



[2017] JMSC Civ 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2012 HCV03567

BETWEEN	NOEL ESTY	CLAIMANT
AND	ANDREW ESTY	DEFENDANT

Joint Tenancy - Divison of property - ConstructiveTrust

Ms Ayana Thomas from Nunes Schoffield and Deleon and Co for the Claimant

Mr Emile Leiba and Mr Jonathan Morgan from Dunn Cox for the Defendant

Heard: 1st November 2016, 2nd November 2016 & 3rd February, 2017.

Shelly-Williams J

BACKGROUND

[1] The Claimant and the Defendant are brothers and are the registered joint proprietors of property located at Lot 27 Belmont Park, Old Harbour in the parish of St Catherine registered at Volume 1055 Folio 525 of the Register Book of Titles (Lot 27). The Title for Lot 27 states that the property was transferred by way of gift registered on the 29th of November 2006 to Roland Walter Esty, Noel Esty and Andrew Esty.

[2] The father of the Claimant and the Defendant Mr Roland Esty had four children namely Noel Esty Andrew Esty Sandra Esty and Sonja Esty. Mr Roland Esty died on the 21st of February 2010 and all four siblings who reside in England returned to Jamaica for the funeral. Whilst in Jamaica the four siblings visited Lot

27 and a decision was made to repair and rent the said premises. How the decision was taken is a point of dispute.

[3] Lot 27 was indeed repaired and rented for a period of approximately one year namely from December 2011 to January 2013 for the sum of \$45,000 per month. The Claimant and the Defendant contribute to the repairs of Lot 27, however the exact sum is in issue.

[4] On the 26th of June 20102 the Claimant Mr Noel Esty filed a Fixed Date Claim Form seeking orders that;-

- a. That the Defendant Andrew Esty account to the Claimant Noel Esty for half of all rent collected from the said property for the period January 2011 to the date of Judgement.
- b. That the Defendant Andrew Esty pays to the Claimant, Noel Esty the sum of 300 pounds being half the sums lent by the Claimant to the Defendant for repairing the said property.
- c. A declaration that Noel Esty, has a 50% interest in property located at 27 Belmont Park, Old Harbour in the parish of St Catherine and registered at Volume 1055 Folio 535 of the Register Book of Titles.
- d. That the property located at 27 Belmont Park, Old Harbour Park in the parish of St Catherine and registered at Volume 1055 Folio 535 of the Register Book of Titles be sold by private treaty pursuant to section 3 and 4 of the Partition Act.
- e. That Nunes Scholefield and DeLeon & Co have carriage of sale for the sale of the property registered at Volume 1055 Folio 535 of the Register Book of Titles.
- f. That all cost incidental to the sale of the said property including but not limited to the payment of transfer tax, stamp duty, real estate agent and Attorney's fees be borne by both Noel Esty and Andrew Esty.
- g. That the net proceeds from the sale of property registered at Volume 1055 Folio 535 of the Register Book of Titles be distributed equally between Noel Esty and Andrew Esty the registered owners of the said property.

- h. If the Defendant Andrew Esty is unable, refuses or is unwilling to sign any and all documents to make effective any and all orders of the Honourable Court, then the Registrar of the Supreme Court is empowered to sign any and all documents to make effective any and all orders of the Honourable Court.
- i. That the costs of this Application be borne equally by both Noel Esty and Andrew Esty.
- j. Such further order as this Honourable Court may deem just.

[5] The Claimant filed two affidavits in support of his claim for the declaration he is seeking. The Defendant filed two affidavits in response to this claim asserting among other things that the Claimant and the Defendant held the property in their own legal capacity and on Trust for their two other siblings.

Facts not In Dispute

- [6] There are a number of facts that are not in dispute. These include:-
- a. That there is no written document that establishes a trust between Noel Esty, Andrew Esty, Sandra Esty and Sonya Esty.
 - b. There is a Title that has only Noel Esty and Andrew Esty registered as Joint Tenants.
 - c. Sandra Esty and Sonya Esty were not joined as parties to the claim before the court. Sandra Esty and Sonya Esty had filed affidavits in the claim but they failed to attend court and as such their affidavits were not considered.

