

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV2004/0120

BETWEEN:

KEITHROY ROMEO SHAW

Claimant

And

CYNTHIA DOROTHY SHAW

Defendant

Appearances:

Mr. Asquith Fearon for the Claimant

Mr. Vernon Tomlinson for the Defendant

.....
2007: February 9th
June 21st
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[1] **Blenman, J:** This is a claim for occupation rent.

Background

[2] Mr. Keithroy Romeo Shaw (Mr. Shaw) and Mrs. Cynthia Dorothy Beatrice Shaw (Mrs. Shaw) are divorced. They own property situate at McKinnons and registered as Registration Section: McKinnons. Block 45 1695B, Parcel 235 (the property)

[3] In a previous claim namely Suit No. 118 of 1995 between Romeo Keithroy Shaw and Cynthia Dorothy Shaw, the property formed part of the subject matter. In that suit His Lordship Mr. Justice Mitchell delivered the judgment on 19th August, 2003 and stated as follows:

"I find that Mrs. Shaw holds title to McKinnons Registration Section, Block 45 1695B, Parcel 235 on a resulting trust for herself and Mr. Shaw in equal shares. Mr. Shaw is entitled to one half share in Parcel 235 as it is presently improved and free from having to make any contribution to the discharge of the encumbrances placed on it by Mrs. Shaw. He is entitled to have his name placed on the register as proprietor of a half share."

- [4] In the case at bar, Mr. Shaw contends that in 1993 Mrs. Shaw ousted him from the property. He further complains that his former wife Mrs. Shaw has rented the property and has been in occupation of the other part of the property, all to his exclusion. He contends that Mrs. Shaw has 8 tenants and earns at least EC\$500 monthly from each tenant and this she has earned over a period of 6 years. The total income that she has earned is EC\$288,000.00. Mr. Shaw therefore contends that he is entitled to a half share of the income of \$288,000.00 which is EC\$144,000 and seeks an order from the Court to this effect.
- [5] Mrs. Shaw denies that she has earned the sum of EC\$288,000.00 as alleged from the rental of the property. Mrs. Shaw further denies that she has ousted Mr. Shaw from the home in 1993 or at all. She alleges that it was Mr. Shaw who deserted her and went to live with his girlfriend, thereafter he failed and/or neglected to maintain or make any contribution to the maintenance of the property.
- [6] Mrs. Shaw further contends that the property, was destroyed by hurricane in 1995 and that she obtained a loan from a bank, and together with financial assistance from her children, she enlarged the property from its original 4 bedrooms to 8 bedrooms. From 1995, to the date of trial, 6 of the bedrooms have been occupied by her children and grand children, rent free. She says that she occasionally rents two of the bedrooms for no more than \$150.00 per week and the money that she earns is used to repay the bank and improve the property.
- [7] She complains that after judgment was granted in Suit No 118 of 1995 Keithroy Romeo Shaw v Cynthia Shaw, Mr. Shaw has secured an order for sale of the property and he is to receive half of the benefit from the sale of the property at its current value exclusive of the mortgage payments incurred by her as a result of the additional expenses which were the direct result of her having improved the property; therefore she further complains that he is seeking to benefit twice.

[8] Further, Mrs. Shaw denies that she has realized the alleged sums as rentals and further contends that Mr. Shaw is not entitled to the relief claimed or any relief at all.

Issue

[9] The issue to be determined is whether Mr. Shaw is entitled to occupation rent and if so, to what extent.

Evidence

[10] Mr. Shaw caused a witness summary to be filed on his behalf whereas Mrs. Shaw filed a witness statement in support of her defence. They were both cross examined. Both parties agreed and placed before the Court a bundle of documents that included the pleadings in the earlier suit.

Mr. Shaw's Evidence

[11] In his witness summary, Mr. Shaw stated that Mrs. Shaw has regularly rented out the property which consists of 8 rooms for at least EC\$500 per month for 6 years for which he claims to be entitled to a half share of the total sum of \$288,000.00 (which sum he alleges that Mrs. Shaw has earned from the rental of the property). He acknowledges that it was in August 2003 that the Court has delivered its judgment and it was adjudged that he was entitled to a half share in the property.

