[1] **ELLIS J:** This claim for division of property by Mrs. Peats, the Applicant arises out of the breakdown of the Parties' marriage and their subsequent divorce. In her application for ancillary relief, the Applicant seeks the following relief:

1. A declaration with respect to the Applicant's fifty percent (50%) interest in the matrimonial home located at The Valley, Virgin Gorda, British Virgin Islands and located on Block No.4839B Parcel 233("the Property").
2. Costs.

[2] The claims for relief are denied by the Respondent who contended that while the Applicant may have some interest in the Property by virtue of her financial contributions over the years; this does not warrant a 50% proprietary interest in the Property.

- [3] The background to this application reveals that the land on which the home was built was initially leased and later purchased during the course of the Parties' marriage. The first floor was constructed in the 1980s and thereafter the Parties took up residence there. Thereafter, the Respondent obtained a mortgage in order to finance the second floor in the 1990s. The Parties then moved into the second floor and rented out the first floor.
- [4] In 2004, the mortgage on the Property was refinanced and thereafter the mortgage fell into arrears. Although the mortgage was brought into good standing, this was short lived and eventually the Property was later forfeited and sold at auction in January 2020. The Applicant now seeks a 50% interest in the balance of the net proceeds remaining after the mortgage and attendant costs were paid off. That balance presently stands at \$266,397.09.
- [5] The Respondent was served with the Application in November 2019. By Order of the Court made on 14th January 2020, the Court gave directions for the filing and service of evidence. The Applicant relied on affidavit evidence filed in support of her Application. The Respondent failed to file any evidence and failed to advance any plausible reasons for such failure. Moreover, the Respondent made no formal application seeking an extension of time to comply with the Court's order. As a result, only the Applicant was cross examined under oath. However, both Parties relied on their legal submissions.

Analysis and Conclusion

- [6] The Respondent gave no evidence in the matter but his Counsel was permitted to cross-examine the Applicant and make closing submissions. She submitted to the Court that other than food and electricity, the Applicant kept all of her earnings to herself and made no direct contributions to the Property. She further submitted that her refusal to be a party to the mortgage when the second floor was being built and her agreement to pay rent in consideration for living in the home demonstrates that she was intent to distancing herself from ownership of the Property. Counsel further submitted that while the Applicant may have taken care of the child of the marriage, she submitted that in the Caribbean, primary care of children especially girls has always been the role of the mother and so this could not be indicative of a 50% contribution by the Applicant.

- [7] Counsel concluded that based on this, the conduct of the Parties throughout the marriage was such that some interest can be given to the Applicant to compensate her for her contributions to having paid the electricity and food but it would not amount to a 50 % proprietary interest in the Property.
- [8] In her written evidence, the Applicant stated when they were first married; they did not own any property but lived in rented accommodation. Adjacent to this rented accommodation was a parcel of land (the subject land) which they also rented for several years. They later agreed to purchase the subject land with the intention of constructing their matrimonial home. She stated that construction of the home began even before they had completed the purchase of the property. They moved into the first floor of the home in 1989. They later they moved into the second floor in October 1991.
- [9] The Applicant stated that although they both took out the mortgage on the Property, it was registered in the sole name of the Respondent. Despite this she stated that it was always understood that she would have an equal interest in the Property as she made direct financial contributions to the construction of the home and she also took responsibility for the other household expenses which the Respondent would normally have undertaken.
- [10] The marriage soon began to breakdown and in 1994, the Respondent demanded that she leave the home. She did in fact depart for a period of 1 year and 5 months. When she eventually returned, she stated that the Respondent informed her that he had refinanced the mortgage and in doing so, had removed her name from the mortgage.
- [11] The relationship between the Parties did not improve and following a further escalation in their conflict, the Respondent once again demanded that she leave the matrimonial home. At some point he informed her that he had rented out the house to a third party and demanded that she leave. The Applicant stated that following the passage of Hurricane Ivan, she had nowhere else to live. It was only after the Applicant's sister intervened that the Respondent finally agreed to allow her to reside in the Property but he demanded that she reimburse him the \$700.00 deposit which he had received from the intended lessee and which would have to be repaid. He also demanded

and she agreed to pay him the sum of \$500.00 every month towards the mortgage from October 2004 and \$300.00 per month for about two years thereafter until May 2016. In May 2016, she discovered that notwithstanding her contributions, the mortgage was in arrears. Together with her daughter, the Applicant ensured that the mortgage debt was made current.

