

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 520 OF 2001

BETWEEN:

VULGINA ALEXANDER

Claimant

v

**NOLLIE ALEXANDER
AND
VULGINA ALEXANDER**

Defendants

Appearances:

Nicole Sylvester for Claimant

Mr. Carlyle Dougan Q.C. for First Defendant

2005: October 4th

DECISION

[1] **THOM, J.:** The Claimant, the step-mother of the first defendant brought an action in which she seeks the following reliefs:

- a) An Order against the first Defendant that the Deed of Transfer bearing registration number 695 of 1990 be cancelled to the extent of the Claimant's undivided half share in the said property.
- b) As against the second Defendant a declaration that the Claimant is entitled to an undivided half share in the said property.
- c) As against both Defendants their servants and/or agents an Order restraining the sale of the said property as described in Deed No. 834 of 1963.

- d) Damages
- e) Further costs or reliefs.
- f) Costs.

- [2] The Claimant and the first Defendant's father Sylvester Alexander (now deceased) lived in a common-law union from 1962 at Clifton Union Island on the property now in dispute.
- [3] The Claimant and Sylvester Alexander got married on the 30th day of August 1972. They renovated the house and in 1978 they constructed a commercial building in which they operate a supermarket. The property is vested in the sole name of Sylvester Alexander.
- [4] On the 23rd day of August 1979 by Deed of Mortgage 1463 of 1979 Sylvester Alexander mortgaged the property and the building to Barclays Bank International (hereinafter referred to as "the Bank") to secure the sum of Thirty Three Thousand Dollars (\$33,000.00). A further charge was executed between the said parties by Deed No. 2298 of 1982 for the sum of Eighty Thousand Dollars (\$80,000.00).
- [5] On the 30th day of January 1990 by Deed of Transfer No. 695 of 1990 the Bank transferred the Legal Mortgage and Deed of Further Charge to the first Defendant with the consent of Sylvester Alexander.
- [6] On the 24th day of January 2000 Sylvester Alexander died.
- [7] The first Defendant through his solicitor by letter dated January 1, 2001 gave the Claimant notice to quit the said property.
- [8] The first Defendant caused a Notice of Sale of the said property to be advertised in the newspapers of 22nd day of November 2001.

- [9] On the 29th day of November 2001 the Claimant filed a claim seeking the reliefs stated in paragraph 1 hereof.
- [10] The second Defendant the Executrix of the estate of Sylvester Alexander has admitted in the acknowledgement of Service that the Claimant has an interest in the said property.
- [11] At the trial the Claimant testified on her own behalf. The first Defendant testified on his own behalf and his common-law wife Ms. Barbara Charles testified on his behalf.
- [12] The evidence on behalf of the Claimant and the first Defendant differed in relation to one material issue that is whether the Claimant had knowledge of the two loans from the Bank, that the said property was the security for the two loans and the transfer of the said mortgage and further charge from the Bank to the first Defendant.
- [13] Learned Queen's Counsel for the first Defendant submitted that the issue for the Court is whether the Claimant's beneficial interest in the property has priority over the rights of a mortgagee under a legal charge executed by her husband with her knowledge. Since she had knowledge of the mortgage and received benefits therefrom she has no overriding interest superior to the interest of the mortgagee. The mortgagee was entitled to transfer the mortgage absolutely to the first Defendant and the first Defendant had an expressed power of sale under the mortgage and Deed of Further Charge to secure money due and owing to him under the mortgage and further charge. Counsel further submitted that estoppel by pais was applicable in this case in fact the Claimant having appealed to the first Defendant to pay the Bank since she and her husband are not paying anything. The first Defendant acted on the representation made by the Claimant

and so altered his position to his prejudice. The Claimant is now estopped from averring that the fact is otherwise than she represented it to be.

[14] The submission of Learned Queen's Counsel for the first Defendant is based on the premise that the Claimant had knowledge of the mortgage and further charge and had requested the first Defendant to make the outstanding payments to the Bank. The evidence of the parties differs on this issue. I will examine the evidence on this issue later.

[15] It is not disputed by the Defendants that the Claimant has a beneficial interest in the property. This beneficial interest is based on the principle of constructive trust as illustrated in the cases of Anne George v Bernard Louis Daisley and CIBC Caribbean Ltd suit No. 354 of 2000 St. Vincent and the Grenadines; and Austin and Another v Austin (1978) 31 WIR p. 46.

[16] The issues to be determined by the court are:

- 1) Whether the Claimant's beneficial interest in the said property is one half share as alleged by the Claimant or some other percentage.
- 2) What is the legal effect of the Mortgage and further charge to the Bank and the transfer of the said mortgage and further charge to the first Defendant in relation to the beneficial interest of the Claimant.

[17] The Claimant in her testimony stated that she had no knowledge of the Deed of 1979 or the Deed of 1982. She was not aware of any communication between the Bank and her husband. She did not know that her husband used money he received as a loan from the Bank for renovations to the matrimonial home or the commercial building on the said property or to purchase items for the supermarket. She only became aware of the loans when she received the letter of notice to quit from the first Defendant's solicitor. She stated her husband did not tell her about his business.

[18] The first Defendant testified that the Claimant knew about the mortgage and further charge to the Bank and that she spoke to him on January 29, 1990 and begged him to pay the sums outstanding to the Bank. She then put his father Sylvester Alexander to speak to him. That the Claimant was in Saint Vincent and the Grenadines when she spoke to him on January 29, 1990. On January 30, 1990 he executed a Deed of Transfer of the Mortgage and further charge with the Bank with the knowledge and consent of the Claimant and his father Sylvester Alexander. Since the transfer of the mortgage and further charge he has not spoken to his father about the money, I allowed him to live on the property. He was sick.

[19] Ms. Barbara Charles the common-law wife of the first Defendant testified that the first Defendant and Sylvester Alexander spoke several times about the money. She knew that the Claimant was in the USA for about five (5) years but she could not recall the exact period. She remembered that it was in the 1990's and agreed that maybe it was from 1989 to 1994. She was not present when the Claimant asked the first Defendant to help with the payment to the Bank.

[20] I believe the testimony of the Claimant that she was not aware of the loans made by the Bank to her husband in 1979 and in 1982. It is not unusual for a husband to transact financial matters without the knowledge of his wife particularly when the property is registered in the sole name of the husband. The Claimant was consistent throughout her testimony and under cross-examination by Learned Queen's Counsel. There is no evidence that the money borrowed from the Bank or any part of it was used on the property. There is no evidence of any discussions being held between the Bank and the Claimant in relation to the loans and the property being used as security. There is no evidence of any communication between the Bank and the Claimant in relation to the loans and the property being used as security. I do not believe the testimony of the first Defendant when he stated that the Claimant was in Saint Vincent and the Grenadines on January 29, 1990 and she spoke to him and begged him to pay the

money owing to the Bank on the mortgage and further charge. I believe the testimony of the Claimant that she went to the USA in 1989 and did not return to St. Vincent and the Grenadines until 1994. The witness for the first Defendant Ms. Barbara Charles testified that the Claimant was in the USA for about five (5) years. While she could not remember the exact period she agreed it was in the 1990's and when the period of 1989 to 1994 was put to her she stated that maybe it was around that time.

[21] The issue what is the quantum of the beneficial interest of a spouse who has contributed to the matrimonial home and other property was considered in the case of Rimmer v Rimmer [1952] 2 AER p. 863; Austin and Another v Austin (1978) 31 WIR p. 46; Villariouel v Clarke 1980 H.C. No. 1048 of 1973 Trinidad and Tobago.

[22] In Rimmer v Rimmer the husband and wife both wage earners bought a dwelling house for £460 to serve as their matrimonial home. The house was registered in the sole name of the husband. The wife paid the deposit of £29 and the balance of the purchase price was borrowed from a building society and the property was mortgaged as security. £150 was repaid from housekeeping money provided by the husband and £289 was paid by the wife out of her own money. The parties separated and the house was sold for £2,117. In a summons to determine how the proceeds should be divided the Court in holding that the proceeds should be divided equally stated at p. 867:

“The question was: On all the facts what was the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased, but also to the light which the whole conduct of the parties had thrown on their relationship together as contributes to the property which was their joint matrimonial home? In some cases it might well be that the amounts which they respectively contributes ought to conclude the question of shares in which they should partake in the proceeds, but on the facts of the present case it was not possible fairly to assess the separate beneficial interests of the husband and wife by reference to the contributions which they had made towards the purchase of the house, and in all the circumstances the proper

and equitable course was to divide the proceeds of sale between them in equal shares.”

Romer LJ at page 870 explained:

“Cases between husband and wife ought not to be governed by the same strict considerations both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property and the old established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of the present one, where the facts as a whole, permit of its application.”

[23] In Austin and Another v Austin the first plaintiff and the defendant lived in a common-law union for approximately 28 years during which time a parcel of land was bought in their names with the purchase price provided by the Defendant. A dwelling house was constructed on part of the land. Both parties made substantial contribution to the construction of the dwelling house. The first Plaintiff and the Defendant got married and subsequently got divorced. The husband sold his half share to their daughter. On the question of their respective interest in the land and house the Court held inter alia that as both the first plaintiff and the defendant had made substantial contributions to the construction of the house and in the absence of any evidence by which their shares could be quantified, their beneficial interests in the house would be treated as equal.

[24] Similarly in Villariouel v Clarke the Court held that the plaintiff was entitled to a half-share in the property under a constructive trust where the plaintiff and the defendant had lived together in a common-law union as man and wife for 25 years during which time they leased a plot of land in the plaintiff’s name and a dwelling house was erected on the land with their joint earnings which were pooled together without regard to the amounts provided by each. Both parties contributed their labour with the wife helping to clear the land of trees, carrying materials to the site from the road and helping to mix concrete.

[25] It is not disputed that the Claimant contributed to the construction and renovation of the property, that the Claimant operated the supermarket and that she went to work in the USA for a period of five (5) years and that during that period she made financial contribution to the operation of the supermarket and the home.

[26] Applying the law as stated in the cases cited above the Claimant and her husband (now deceased) both contributed their labour and finances to the construction and maintenance of the matrimonial home and the commercial building which houses the supermarket. The Claimant and her husband lived on the property from 1962 until his death in 2000 approximately thirty-eight (38) years. I find that it is not possible fairly to assess their precise contributions. Applying the principle as stated by Sir Evershed MR in Rimmer v Rimmer at p. 867 and applied in Austin and Another v Austin and in Villariouel v Clarke that principle being:

“Where the Court is satisfied that both of the parties have a substantial beneficial interest and it is not fairly possible to assure some precise calculation of their shares I think that equality necessarily follows.”

I find that the Claimant’s beneficial interest in the property is one half (1/2) share of the property.

[27] The issue of what is the legal effect of a mortgage of property in which a spouse has a beneficial interest based on the principle of constructive trust was considered in the cases of Williams and Glyn’s Bank Ltd v Boland [1980] 2 AER p. 408; Barclays Bank PLC v O’Brian [1993] 4 AER p. 417; and Anne George v Bernard Louis Daisley and CIBC Caribbean Ltd Suit No. 354 of 2000 Saint Vincent and the Grenadines.

[28] In Williams and Glyn Bank Ltd a husband and wife contributed to the purchase of a matrimonial home but only the husband’s name was stated as the registered proprietor in the land registry. The husband mortgaged the property to the Bank without the wife’s knowledge. Before taking the mortgage the Bank did not inquire of the husband or the wife whether the wife had any interest in the property. The husband defaulted on the mortgage and the Bank brought

proceedings for possession. The Court found that since the wife had no knowledge and the Bank made no enquiries the bank had taken the mortgage subject to the wife's interest and the bank was not entitled to possession. In so holding the Court stated that

“In view of the widespread development of shared interests of ownership the departure from an easy going practice of disposing with inquiries as to occupation beyond that of the vendor and substitution of a practice of more careful inquiry extending to spouses and other members of the family or even of persons outside it cannot be considered unacceptable.”

[29] In Barclays Bank PLC v O'Brien a husband who was a businessman secured a loan for his company with the security being the matrimonial home which was owned jointly by the husband and the wife. The husband signed the mortgage documents without reading them and the next day he took them to his wife who also signed without reading them. The wife was not advised that she should take independent advice about the mortgage. The company defaulted with the payments and the Bank brought an action to enforce payment under the guarantee. The wife in her defence contended that her husband had put undue pressure on her to sign and she succumbed to that pressure and her husband had misrepresented to her the effect of the legal charge which she believed was for a small sum to be repaid in three weeks. The House of Lords in ruling in favour of the wife held:

“On the facts the bank knew that the parties were husband and wife and should therefore have been put on inquiry as to the circumstances in which the wife had agreed to stand as surety for the debt of her husband. The failure by the bank to warn the wife when she signed the security documents of the risk that she and the matrimonial home were potentially liable for the debts of the company or to recommend that she take legal advice fixed the bank with constructive notice of the wrongful misrepresentation made by the husband to her and she was therefore entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank.”