[12] Mr. Shaw, in amplifying his witness summary, told the Court that Mrs. Shaw had ejected him from the property since the 10th July 1993. Mrs. Shaw has had exclusive possession of the property to the present time. He said that subsequent to Justice Mitchell's decision he visited the premises, with named persons, with the hope of viewing the property but that he was denied access to the property by Mrs. Shaw and/or her agents. In fact on one occasion, when he went to the property together with a Mr. Knight, Mrs. Shaw told the other gentleman that he would have had to return. Mr. Shaw says that he has been unable to have persons view the property and therefore has not been able to obtain a sale of the property, in order to realize his half share in the property.

[13] During cross examination by Learned Counsel Mr. Tomlinson, Mr. Shaw maintained that on several occasions he was prevented by Mrs. Shaw from viewing the property. He was sure that one Pauline Lake is Mrs. Shaw's tenant of the property in which he has a half share.

[14] Mr. Shaw maintained during cross examination that he was unable to obtain a sale of the property since it was impossible for intending purchasers of the property to see the property due to Mrs. Shaw's deliberate actions in preventing intending purchasers from viewing the property.

Mrs. Shaw's Evidence

[15] In her witness statement she states as follow:

"I was married to Mr. Shaw who abandoned me, leaving our matrimonial home, in about 1993 and went to live with his girlfriend. We did not keep in touch but I later found out that he left Antigua and went to live in England. After Mr. Shaw abandoned me and my family, in or about 1993, he made no contribution to his family or the matrimonial home, its upkeep, maintenance and/or repair, insurance payments, mortgage payments, property tax, and/or paid my any spousal maintenance.

In or about 1995 our former matrimonial home suffered hurricane damage as did the house in which my sons had been living and I refinanced the mortgage on the concerned property and my sons and daughter helped financially to repair the damage and we enlarged my home to accommodate my children and grandchildren and increased the number of bedrooms in the said home from four (4) to eight (8).

The rooms in my home are and have been occupied since 1995 for the most part as follows:- one each by Wentworth James (son) and his wife Jenny James, Evington James (son), Kathleen James (granddaughter), Joycelyn James (daughter), St. Clair Lewis (grandson) and by me, Cynthia Shaw (the Defendant).

In or about February 2004, St Clair Lewis moved out, and in or about January 2003 Kathleen also moved out. My daughter, Joycelyn James is developmentally disabled and relies on me for her care and support.

There were two (2) free rooms in the house, which I have occasionally rented to help me meet the mortgage and expenses of up-keeping the home, the insurance payments, and property tax. I have never rented the

rooms long term, only occasionally at Carnival, Christmas, and/or Sailing Week, for no more than two weeks at a time and usually to friends or relatives. I would charge a weekly rate of \$150.00

I did not do this often as anyone who stayed there would have to share the bathrooms and kitchen with the rest of my family. Also I was always concerned about leaving strangers in the house with Joycelyn as she cannot defend or take care of herself.

Any money that was earned from the use of the property was put back into the property. I am still paying the mortgage and all out going on the property despite my ex-husband, having been given a half share in the premises he has made no effort to assist me with any of the expenses.

The Registrar of Land ordered a sale of the property, in or about March 2004, all expenses for the sale and the mortgage are to be subtracted from my share of the house, and Mr. Shaw is to benefit from the increased value as a result of the mortgage that I am presently paying.

The property is valued for auction at \$549,568.00 without the expenses of the sale and legal fees this would leave me with approximately \$130,784.00, from which the mortgage, and all court costs, legal fees, and auction fees will be taken, the remainder for me to find a home for me and my daughter Joycelyn.

Mr. Shaw is attempting to benefit twice in this matter and has shown no proof that I have ever collected any rent, much less \$288,000.00."

- [16] Mrs. Shaw, in amplifying her witness statement, denied that she has prevented persons from viewing the property. She denied that Pauline Lake is her tenant; infact, Pauline Lake is a friend of hers who assists her to take care of her disabled child.
- [17] During cross examination by Learned Counsel Mr. Fearon, Mrs. Shaw maintained that she does not have a tenancy agreement with Pauline Lake. Mrs. Shaw said that "while Pauline Lake does not pay her a rent she gives her anything". In fact, her friend Pauline Lake "gives her anything that she has" said Mrs. Shaw. Mrs. Shaw was adamant that she did not rent the property on a regular basis. In recent years, she has expanded the house and while the house now has 8 rooms it does not have 8 bedrooms. Her children live at the property with her. Mrs. Shaw was forced to admit during intense cross examination that

her son Everton did not live with her between 1995 – 2004. Further, Mrs. Shaw admitted that she treated the house as if it were her own because she alone maintains the house.