- [12] During this period, the Respondent continued to reside in the home on weekends (while he worked in Tortola), making no financial contribution thereto and yet partaking of whatever food was provided by the Applicant. When the Respondent returned full time to Virgin Gorda, the Applicant would give him \$300.00 instead of \$500.00 and they agreed to share the utility bills with her paying the greater portion, ($\frac{3}{4}$) to his ($\frac{1}{4}$).

- [13] On the basis of her direct and indirect financial contributions and based on their common intention the Applicant contends that she is entitled to a 50% interest in the proceeds of sale of the matrimonial home.

- [14] When she was cross examined about the Property, the Applicant testified that after they were married, they lived in leased premises. About three to five years later, they agreed to lease the adjacent land. The Respondent paid the rental payments while she used her salary to pay for food and utilities. Eventually, the Respondent approached her about purchasing the land and she agreed to that course.

- [15] The Applicant readily conceded that the Respondent purchased the land with his own funds and earnings. However, she testified that while he was paying for the land, it was agreed that her salary would be applied to providing food and paying the utilities and raising their child.

- [16] The Applicant also indicated that the Respondent directly financed the construction of the first floor of the home. During construction of the bottom floor, they continued to live next door and the Applicant continued her role of homemaker and she continued to pay for food and utilities. The Court is also satisfied that she gave the Respondent money to pay for the tiles in the living room.

- [17] The Parties eventually moved into the bottom floor of the building in 1989. The Respondent then decided to build the second floor of the building. He financed this construction through a mortgage. It is not clear from the Applicant's evidence whether she was ever originally recorded as a co-mortgagor and whether she was later removed. While she may well have had discussions with the Respondent about the mortgage and she may well have attended at the bank at the invitation of the Respondent, it became clear that she refused to commit to direct payments towards the mortgage because she did not wish to have any further deductions from her salary. What is also clear is that her name was never entered onto the land register as co-proprietor. Nevertheless, the Court is satisfied that the Applicant continued to pay for food and utilities during this second phase of construction.
- [18] It is apparent that with the deterioration of the marriage, the Respondent determined that he was the sole owner of the Property and so he could act independently and could demand vacant possession from the Applicant. The Applicant left the home for 1 years and 5 months but later returned at the invitation of the Respondent. The relationship continued to deteriorate and she was again asked to leave the home because the Respondent indicated that he wished to rent out both floors.
- [19] In the case at bar, it is not disputed that the Property is registered in the sole name of the Respondent. It follows that the legal interest in the Property is vested solely in him. In **Stack v Dowden**,¹ the House of Lords stated:
- “Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.”
- [20] The Applicant has advanced that based on the principles of constructive trust she has a beneficial interest in the Property. The legal foundation for the doctrine of constructive trust arises from the case of **Gissing v Gissing**.² In that case, the English House of Lords held that a claimant must

¹ [2007] UKHL 17, per Baroness Hale of Richmond at para. 56.

² [1971] AC 886.

prove that the legal owner of the land induced him to believe they would be entitled to a share in the ownership. He may prove this by demonstrating an (i) express agreement or (ii) contribution to the acquisition. In addition, the claimant must have acted to his detriment. If these requirements are demonstrated, the defendant will be considered to hold the property on a constructive trust for themselves and the claimant. The court will then calculate the respective shares in the property either by a 'holistic' examination of the whole course of dealing between the parties or, where no clear intention can be found, imputing what is fair in the context.³

[21] The relevant legal principles have been restated in **Lloyds Bank Plc v Rosset**.⁴ In that case, the House of Lords made the central issue that of common intention. Lord Bridge of Harwich explained the position in the following terms:

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, **there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially**. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. **In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust.** But, as I read the authorities, it is at least extremely doubtful whether anything less will do." Emphasis mine

³ Jones v Kernott [2010] EWCA Civ 578.

⁴ [1991] 1 AC 107.

- [22] In the absence of an express written or oral agreement, a common intention may be inferred from the conduct of the parties. This may involve a court considering matters such as direct and indirect financial contributions to the purchase price or mortgage installments of the property, payment for repairs or improvements to the property or, in exceptional circumstances, non-financial contributions (such as raising children and looking after the household). In such cases, it is critical that a claimant demonstrate that underlying such contributions is a common unspoken intention for the property to be shared.
- [23] The Court has no doubt that even before they got married, the Respondent did in fact tell the Applicant that it was his responsibility to build a home to put her in. The Court does not doubt her evidence that the Respondent discussed both the purchase of the land and later intention to construct their home on the same with the Applicant and that she agreed with that course of action. No doubt, she would then have counted on the fact that she equally owned the Property. She took on the role of homemaker, raising their daughter and making both direct and indirect financial contributions to the purchase and construction of the Property.
- [24] The Court found the following evidence of the Applicant to be compelling:
- “I do not know why my name was not on the Property. I thought my name was on it. We were married, we were a couple living together and doing everything together.
- I realized my name was not on it after he was threatening to put me out and sell the property. I was speaking to a friend and she told me to go to a lawyer to put a caution. She told me to bring the land paper and I noticed that my name was not on it.”
- [25] The Court had an opportunity to observe the Applicant during cross examination. The Court found her to be a truthful and forthright witness. Where her evidence revealed inconsistencies, the Court was satisfied that this was not an attempt at subterfuge. It became clear that the breakdown in the Parties’ marriage began at a very early stage. There appears to have been little meaningful communication with the Respondent taking decisions which were ostensibly unilateral and thereafter soliciting the compliance of the Applicant. The Applicant clearly maintained a submissive role throughout the marriage which was no doubt fostered by the Respondent dominant control.