Claimant's Case

[7] The Claimant's case is that in 2006 his father Roland Esty placed Lot 27 in the names of the Claimant, the Defendant and Roland Esty as joint tenants. Mr Roland Esty died in 2010 and as such the Claimant and the Defendant are the registered joint tenants of the said property. At no time neither before the signing of the transfer, at the time of signing the transfer nor after the signing did his

father indicate to him that he was to hold any part of Lot 27 on trust for his two sisters.

[8] On the death of his father all four siblings journeyed to Jamaica to attend their father's funeral. Whilst In Jamaica the Claimant and the Defendant had a discussion about repairing and renting Lot 27. A visit was made to Lot 27 when it was agreed as to what repairs were to be made. Subsequent to that visit on the return to England of the parties he, the Claimant, contributed the sum of 600 pounds towards the repairs of Lot 27.

[9] The Defendant is the one who undertook the repairs and the said property was subsequently rented. The Claimant asserts that a bank account was opened with his assistance and the proceeds of the rent were placed in the bank account. His evidence is that he never received any payments from the rent and as such he is asking the Defendant to account for the rent. The Claimant's evidence is that at no time after the death of his father did he agree with the Defendant and his sisters that his sisters were entitled to any portion of Lot 27, nor were his sisters to benefit in any way from Lot 27. He claims that he is entitled to half the value of the property and as such he asked the court for such a declaration and an order for the sale of the property.

Defendant's Case

[10] The Defendant contends that prior to the transfer of the property to himself and the Claimant their father had indicated to both of them that the property was to be for the benefit of all four siblings namely the Claimant, the Defendant and their two sisters. He contended that the only reason the property had not been placed in the names of all four siblings is that his sisters were experiencing financial problems and were unable to journey to Jamaica to sign the transfer documents. His evidence is that after the death of their father in 2010 all four siblings journeyed to Jamaica for the funeral. Whilst in Jamaica all four siblings first discussed, then went to Lot 27 and agreed on the repairs to the said property.

After their return to England the evidence of the Defendant is that he received the sum of:-

- a. 200 pounds from the Claimant towards the repairs of Lot 27.
- b. 1,000 pounds from each sister towards the repairs.
- c. He contributed the sum of 1,800 pounds towards the repairs.

[11] Lot 27 was repaired and the Defendant produced a number of Western Union receipts and receipts from National Commercial Bank amounting to 3,335.77 pounds in support of this evidence. Subsequent to the property being repaired it was rented for approximately one year i.e. from December 2011 to January 2013 at the sum of \$45,000 per month. The rent was placed in a bank account that was opened firstly in his name alone but later his sister Sandra Esty's name was added to it. The Defendant had been invited by the Claimant to add his name to the account however the Claimant did not have the documentation to do so.

[12] The Defendant gave evidence he had accounted for the rental income. There was no rent collected for the period October to November 2012 as the tenants failed to pay their rent. He contended that rental income was distributed between the four siblings for four months namely February 2012 and July to September 2012. The remainder of the rental income was used to make repairs to Lot 27.

Issues

[13] The issues to be decided by the courts are:-

- a. Whether the court has jurisdiction to declare that a trust had been created as the persons who are claiming the trust were not joined as parties to the claim.
- b. Whether a trust had been established.
- c. Whether the Claimant is entitled to 50% of the value of Lot 27.
- d. Whether the Claimant is to received 50% of the rental income from the said property.

Analysis Jurisdiction

[14] The Claimant contends that the issue of whether a trust had been established is not one that should be entertained by the court as the siblings who ought to have claimed were not made parties to the Claim. Counsel for the Claimant argued that Section 19 of the Civil Procedure Rules detailed the procedure by which a party can be joined to a claim. This was not pursued and as such the court has no jurisdiction to make such a declaration in this case. In support of her submission counsel for the Claimant relied on the case of Eric McCalla, Jenice McCalla, Jeffery McCalla v Grace McCalla [2012] JMCA Civ 31.