[18] She said during further cross examination that her children and grandchildren live in the property rent free. Even though her children are working adults and could contribute financially by paying rentals she “does not charge them anything” because when the house was being built they had contributed financially to its construction. She said that at no time did she entertain the thought that her children were occupying Mr. Shaw’s portion of the property. Neither did it ever occur to her that her children should have paid her rent for the occupation of the property. She was adamant that she has never rented the rooms in the property on a long term basis but had occasionally rented rooms in the property during Carnival, Christmas and Sailing Week. While she was aware of the valuation report which Mr. Shaw submitted and which indicated that the estimated market rental of the property was between \$3,500.00 per month and \$4000 per month, she has never read the report. Further, Mr. Shaw told the Court that she used the property to secure loans and that she spent part of the money realized from the loan on herself and the other half she has spent on the property. During further cross examination by Learned Counsel Mr. Fearon, Mrs. Shaw stated that she owns another property in which her adult children could reside.

[19] During re-examination by Learned Counsel Mr. Tomlinson, Mrs. Shaw restated that she does not receive any rent from her children. She has unsuccessfully tried to sell the property so as to give Mr. Shaw his share in the property.

Mr. Tomlinson’s Submissions

[20] Learned Counsel Mr. Vernon Tomlinson submitted that Mr. Shaw can only proceed on the basis of a common law claim or in equity. At common law a co-worker is not obliged to account to the other co-worker(s) for any income and profits derived by the former’s own labour in working the co-owned property. This is established in the case of **Henderson v Eason (1851) 17 QB 701**. Further, a co-owner who received from a third party (such as a tenant) more than that co-owner’s proportionate share of income or profits from the co-owned property was not obliged to account for the excess to the other co-owners. At

common law, a co-owner who improves or repairs co-owned property without the consent of the other co-owner(s), cannot sue in debt to recover a contribution towards the cost of those improvements or repairs from the other co-owner(s), who, after all, was/were not given an opportunity to prevent the making of those improvements or repairs. See: **Leigh v Dickenson (1884) 15 QBD 60**. Mr. Tomlinson Learned Counsel said that the harshness of this common law rule is tempered in equity by allowing the improving co-owner to seek a general adjustment of rights in the property when the co-ownership comes to an end (for example, when the property is sold, partitioned) on the basis that 'a person who seeks equity must do equity'. The other side of this maxim will come into play in this matter stated Mr. Tomlinson as Mr. Shaw's interest in the property is as a result of an equitable relief granted to him by the Court. Mr. Shaw is now seeking after the sale of the property to have an equitable accounting and occupation rent which are equitable reliefs and he is therefore bound by the maxims of equity.

[21] Learned Counsel Mr. Tomlinson referred the Court to the maxim, "he who comes to equity must come with clean hands". Mr. Shaw failed to state in his Claim Form and/or Statement of Claim that he had already received relief from the Court to compensate him for his interest in the property. Also, he has failed to indicate to the Court the extent of the relief he has received; this was a material fact that demanded disclosure as it goes directly to the issue of any equitable entitlement of Mr. Shaw, the relief he now seeks.

[22] Mr. Tomlinson argued that Mr. Shaw does not state either in his Statement of Claim or Witness Summary that he was not allowed to re-enter and occupy the premises, and this is a precondition for the request for an occupation rent, as it must be as a result of an ouster, that a claimant seeks occupation rent. In **Re Pavlou (1993) 1 WIR 1046**, Millet J. at 1050 stated that:

"If a tenant in common leaves the property but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to charge him or her with an occupation rent".

In the absence of the above information, Mr. Tomlinson submitted that Mr. Shaw cannot avail himself of any equitable relief. Counsel said that there is no evidence before the

Court that Mrs. Shaw has ousted Mr. Shaw from the property and that this omission is fatal to Mr. Shaw's claim.