- [26] Where there is no written evidence of declaration of a common intention as to a shared beneficial interest in the subject property, a court may have regard to the oral statements of the Parties. In that regard, the Court has considered the Applicant's oral testimony. She recounts representations made by the Defendant which she asserts led her to believe that they were building a life together. In the Court's judgment, the purported representation evidences an intention on the part of the Respondent to provide for his wife and family. It framed the roles which the Parties adopted throughout their marriage.
- [27] Counsel for the Respondent placed much emphasis on the fact that there came a point when the Applicant began to pay "rent" in order to occupy the Property. She submitted that this is not consistent with a person who believes that she has an equal share in the Property. However, the Court cannot ignore the whole context of this deteriorating marriage, the intimidation which must have been felt by the Applicant and her subsequent constructive ejection from the Property. The Applicant was left with no place to live and it was only with the intervention of her sister that she was permitted to reenter the Property.
- [28] The Court is satisfied that the facts of this case disclose no legally recognisable lease agreement between the Parties. The Applicant stated that she agreed to pay these sums (\$500.00 and later \$300.00 per month) because she felt she had no choice as she had nowhere else to live. The Applicant was therefore acting under duress. Further, it is not disputed that the Respondent continued to reside in the matrimonial home and that the Applicant continued to carry out the duties of homemaker and she still serviced the cost of the utilities at the home. Finally, the Court accepts that the sums were intended to contribute towards the mortgage payments which the Respondent could no longer solely maintain. This arrangement continued from 2004 until 2016.
- [29] The English Court of Appeal in **Grant v Edwards**⁵ concluded that indirect evidence of common intention could be inferred by the conduct of the Parties when such conduct on the part of the applicant is directly referable to the purchase of the property and could only be explained by reference to a person acting on the basis of having a beneficial interest in that property. This

⁵ [1986] Ch 638.

position has since been qualified and in that regard the Court is also guided by the learning in **Pettit v Pettit**⁶ and more recently by the Privy Council decision in **Abbott v Abbott**.⁷

- [30] In the latter case, the wife gave up working early in the marriage and remained a homemaker for the majority of the marriage. In delivering the Privy Council's judgment, Baroness Hale emphasized the fact the parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership. The Board favoured the reasoning of the trial judge Mitchell J., who relied heavily on the fact of the parties joint and several liability to repay the mortgage supported by their life insurance policies and also that fact that their income went into a joint bank account in concluding that the Parties had equal beneficial interests in the home.
- [31] The Court has no doubt that in addition to the money which she spent on the tiles and the monthly payments made between 2004 and 2016, the Applicant did in fact contribute the sum of \$4,000.00 towards the mortgage payments in order to stave off the forfeiture of the Property. The Applicant testified that these were the proceeds of the payout received from her employer when she was made redundant and the Court found this evidence to be plausible. Despite these efforts and no doubt because the Respondent ceased contributing to the mortgage for whatever reason, the Property was forfeited by the financing institution and sold at auction.
- [32] When the Court has regard to the whole course of conduct in relation to the Property, the Court is satisfied that despite their troubled marriage, their conduct demonstrated that their intention was to make this Property their matrimonial home. The Applicant's indirect financial contributions to the household expenses enabled the Respondent to dedicate his earnings to the acquisition and construction the Property. The Court is satisfied that this division of resources was by agreement. The Applicant also made direct financial contributions over the course of the marriage. The course of conduct discloses that the Parties intended that they both have beneficial interest in what is undeniably a matrimonial asset despite the fact that it is registered solely in the name of the Respondent.

⁶ [1970] AC 777.

⁷ [2008] 1 FLR 1451.