[15] The issue to be decided is whether a court can make any decision concerning a constructive trust if the persons claiming to be the beneficiaries under the trust have not been joined as parties in the claim. If a party wishes to prefer a claim before the court or to contest a claim before the court they are required to be joined as party to the claim. Section 19.3 of the Civil Procedure Code outlines with the procedure to add and substitute parties in a claim. Section 19.3 states that:-

- (1) The court may add, substitute or remove a party on or without an application.
- (2) An application for permission to add, substitute or remove a party may be made by:
 - a. An existing party; or
 - b. A person who wishes to become a party.

[16] If a person is not joined as a party to the claim then the court would lack the jurisdiction to make orders concerning that person. This point was highlighted in the case of McCalla v McCalla (supra). The facts of that case were that the Claimant had filed a suit claiming that she had an interest in a property where she had resided with her husband. She had contended that the property belonged to her and claimed that she paid the escalating fees for the property, paid the mortgage for the property, made additions to the property and as such asked the court for a declaration that the property was being held in trust for her

and her husband. Her husband was one of the Defendants in the Claim and maintained that the property was leased by himself and the Claimant and as such they had no interest in the property. Sykes J found for the Claimant and awarded 50% of the property to the Claimant and 50% to the Defendant Jefferey McCalla. On appeal McIntosh JA at paragraph 46 of the decision stated that:-

*“It is also my opinion that the learned trial judge lacked the jurisdiction to make the orders that he made with respect to Jefferey including the order giving him time to acquire interest (and vice versa). If he was correct in finding that Grace was beneficially entitled to a 50% interest, then the remaining 50% would have to revert to the registered proprietors (see the judgment of **Lord Reid in Vandervell** at page 307 (G) to 308(A).*

[17] In this case, the sisters of the Claimant were not joined as parties in the claim. They would have been the ones to raise the claim for Constructive Trust. The Defendant raised the issue that he and the Claimant held the property for themselves and on trust for his two sisters. The Defendant however is before the court in his personal capacity only and made no attempt to be joined in the capacity as a Trustee on behalf of his sisters. He has never indicated in his evidence that he is appearing on behalf of his sisters nor that he had the permission of his sisters to make the claim on their behalf.

[18] In light of this, despite the evidence that the sisters of the Claimant would have acted in to their detriment in relation to Lot 27, the court would not have the requisite jurisdiction to make any declarations in relation to the two sisters of the Claimant and the Defendant. The court would not have jurisdiction to make a declaration in relation to constructive trust as it has not been properly raised.

Is the Claimant the Owner of 50 Percent of the Property?

19] In this case the Claimant asserts that he is registered as the Joint Tenant of Lot 27 with the Defendant. He is claiming that he has equal legal and beneficial

interest in Lot 27 and as such he is asking the court to make a declaration of his fifty (50%) interest. The Claimant has made this application pursuant to the Partition Act.

[20] Joint tenancy is described in Osborn's Concise Law Dictionary as being 'a form of co-ownership in which two or more persons are each regarded as being wholly entitled to the whole property. On the death of one of the joint owners (or tenants) the property remains vested in the survivors by right of survivorship (jus accrescendi).'

[21] The Partition Act details the method by which a property that is jointly owned can be separated by the parties. Section 3 of the Acts states:-

"In a suit of partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the numbers of the parties interested or presumptively interested therein, or of the absence of disability of some of those parties, or of any other circumstances, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

[22] Section 4 of the said Act states how a party can apply to the court for the division of the property. Section 4 states:-

"In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property, and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions."

[23] The starting point in such cases as outlined in **Stack v Dowden**[2007] UKHL 17 is that where there is joint legal ownership this raises a strong presumption of joint beneficial ownership. In determining the parties' intentions, the court may consider a wide range of factors. Thus at paragraph 69 Baroness Hale in **Stack v Dowden** states:

"In law, "context is everything" and each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home.

The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then."

[24] In this case the property was transferred in the name of Roland Esty, the Claimant and the Defendant as joint tenants by their father for love and affection. There was no payment of any sums by either the Claimant or the Defendant at the time of the acquisition of the property. On the death of Roland Esty the Claimant and the Defendant are the persons named on the property as joint tenants. The starting point in relation to interest of the Claimant and the Defendant as joint tenants would be 50%. The only evidence presented to the court to change that position was that repairs were made to Lot 27. In an effort as ascertain to whether the repairs amended the interest of the parties I looked at the type of repairs and manner in which the repairs were undertaken.

- [25] The repairs undertaken on the property included:-
- a. a gate that was constructed and erected.
 - b. Fencing which consisted of post and barbwire which was erected around Lot 27.
 - c. repairs or construction of a soak away in 2013.
 - d. redecorating of the property in 2014.
 - e. repairs to the roof.
 - f. the painting of Lot 27.

I find that the repairs undertaken on Lot 27 with the agreement of both parties do not appear to have been of a substantial nature and as such would not amend the 50% interest in the property of the Claimant and the Defendant. I would however deduct the sums contributed by each party to the repairs from the net proceeds of the sale of Lot 27.

What are the contributions?

[26] The exact cost of the repairs were not detailed however the Defendant placed into evidence a number of receipts from Western Union and from National Commercial Bank showing varying sums sent to Jamaica by Sandra Esty. The Defendant gave evidence that most of the sums that were sent to Jamaica were for the repairs to Lot 27. The sums forwarded to Jamaica by Western Union and

by National Commercial Bank transfer amounted to 3,335 pounds. The evidence from the Defendant is that he contributed among other sums the amount of 1,800 pounds towards the repairs. The source of the funds was an investment account that he had. The Defendant also gave evidence that his sisters contributed the sums of 1,000 pounds each towards the repairs.

[27] The evidence from the Claimant is that he contributed 600 pounds to the repairs of Lot 27. That sum was contested by the Defendant who gave evidence that the Claimant gave him the sum of 200 pounds towards the repairs of the said property of which he the Defendant repaid 40 pounds.

[28] There no documentary evidence from either the Claimant or the Defendant as to the sums they personally contributed to the repairs of Lot 27. The only evidence is from the Western Union receipts and the receipts from the National Commercial Bank. Whether I accept that repairs were done on Lot 27 and the amounts that were used for these repairs had be decided on a matter of credibility of the witnesses.

[29] The evidence of the Defendant is that the he and his sisters were the ones who:-

- a. hired the work men,
- b. paid the workmen,
- c. found the agent who assisted in the rental of the property.
- d. sited Jamaica along with his sister Sandra in relation to these repairs.

[30] I found the Defendant to be a forthright honest witness. Whenever he was unable to remember any details of events he would say so. The Defendant had relied on his sister Sandra Esty in relation to some of the repairs and the distribution of rental income for Lot 27 and he indicated this to the court. I find that the Defendant did contribute the sum of 1,800 pounds towards the repairs to Lot 27 and that his sisters contributed the sums of 2,000 pounds towards these repairs.

[31] The Claimant in his evidence stated that he had contributed the sum of 600 pounds to the repairs to Lot 27. His evidence was that he was unable to contribute any more as it would be taking from his children. He further stated that he asked for the return of the 600 pounds and had arranged with the Defendant through his sister Sandra for its return. He had been repaid the sum of 40 pounds. The Defendant gave evidence that the Claimant contributed the sum of 200 pounds to the repairs.

[32] In giving evidence, I found the Claimant hesitant and appeared to struggle with the truth. The Claimant gave evidence for instance that there was no discussion or agreement between himself, his brother the Defendant and his sisters about the repairs of the house. When pressed in cross-examination he agreed that all four siblings went to Lot 27, that he was present when there was a conversation about the repairs to the property however, he did not take part in the conversation. I did not find that the Claimant to be a credible witness and I accept the evidence of the Defendant that the Claimant only contributed the sum of 200 pounds towards the repairs 40 pounds of which been repaid.

[33] The only remaining sum that that was expended for the repairs of Lot 27 was 2,000 pounds that the Defendant asserts that his sisters contributed. The Claimant denies that his sisters paid any sums in relation to the property. I find based on the evidence of the Defendant that the sum of 2,000 pounds was expended for the repairs and as such that sum should be repaid to the Defendant.

Whether The Claimant Should Receive 50% Of The Rental Income?

[34] The Claimant has asked the Defendant to account for the rental income for Lot 27 as he is entitled to half of it. The property was rented during the period of December 2011 to January 2013. The Defendant accounted for the rent in this manner:-

- a. The tenants failed to pay rent for the period October and November 2012.

- b. The rent was distributed between the four siblings over a four months period i.e in February 2012 and July to September 2012.
- c. The remainder of the rental income was used to make repairs to Lot 27.

[35] The Claimant gave evidence that he did not receive any rental income from Lot 27. He gave evidence that his sister Sandra had sent two packages to him by means of recorded delivery however he did not receive any money in those packages. His evidence that he was informed of a third package but his evidence is that it was sent to the wrong address. Sandra Esty did not give any evidence in relation to the distribution of rent and the Defendant gave evidence that he relied on his sister to send the rental income to the Claimant. I find that the Claimant appeared to less than truthful when he gave answers to the questions relating to the rent, however in the absence of any direct evidence from Sandra Esty I have nothing to refute this evidence. I accept the evidence of the Defendant that rent was only distributed for four months and therefore I find that the Claimant is to receive the sum of \$90,000 which is the half the rent for four months period. The remainder of the rent was used for the repairs of Lot 27 from which the Claimant is to benefit.

Conclusion

[36] Pursuant to the Partition Act Lot 27 is to be sold and the proceeds of the sale to be divided equally between the parties ie that the Claimant is entitled to 50% and the Defendant 50%. The parties are to be repaid the sums they contributed to the repairs of Lot 27. The Claimant is to receive 160 pounds and the Defendant the sum of 3,800 pounds. The refunds are to be paid from the net proceeds of the sale of the property prior to the division. The Claimant is entitled to the sum of \$90,000 which is half the rental income for four months which is to be paid from the net proceeds of the sale of Lot 27.

[37] The order of the court is that:

1. The Claimant is entitled to 50% of the property located at 27 Belmont Park Old Harbour in the Parish of Saint Catherine and registered at Volume 1055 Folio 535 of the Register Book of Titles.
2. That the said property is to be sold by private treaty pursuant to Section 3 and 4 of the Partition Act.
3. That the Claimant is to be paid the sums of 160 pounds representing his contribution to the repairs of the said property and \$90,000 representing rental income from the net proceeds of the sale of the said property.
4. That the Defendant is to be paid the sum of 3,800 pounds representing his contribution to the repairs of the said property.
5. Nunes Scholefield and DeLeon & Co have carriage of sale for the sale of the property registered at Volume 1055 Folio 535 of the Register Book of Titles.
6. That all cost incidental to the sale of the said property including but not limited to the payment of transfer tax, stamp duty, real estate agent and Attorney's fees be taken from the net proceeds of the sale of the property.
7. That the net proceeds from the sale of property registered at Volume 1055 Folio 535 of the Register Book of Titles be distributed with 50% to Noel Esty and 50% to Andrew Esty.
8. If the Defendant Andrew Esty is unable, refuses or is unwilling to sign any and all documents to make effective any and all orders of the Honourable Court, then the Registrar of the Supreme Court is empowered to sign any and all documents to make effective any and all orders of the Honourable Court.
9. Each party to bear their own cost.