[23] Learned Counsel, Mr. Tomlinson further said that Mr. Shaw was awarded a half share of the property under a resulting trust, at the improved value and free of making any contributions to the discharge of the encumbrances thereon. In effect, Mr. Shaw has made a profit on his initial interest in the property which, when he left Mrs. Shaw was valued at approximately \$250,000.00 and, has realized a present market value of \$608,000.00. Mrs. Shaw expanded the property over the years by building at her own cost two additional bedrooms, a kitchenette, storeroom, television room, and patio. In **Brenda Joyce Byford v David Butler [2003] EWCH 1267 (Ch)** Collins, J at para 15 stated:

"That it would be inequitable for a party to realize the benefit of the increase in a property's value without meeting his share of the cost of achieving that increase and require the party in occupation to pay an occupation rent."

This legal position is also expounded upon in the decision of **Clarke v Harlowe [2005] EWCH 3062 (Ch)**.

[24] Mr. Shaw also wants a half share of any rents collected but has provided no proof to substantiate his specific claim for \$144,000.00. He does not make any allowance for the fact that Mrs. Shaw, after he abandoned her, had to bear the cost of completing the property, and stood the costs by way of a mortgage for increasing the size of the property. Lord Denning MR., speaks to this issue in the decision of **Davis v Vale (1971) 2 ALL ER 1021 at 1026**. Mr. Tomlinson advocated that, the same principle be adopted in the case at bar. Mr. Shaw, having already realized a benefit from the increased value of the property at the expense of Mrs. Shaw, cannot in good faith or conscience ask the Court to grant him an occupation rent and/or any sums that may have been earned by Mrs. Shaw based on the occasional rental of rooms in the property.

[25] Finally, Mr. Tomlinson submitted that the time at which equitable accounting, settlement of all accounts and interests, are made is at the date when the Court made a declaration of the parties' interest; this was the date on which Justice Mitchell delivered his judgment in

the previous suit. Mr. Tomlinson requested the Court to treat the order of Justice Mitchell as having done equity in apportioning the parties' interest in the property. Although the Learned Judge did not specify each and every matter that was considered, the decision did equity between the parties and as such Mr. Tomlinson submitted that the Court should now treat as done that which ought to have been done (and the end result is that equity was achieved). In the event that the Court should make an award to Mr. Shaw, Mr. Tomlinson said that it be limited as provided by the Limitation Act and not carry beyond six (6) years.

[26] Alternatively, Mr. Tomlinson submitted that Mr. Shaw has already been compensated for his share of the property in all respects up to the determination of **Civil Suit No. 118 of 1995 – Keithroy Romeo Shaw v Cynthia Dorothy Shaw** by the Order of Justice Mitchell and he cannot now seek to retry that matter, vary or extend the Learned Judge's Order, or appeal the decision by these proceedings.

[27] Mr. Tomlinson submitted that this is a matter of equity between the parties. He referred the Court to the decision of **Stack v Dowden [2005] EWCA Civ 857** in which Chadwick LJ at paragraphs 61- 63 made it clear that:

“Ms. Dowden would not be ordered to pay compensation in respect of Mr. Stack's exclusion from their family home, following an order for sale of that property where the timing of the sale was beyond Ms. Dowden's control. In addition, of equal importance, was the fact that Ms. Dowden was obliged to house the children of the relationship at that property until the date of sale.”

Mr. Tomlinson argued that the above case is applicable to the case at bar, since Mrs. Shaw has found herself in a similar position as an Order was made by the Registrar for the sale of the property, over which she has no control. Further, despite the accusations of Mr. Shaw, her evidence at trial is that prior to the Order for sale she had employed the services of Mr. Paddy James to sell the property. In addition, she has on only once occasion requested that a realtor return at a later date and she gave evidence that he so did. Mr. Shaw, on the other hand attempted to mislead the Court into believing that the property was still on the market and that Mrs. Shaw was preventing its sale.