[33] The constructive trust arises because it would be inequitable to allow the legal owner to refuse to give effect to the intention when the claimant has acted in a personally detrimental manner. Therefore, where a claimant has successfully established that there was a common intention, he or she then needs to establish that they have acted to their detriment in reliance of such common intention. Generally, to qualify as detriment, the substantial activity undertaken must be such that there can be no other reasonable explanation for the claimant performing the relevant acts other than they were in reliance of the fact that she was to share in the subject property.⁸ This must be considered within the broader context of unconscionability. At page 232 of the judgment in **Gillett v Holt**, Walker LJ held:

“The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved.”

[34] In **Grant v Edwards** the court made it clear that in order to succeed on this ground, a claimant must have done something which she could not reasonably be expected to have done unless she was to have an interest in the property.⁹ However, at page 657A – B, Sir Nicolas Browne-Wilkinson V – C, set out the following qualification:

“As at present advised, once it has been shown that there was a common intention that the claimant should have an interest in the house, **any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify**. The acts do not have to be inherently referable to the house.” Emphasis mine

[35] Once a common intention is inferred rather than express, the conduct leading to the inference will generally suffice to demonstrate detriment. Lord Bridge in **Lloyd’s Bank v Rosset** explained the position in the following terms:¹⁰

“...once it has been shown that there was a common intention that the claimant shall have an interest in the house any act done by her relating to the joint lives of the parties in my judgment is sufficient detrimental reliance.”

⁸ *Gillett v Holt* [2000] 2 ALL ER 289, per Robert Walker LJ.

⁹ [1986] Ch 638 per Nourse LJ.

¹⁰ [1990] 1 AC 107 at 132 – 133.

- [36] The Court is guided by this dictum and finds that this limb has been adequately satisfied on the evidence before the Court. The Court therefore finds that the Property is a matrimonial asset which falls to be considered as part of ancillary relief.
- [37] The applicable legislation is the **Matrimonial Proceedings and Property Act, 1995** ("the Act"). Section 25 of the Act gives the court power, inter alia, to make a property adjustment order for the benefit of a party to a marriage or a child of the family. In deciding whether to exercise the powers given by section 25, the Court must have regard to all the circumstances of the case including the following matters stipulated in section 26 which are:- (a) the present or foreseeable future income, earning capacity, property and other financial resources of each party, (b) the present and foreseeable future financial needs, obligations and responsibilities of each party, (c) the standard of living enjoyed by the family before the breakdown of the marriage, (d) the age of each party and the duration of the marriage, (e) the physical or mental disability of either party, (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home, (g) any order made under section 49 (not applicable), and (h) the value to either party, of any benefit (for example, a pension) which, that party will lose as a result of the dissolution of the marriage.
- [38] Under section 26 of the Act the court is required to exercise its powers so as to place the parties, so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities towards the other. This duty should be carried out in a just and practicable way having regard to the conduct of the parties.
- [39] In **White v White**,¹¹ Lord Nicholls of Birkenhead who applied the principle of fairness in considering similar legislative provisions said:-
- "As a general guide, equality should be departed from, only if, and to the extent that there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination."

¹¹ [2001] 1 ALL ER 1 at paragraph 25

[40] The Parties in the case at bar were married on 18th October 1990 and obtained decree absolute on 19th February 2019. This was clearly a long term marriage of 29 years during the course of which, they produced one child, who is now an adult. The Court did not have the benefit of evidence as to the physical or mental disability of either Party but they are both over the age of 60 and retired.

[41] When she was examined under oath, the Applicant testified that she is currently unemployed and receives \$1,057.00 per month in social security payments. The Applicant now resides with her niece and her son in a 1 bedroom apartment. Presumably, the Respondent has also had to find alternative accommodation. From all accounts the Property would have been the only matrimonial asset held by the Parties. The fact that all that remains is the balance of the proceeds of its sale at auction after the Parties were unable to save the Property from forfeiture is a testament of this long and unhappy marriage.

[42] For the reasons which have been set out herein, the Court is satisfied that the Respondent held the Property on trust for the benefit of himself and the Applicant. Bearing in mind that it was a marriage of some 29 years, yielding 1 child and that the Applicant was an active financial partner and contributor as well as meeting the responsibilities of wife and mother, and bearing that the Respondent has failed to advance any plausible reason to justify a departure from the principle of equality the Court is satisfied that a fair outcome in this case dictates that the Parties are entitled to an equal share in the balance of the proceeds of the sale of the Property.

[43] In view of the foregoing premises, it is ordered and declared that:

- i. The Applicant is entitled to 50% share in the balance of the proceeds of sale of the Property.
- ii. The said sum is to be forthwith paid out to the Applicant.
- iii. The Applicant will have her costs in the sum of \$1,500.00.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar