



[2016] JMSC Civ. 174

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2014HCV00185**

<b>BETWEEN</b>	<b>HILLERIE DAVIS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>WALSWORTH GEORGE THOMAS</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mr. Michael Palmer Attorney-at-law for the Claimant, instructed by Palmer Smart & Co.

Mr. Zavia Mayne Attorney-at-law for the Defendant

Heard: 11<sup>th</sup> May and 18<sup>th</sup> October 2016

**REAL PROPERTY - AGREEMENT TO PUT CLAIMANT IN POSSESSION -  
CONDUCT OF THE PARTIES IN RELATION TO THE PROPERTY - COMMON  
INTENTION - WHETHER ANIMUS POSSIDENDI PRESENT - WHETHER TITLE  
HOLDER HAS MAINTAINED BENEFICIAL INTEREST - LIMITATIONS OF ACTIONS  
ACT SS 3 AND 30.**

**BERTRAM LINTON, J (Ag.)**

### **Background**

[1] The Defendant bought the property located at Lot 210 Llandilo Housing Scheme, Savanna-la-mar in the parish of Westmoreland, with the assistance of a mortgage loan from the National Housing Trust, and his name was endorsed on the Certificate of Title. He has never lived in the premises as he continued to reside with his former girlfriend and her father. The claimant is a cousin of that former girlfriend.

[2] In or around 1987 the Defendant agreed to allow the Claimant to occupy the property. It was agreed that she would make all monthly payments to the National Housing Trust and between the periods of 1987-2002 the Claimant paid One Hundred and Ninety Four Thousand Ninety Seven dollars and Forty Eight Cents (\$194,097.48) in pursuance of that arrangement.

[3] The defendant has not been back to the property since and the Certificate of Title is still in possession of the National Housing Trust albeit that the mortgage has been discharged.

### **Submissions**

[4] The Claimant gave evidence that sometime in 1981 she met the Defendant who was at the time her cousin Clairia Beharie's boyfriend. She stated that in or around 1987 the Defendant and Clairia Beharie agreed to hand over the property to her and it was agreed that she would make all monthly payments to the National Housing Trust and eventually she would be given legal ownership of the property.

[5] The Claimant purports that during 1987-2002 she paid the monies steadily and in keeping with that agreement and with the expressed understanding of the parties that the place was hers. The defendant she says had made plans to migrate and it was in keeping with those plans that he had told her he was not interested in the premises any longer.

[6] She maintained the house fully, paid all the property taxes, dumped the land with top soil , planted fruit trees and fenced the property all on the understanding that the place was hers.

[7] She says that in a letter dated October 17<sup>th</sup> 1989 the Defendant and her cousin wrote to the manager of the Mortgage Accounts Department of the National Housing Trust requesting that the unit to be handed over to her. This letter is exhibited to her affidavit in support of the matter before the court. It was only after several attempts had failed to get the defendant to do the necessary legalities to

finalize her ownership and transfer title to her that she lodged a caveat against the title in 2000.

[8] The Defendant says that he and Clairra agreed to give the Claimant possession of the property on condition that she pays the utilities, maintain the premises, pay property taxes and the Mortgage sum directly to the National Housing Trust as a consideration or as rent.

[9] Counsel for the Defendant submitted that a landlord and tenant relationship exists between the Claimant and the Defendant and remained in effect until February 10<sup>th</sup>, 2003 when the mortgage on the property was discharged. He denies that any letter was ever signed and submitted to the mortgage company. He says that the defendant has been intimidated to the point where he has been put in fear of his life and this is what caused him not to assert his ownership over the premises.

### **Issues**

[10] 1. What was the True agreement between the parties in relation to ownership of the property and was the conduct of the parties consistent in relation to the agreement?

a. Is the defendant holding the legal estate as a Trustee for the Claimant?

b. Is there the existence of a resulting, implied or constructive trust establishing a beneficial interest in the land/did the Claimant have a beneficial interest in the land under the principles of resulting, implied or constructive trust.

c. Is it inequitable for the legal owner to claim the beneficial interest.

### **Discussion and Analysis**

[11] The property is registered in the name of the defendant, so the legal estate is in his name and prima facie carries with it the complete beneficial interest.

For the claimant to succeed, she must show, on a balance of probability that the registered owner, the defendant holds the legal estate as trustee for her based on the arrangement that they had.

- [12] In **Gissing v Gissing [1970] 3 WLR, 267** Lord Diplock enunciated the principle like this.

*“Any claim to a beneficial interest in land by a person whether spouse or stranger, in whom the legal state is not vested must be based upon the proposition that the person in whom the legal estate is vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as ‘cestui que trust.’”*

- [13] In the absence of a written agreement, the claimant has to establish through the evidence that there was a common intention that the property should be handed over to her, that she acted on this common intention to her detriment in the belief that by doing so she would acquire the complete beneficial interest and that it would be inequitable for the legal owner to claim that beneficial interest. The court would need to look at both the oral and documentary evidence with a view to making a finding of fact as to whether the defendant holds the property as a trustee for the claimant.