[28] Mr. Tomlinson said that Mrs. Shaw gave evidence that she is responsible for the day to day care of her disabled daughter and that she allowed her friend Pauline Yearwood/Lake to reside at the premises to assist her with her daughter at a nominal rent of \$150.00 weekly, when she is able. Mrs. Shaw stated that Pauline Lake was at home "minding" her daughter while she attended Court for the trial of this matter. Further, evidence of the occupation of the property since the date of the Court Order is that her son Evington moved in to take care of her due to her illness. However, Mr. Shaw has not provided any evidence that Mrs. Shaw has rented the property or realized any sums as profit from the property to which he is entitled. Mr. Shaw seeks to make a further gain from his ex-wife and has not given any evidence that he attempted to assist her in the maintenance of the property and/or even to insure the property against harm. Mrs. Shaw gave evidence that she has maintained the property, insured it and pays for the grass to be cut. Further, Mr. Tomlinson urged the Court to find that Mr. Shaw has not given any evidence to support his claim for \$144,000.00. Mr. Tomlinson also argued that as Mr. Shaw did not produce the author of the valuation report, he sought to rely on, for cross examination the Court should not take it into consideration.

[29] In conclusion, Mr. Tomlinson emphasized that the thrust of Mr. Shaw's case has been to attempt to retry, vary, extend, and/or appeal the earlier proceedings between the parties, in the case at bar and the majority of his evidence was directed in such a manner. Equity has already been accomplished between the parties in the previous matter. Mrs. Shaw having to suffer Mr. Shaw receipt of half of the proceeds of the sale of the property at today's value without him having to make any contribution to the completion of the property and/or later improvements, or without making any contributions to the upkeep of the property, or to the insurance payments on the property. Mr. Tomlinson said that he does not believe and can accept that it was the intention of Justice Mitchell and/or even the desire of Mr. Shaw to put Mrs. Shaw and her daughter out on the street and leave the house vacant until it was sold. Further, Mrs. Shaw's occupation of the property benefits Mr. Shaw, as she continues to maintain the property rather than it being empty and derelict.

Mr. Fearon's Submissions

- [30] Learned Counsel Mr. Fearon said that Mr. Shaw's claim is to order Mrs. Shaw to pay to Mr. Shaw an occupation rent, for her exclusive occupation of the property and for half of the rental income which she earned from the property.
- [31] Mr. Fearon said that Mr. Shaw has submitted to the Court a valuation report prepared by the late Ewald Samuel Esq. Civil Engineer and Valuer in which Mr. Samuel expresses the professional opinion, that the rental income for the property would range between EC\$3,500.00 – EC\$4,000.00 per month, and this was based upon the number of rooms, in the property. Mrs. Shaw in her affidavit sworn on the 29th day of November 2002, at paragraph 30, expressly stated that she, "expanded the house, and put out rooms to rent." In her Supplemental Affidavit sworn on the 20th day of June 2003, in paragraph 39, she again deposed on oath, that, "I remodeled the house, so I could run my business from there and rent rooms to repay the bank; whereas, in her witness statement filed on the 19th day of January 2005, she denies these statements or at any rate seeks, to limit her liability by saying that these rentals were only occasional, and limited, to Christmas, Sailing Week and Carnival and limited to her friends; this is totally untrue argued Mr. Fearon and she should not be believed.
- [32] Further, Learned Counsel Mr. Fearon posited that Mrs. Shaw could not explain how it was that she encumbered the property by way of a loan on the 25th July 1995, which she says that she borrowed to repair the damage to the property caused by Hurricane Luis, which occurred on the 4/5 September 1995. On 7th December 2000, she borrowed another EC\$29,205.00 which she said she applied to complete the property. Further, on the 29th April 2002, over one year after Hurricane Lenny she says she borrowed EC\$33,316.00 to repair flood damage. All of these loans were secured by way of a charge on the property without, the knowledge or consent of Mr. Shaw.
- [33] Next, Learned Counsel Mr. Fearon stated that Mrs. Shaw had previously said that "after the house was completed", she and Mr. Shaw moved in. Confronted with her previous statement, she said she was doing alterations to the house, and that she had expended

some of the money on herself. Further, contrary to her previous statement that after the hurricane she, her children and grandchildren lived in the house since 1995, she later admitted that her son was not living there since 1995, but that he came and went between the house in Yorks Village and the property. She had previously said that the house in Yorks Village had sustained hurricane damage, later she admitted that the damage was not so bad that her children could not live in it. She could not remember the date Evington came to live in the property, nor when he left, but she remembered that it was at the time of his marriage. However, she says that he stayed for three years when she had previously said that he was living there since 1995.

[34] Mr. Fearon therefore submitted that the evidence of Mrs. Shaw is wholly unreliable, and outright dishonest, and should be rejected in its entirety. In contrast, Mr. Shaw was consistent in his evidence and his testimony where necessary was supported by documentary evidence. His evidence is reliable and honest and the Court ought to accept his evidence as true.

[35] Mr. Fearon, Learned Counsel next submitted that Mr. Shaw's claim is to be determined in accordance with the principles of equitable accounting whereby the proceeds of sale of jointly owned property, is used to meet certain personal obligations that have arisen by one of the owners before the proceeds of the sale, are distributed. Mr. Fearon advocated that when the proceeds of sale are realized there will have to be equitable accounting between the parties. Before the money is distributed the party who has left is entitled to receive an occupation rent. He referred the Court to **Re Bernard v Joseph [1982] Ch 391 at 405**. Mrs. Shaw as trustee will not be allowed to take advantage of her position, to make a personal profit for her own use and benefit, and she must account for the profits. See: **Re Keech v Sandford [1726] 2 Eq Cas Abr 741**.

[36] Mr. Fearon argued that Mr. Shaw is entitled to half share of the rental income collected by Mrs. Shaw, since he was ousted from the property on the 10th July 1993, and for occupation rent from Mrs. Shaw, for her exclusive occupation of the property and for the loss he suffered for not being allowed the enjoyment of his property. Mr. Fearon said that

by her sworn statement Mrs. Shaw has admitted to making a profit, as a trustee for the part of the profit that belongs to Mr. Shaw she has not accounted. Mr. Fearon said that Mr. Shaw claims that she earns for 8 rooms EC\$500.00 per room per month, which is less than the amount Mrs. Shaw rents these rooms for. She says she rents for \$150.00 per week. She does not say in what currency, but if we assume it is EC\$ then the monthly rental is EC\$600.00 per room. Justice Mitchell found in the previous suit that at the time of trial, there was a small amount of money left to be paid on the loans she had taken out. She must have been making more money from the rental income than she has disclosed to the Court. Mr. Fearon asked the Court not to believe Mrs. Shaw when she says that she earns \$150.00 per week.

[37] Mr. Fearon then referred the Court to **Re Davis v Vale [1971] 1 WLR 1022** in which it was held that the party who had left the former matrimonial home was entitled to be credited with half the rental income which the occupying party had received from sub tenants. In **Clarke v Harlow [2005] EWHC B20 (Ch)** it was held that equitable accounting begins at the date of separation, per HHJ Behrens QC. In the case at bar, Mrs. Shaw has also admitted to using the property for other personal benefit, such as operating her business, (see her statement dated 20th June 2003 para. 39), this admission by her represents other gains from the property for which she has not accounted. In **Dennis v McDonald [1981] CA 63** it was held that:

“A tenant in common, who had been excluded from occupation of the property by the other, was entitled to compensation. That the nature of the payment was that of some sort of compensation to be paid by a trustee to a beneficiary for exclusive enjoyment of the trust property attributable to exclusion on the part of the payer inconsistent with the discharge in due order of the trust; and that, therefore the purpose to which the payer put the property was irrelevant.”

[38] Mr. Fearon posited, therefore, that once Mrs. Shaw occupied the property by right of her beneficial interest, the proper way to assess the occupation rent was that she ought to pay to Mr. Shaw one half of such sum as represents a fair rent. Mr. Fearon submitted that the above principle should be applied in the case at bar and that fair rent can be assessed by

the Court based on the evidence provided both by Mrs. Shaw and the valuation report that is before the Court.

- [39] Next, Mr. Fearon referred the Court to **Daniell's Chancery Practice 8th edtn Vol.II by Williams and Sunthrie Smith at pp 1186 – 1189** the learned authors postulate that "the Court will order an account to be taken in for portions of what has been expanded and where one joint owner appears to have received more than his/her share of rents, an account will be directed of rents and profits received by him/her." Mr. Fearon finally stated that the Court should order Mrs. Shaw to account for half of the rent that she has received for the property from 1993 to the present.