[30] Similarly in Anne George v Bernard Louis Daisley and CIBC Caribbean Ltd. the Claimant and first Defendant cohabited in a common-law union as husband and wife. They purchased a plot of land together. The land was registered in the first Defendant's name. They constructed a dwelling house on the land which they

occupied as their home. The first Defendant used the property as security for a mortgage from the second Defendant Bank for his company. He subsequently executed a further charge on the property in favour of the said second Defendant Bank. The Claimant had no knowledge of the mortgage or the further charge. The evidence for the second Defendant Bank was that it investigated the physical condition of the property to determine its value and although the Bank's Land Security Forms make provision for an inquiry to be made of the borrower as to whether he admits to a spouse, the Bank does not independently investigate whether there is in fact a spouse or some other person with an interest in the property. The Court granted a declaration that the Claimant was a beneficial owner of one half-share of the property and an injunction restraining the defendants from selling or disposing of the property. Justice Mitchell at p. 20 stated:

“...the bank failed to take reasonable care, or any care at all, to check whether there was some other persons with a claim of a beneficial interest in the property. If the Bank had made a physical check of the premises, it would have discovered from the construction crew at the time of the construction or from the Claimant herself both during the construction period and after the construction period had been completed that she possibly held a beneficial interest in the property as a common-law wife, and that she definitely held a beneficial interest as a person who had contributed financially to the purchase and construction of the property, and as a person who with the title holder held the common intention that she should hold a beneficial interest in the property although it was registered in the name of the husband alone. Although the businessman in this case the first Defendant held legal unencumbered title, it would have been the duty of the bank to have explained to the common-law wife in the circumstances the implications of the husband giving the bank a legal mortgage over the property. It would further have been the duty of the Bank to recommend to the Claimant that she take independent advice before she consented to the granting of the security of the first Defendant. It would have been necessary for the bank to ensure that the wife give her informed consent to the granting of security by the husband. To do otherwise than to make such enquiries and to take such care is for the Bank to take a great risk.”

[31] Apply the principle as stated in the cases of Williams and Glyn Bank v Boland; Barclays Bank PLC v O'Brian; and Anne George v Bernard Louis Daisley and CIBC Caribbean Ltd there is no evidence that the bank from which the mortgage

and further charge was transferred to the first Defendant made any enquiry of the Claimant as to her interest in the said property that the Bank explained to the Claimant the implications of her husband giving the Bank a legal mortgage over the property and that the Bank recommended that she received independent legal advice of the legal effect of the mortgage on the property which was her matrimonial home and which housed the supermarket which she operated and that thereafter she consented to the mortgage. The Bank's interest in the property was therefore subject to the beneficial interest of the Claimant.

[32] The first Defendant was aware that the Claimant was the wife of his father and that she lived on the property and operated a supermarket thereon. The first Defendant failed to take reasonable care or any care at all to ensure that the Bank's interest was not subject to the beneficial interest of the Claimant. In accepting a transfer of the mortgage and further charge from the Bank without such enquiry he took a great risk. The Bank's interest was subject to the beneficial interest of the Claimant. His interest is subject to the Claimant's beneficial interest of one half (1/2) share in the said property.

[33] Judgment for the Claimant. I grant the Claimant the following orders and reliefs:

- i. A declaration that the Claimant is entitled to an undivided half share in the said property as described in Deed No. 834 of 1963.
- ii. A declaration that the Deed of Transfer bearing registration number 695 of 1990 be cancelled to the extent of the Claimant's undivided half share in the said property as described in Deed No. 934 of 1963.
- iii. An injunction restraining the first and second Defendants or either of them their servants and/or agents from selling or disposing of the property described in Deed No. 834 of 1963.
- iv. Costs against the first Defendant in the sum of \$15,000.00.

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Gertel Thom
HIGH COURT JUDGE.