- [14] It would be in these circumstances that the court could then decide whether there was the establishment of a trust in the claimant’s favour. That common intention can be proved either by bringing direct evidence or may be inferred from the actions of the parties.

- [15] The authorities reveal that there is a distinction between conduct from which a common intention can be inferred on one hand and conduct on the other hand which demonstrates that a party acted to their detriment in reliance on the common intention ; see **Grant v Edwards [1986] 72 All ER 426**.

**Also In Royes v Campbell SCCA No. 133/2002**, Smith J.A. said,

*“Generally, the common intention can be inferred from expenditure which is referable to the acquisition of the property. If expenditure is shown to be referable to the acquisition of the property, it will perform the two fold*

*function of establishing the common intention and showing that the party had acted on it. Further and importantly, such an expenditure may provide corroboration of direct evidence of intention.”*

**[16]** It is the contention of counsel for the claimant that even though she did not make a contribution to the initial deposit paid to the mortgage company, the mortgage payments played a significant part in the purchase of the property and was undertaken by her because of the arrangement that she had with the defendant. Apart from this, it is the claimant’s contention that the conduct of the parties in their relationship to the property points, on a balance of probabilities, to the agreement as claimed by her.

**[17]** She points to several other things which she contends are referable to a common intention that she should have a 100% beneficial interest in the property and which is accepted by the court;

1. The fact that she consistently made the contributions directly to the National Housing Trust as required under the agreement without any reference to the defendant.

2. The defendant’s letter to the Mortgage Company in 1989, indicating his intention to migrate and asking that the property be “hand(ed) over to Hillerie Davis who is presently occupying unit and paying mortgage payments” which had been prompted by his intention to migrate.

3. The lack of interest by the defendant in visiting or even exercising any proprietary interest in the property consistent with his abandonment of his interest in the property.

4. The fact that she fully maintained the property and made several improvements without reference to the defendant.

[18] The defendant submitted that it was a landlord and tenant relationship that existed between the defendant and the claimant.

In the case of **Bruton v London & Quadrant Housing Trust [2000]1 AC 406** it was stated that

*“ a lease’ or ‘tenancy’ is a contractual binding agreement, not referable to any relationship between the parties by which one person gives another the right to exclusive possession of land for a fixed or otherwise renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant.”*

[19] In the case of **Steadman v. Steadman [1947] 2 All ER 977** it was held that the alleged acts of part performance had to be considered in their surrounding circumstances and, if they pointed on a balance of probabilities to some contract between the parties and either showed the nature of or were consistent with the oral agreement alleged then there was sufficient part performance of the agreement.

[20] In light of these cases and the evidence presented, no landlord and tenant relationship has been shown, as the formalities required for the creation of a lease or tenancy were not met. Even if it is established that the payment of the NHT money is considered to be rent there is no evidence to show how long the Claimant was to be in possession. It lacked certainty of duration and as such no landlord and tenant relationship was created.

### **Findings**

[21] It is my finding that the principle of part performance would not be favorable to the Defendant to prove he was indeed a landlord. The evidence of the defendant does not support that there was a binding agreement, and there were insufficient acts of part performance and that these acts did not indicate the existence of an agreement and are consistent with the agreement. The defendant has not carried out any acts which would depict that he is exercising his role as a landlord. The evidence revealed that he had not visited the property in over 10 years and if he was indeed a landlord he would have done so.

**[22]** It is my finding that the conduct of the parties indicated an agreement that the property would be transferred to the Claimant and that she was not a tenant. Even after the mortgage was discharged the Claimant was still in possession of the property therefore if there was no agreement she would have been a squatter and the defendant entitled to remove her and the evidence did not support this. I therefore resolve the issues in favour of the claimant after a full examination of both the oral and documentary evidence.

**[23]** The claimant has indeed established to the satisfaction of this court that on a balance of probability the defendant holds the legal estate in trust for her.

I would therefore order as follows:-

1. The Claimant is entitled to 100% interest in all that parcel of land part of Llandilo Pen in the parish of Westmoreland being the lot numbered 210 and all the land comprised in Certificate of Title registered at Volume 1223 Folio 539.
2. The Registrar of the Supreme Court is empowered to execute on behalf of the defendant any document or documents necessary to be executed by the defendant for the transfer of all that parcel of land registered at Volume 1223 Folio 539 to the claimant.
3. The duplicate Certificate of Title for the premises is to be provided upon request by the National Housing Trust to the attorney at law for the claimant or by such persons or institutions in possession of same.
4. Costs awarded to the Claimant to be agreed or taxed