Court Analyses and Findings

- [40] I have given careful consideration to the evidence adduced in this matter and to the submissions of both Learned Counsel. Let me say straightaway that it is no part of my function to any way attempt to vary or amend the judgment that of Mr. Justice Mitchell dated 19th August 2003. The principles of res judicata would prevent the Court from seeking to reopen the issues already conclusively decided by Mitchell J, in a closely reasoned judgment. Therefore, in seeking to make my determination in the case at bar, I am debarred from allowing Mr. and Mrs. Shaw to relitigate the issue that were resolved by Justice Mitchell nearly 4 years ago. I therefore would pay very little regard if any to factual contentions of both parties in so far as they relate to period before August 2003. By virtue of the rule of res judicata, where a final decision of the Court has been pronounced on the merits, any party to such litigation, as against any other party, is estopped in any subsequent litigation from re opening the issues that have been already resolved. There are two reasons for this principle namely the interest of the community in the termination of disputes and in the finality and conclusiveness of decisions; and the right of individuals to be protected from vexatious multiplication of suits and prosecutions.
- [41] It is clear that in the previous suit that by virtue of the judgment of Justice Mitchell, Mr. Shaw was awarded a half share or interest in the property. Further, I have no jurisdiction and cannot seek to go behind Justice Mitchell's judgment in order to attempt to determine

what facts the Court took into consideration this is exclusively the function of an appellate Court; it is no part of my function. The only matter that can properly arise for my determination is whether in view of Justice Mitchell's judgment, through which Mr. Shaw was awarded a half interest in the property, Mr. Shaw is entitled to occupation rents, with effect from the date of the order, if any, in view of the fact that Mrs. Shaw has had exclusive use and occupation of the property since the date of the judgment.

[42] The fact that I was able to observe both parties carefully during their testimony proved very useful. It is clear to me that Mrs. Shaw is still smarting over the decision through which Mr. Shaw was awarded a half share in the property. Generally, I did not find Mrs. Shaw to be either a credible or reliable witness. During her cross examination by Learned Counsel Mr. Fearon she was forced to change positions that she had earlier taken on various matters. In contradistinction, Mr. Shaw was a very forthright and credible witness. He gave the clear impression of being a simple man who merely wished to obtain from Mrs. Shaw his entitlement in the property, in accordance with Justice Mitchell's judgment. Therefore, wherever a conflict arose between Mr. Shaw and Mr. Shaw's evidence, I prefer his evidence and accept it as true.

[43] I have no doubt that Mrs. Shaw, even after Mitchell J's judgment continues to treat the property as her sole property and as stated earlier has had the exclusive use of the property. She unsuccessfully endeavoured to paint a picture of an ill, old woman who at this stage needed help. In any event those are not the overriding issues which the Court should take into consideration, if at all, in its determination of whether she is obliged to pay Mr. Shaw occupation rent for her exclusive use of the property. I note in passing, that Mrs. Shaw even at the date of trial is upset with Mr. Shaw. While I have no doubt that she may have utilized some monies she obtained in order to repair the house and to pay the insurance etc on the property, I am equally satisfied that she having expanded the house has utilized the house exclusively for her own purposes. I am also of the opinion that she is business savvy and has rented out the rooms of the house on a regular basis and she has used the proceeds realized therefrom for her own benefit.

[44] Mrs. Shaw has sought to persuade me that many of her adult children and grandchildren occupy the property. I do not believe her. While from time to time some of them may have lived with her on the property, I have no doubt as stated earlier that she rents rooms in the property, the rents which she has utilized for her own benefit. Further, I do not believe Mrs. Shaw when she says that she occasionally rents some of the rooms of the property for a mere \$150.00 per week. While Mr. Shaw has been unable to provide any credible evidence to substantiate his allegation that Mrs. Shaw earns \$500.00 per week from the rental of each room of the property, based on her evidence taken together with the valuation provided, I have no doubt that at minimum Mrs. Shaw earned \$500.00 per week from renting the rooms in the property and this is a very conservative figure. I believe that the property has 8 rooms. I will round off the figure that Mr. Shaw earns to a monthly sum of \$2,000. There seems to be common ground that the Registrar has ordered that the property be sold. It is against that factual background, I am required to determine the issue as to whether or not Mr. Shaw is entitled to occupation rent.

[45] Further, I am believe that Mr. Shaw sought to show the property to intending purchasers with a view to effecting the sale of the property but was denied entry to the property by Mrs. Shaw. I have no doubt that, for the reasons which are obvious, Mrs. Shaw is not in favour of giving Mr. Shaw his half share in the property as adjudged by the Court; neither is she interested in having the property sold. I do not believe that Mrs. Shaw is genuinely interested in having the property sold even though I am satisfied that recently at the behest of Mr. Shaw the Court granted an Order of the Sale of the property. It is noteworthy that at the date of the trial the property remained unsold meanwhile Mrs. Shaw continues to rent and occupy the property.

[46] Having made my findings of fact above, this brings me now to consider the legal principles that are applicable to the case at bar. It is the law that one co-owner of property who has exclusive possession of the property must account for the occupation rent for using the other's share of the house. It is a recognized principle of law that a co-owner who has the use of the other's share of the property should pay an occupation rent for it. See: **Dennis v McDonald [1981] 1 WLR 811. *ibid.***

[47] Based on the totality of the evidence and in so far as Mrs. Shaw struck me a very strong willed and deliberate lady; she was still visibly angry over the fact that her relationship with Mr. Shaw was ended; I have no reservation in holding that Mr. Shaw is not welcomed back into the property. Accordingly, I am of the view that the principle stated in **Re Pavlou** has no application to the case at bar; it is clearly distinguishable from the case at bar. With respect, I state that most of the cases to which Mr. Tomlinson referred the Court do not assist Mrs. Shaw's claim. I am of the respectful opinion that the cases of **Leigh v Dickeson** *ibid*, **Henderson v Eason** *ibid* are clearly distinguishable from the case at bar. In those cases it was held that the co-owner is not liable to account to the other co-owner for any income and profits derived by the former's own labour. In contradistinction, in the case at bar, the co-owner Mrs. Shaw has derived income from renting the property from which Mr. Shaw excluded; I am therefore of the respectful view that she has to account for half of the income that she has realized from renting the property and I am of the further view that the purpose for which she rented the property is of no moment.

[48] Further, I find the principles enunciated in **Dennis v Mc Donald** *ibid* very helpful. In that case it was held that although the general rule was that each tenant in common had a right to occupy the property and if one voluntarily chose not to exercise that right the other was not liable to pay compensation, a tenant in common who had been excluded from occupation of the property by the other tenant in common was liable to pay compensation. It was further held that the nature of the payment was that of some sort of compensation to be paid by a trustee to a beneficiary for an exclusive enjoyment of the trust property attributable to exclusion on the part of the payer inconsistent with the discharge in due order of the trust; and that therefore, the purpose to which the payer put the property was irrelevant.

[49] In view of the foregoing and applying the principles referred to above and in the interest of justice, I have no doubt that Mrs. Shaw must account to Mr. Shaw for the occupation rent that she obtained from August 23rd, 2003 that is the date of Justice Mitchell's judgment until the sale of the property. Further, I hold that Mr. Shaw is entitled to half of the \$2,000 per month earned by Mrs. Shaw from the rental of the property with effect from the date of

Mitchell J's judgment until the property is sold. For what it is worth, I might add that whether or not Mrs. Shaw has her adult relatives occupy rooms in the property rent free cannot undermine Mr. Shaw's entitlement to receive occupation rent to the extent of half of the rental value of the property. I am of the view, in any event, that \$2,000.00 per month is a reasonable sum for the rental value of the property.

Conclusion

[50] I make the following orders:

- (a) Judgment is given for Mr. Keithroy Romeo Shaw against Mrs. Cynthia Dorothy Shaw.
- (b) I declare and order that Mrs. Cynthia Dorothy Shaw do pay Mr. Keithroy Romeo Shaw occupation rent at a rate of \$1,000 per month with effect from the 23rd August 2003 to the date of the sale of the property described as Registration Section: McKinnons. Block 45 1695B, Parcel 235
- (c) I further order that Mr. Keithroy Romeo Shaw is to have prescribed costs unless otherwise agreed.

[51] I thank both learned counsel for their assistance.

**Louise Esther Blenman
High Court Judge**