



[2022] JMSC Civ. 95

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 01002

BETWEEN	GAIRY GRENNAN	CLAIMANT
AND	DENISE HENDRICKS-OGILVIE	1ST DEFENDANT
AND	ASTON PINNOCK	2ND DEFENDANT

IN CHAMBERS

Mr. Lemar Neale instructed by Nea|Lex, Attorneys-at-Law for the Claimant

Dr. Mario Anderson instructed by the Kingston Legal Aid Clinic Limited for the 1st Defendant

Heard: February 16, 2022, June 3 and 10, 2022

Equity - Constructive Trust – Purchase of land – Construction of house – Conduct of parties

WILTSHIRE J.

Background

[1] This matter is before the court by way of Fixed Date Claim Form filed on the 12th of March 2019 where the Claimant, Gairy Grennan claimed relief against the 1st Defendant, Denise Hendricks-Ogilvie and the 2nd Defendant Aston Pinnock. The relief sought was as follows:

1. A declaration that the Claimant is the sole beneficial owner of ALL THAT parcel of land part of CURATOE HILL in the parish of Clarendon registered at Volume 1399 Folio 163 of the Register Book of Titles (hereinafter called the "said property")
2. A declaration that the Defendants hold their interest in the said property on constructive trust for the Claimant.
3. An order that the Defendants shall execute a transfer of the said property to the Claimant and deliver up the Duplicate Certificate of Title to the Claimant's Attorney-at-Law to facilitate the said transfer thereof within seven (7) days of the date of the order.
4. An order that the Registrar of the Supreme Court is empowered to sign any transfer or other document to give effect to the transfer of the said property in the event that the Defendants shall fail, refuse and/or neglect to execute the transfer.
5. In the alternative, a declaration that the Claimant is entitled to 90% interest in the said property or such interest as this Honourable Court shall determine.
6. An order that the property be valued by a valuator agreed by the parties and the costs borne equally by the parties and in the event that the parties cannot agree a valuator within seven (7) days of the date of the order, a valuator shall be appointed by the Court.
7. An order that the Claimant be given the first option to purchase the Defendants' interest in the said property within ninety (90) days of the date of the order.

Claimant's Case

- [2] The 1st Defendant is his sister and the 2nd Defendant is his stepfather. His evidence is that the 1st Defendant qualified for a loan from the National Housing Trust, but she was not interested in the benefit as she did not have the capital to deal with a property. He gave evidence that he told her to take the loan, which she did, but he is the one who has been paying the mortgage to National Housing Trust, hereafter referred to as NHT.
- [3] He stated that the 1st Defendant identified a lot that was priced at J\$566,000.00 and she informed him that the deposit was about J\$270,000.000. He sent the deposit through Western Union to purchase it and further sent \$3000.00 monthly, initially to the 1st Defendant on a monthly basis to repay the loan from NHT, and then to the 2nd Defendant after the 1st Defendant failed to present proper receipts.
- [4] He said that in 2005/2006 he instructed the 2nd Defendant to start digging the foundation for the construction of a house on the property. The 2nd Defendant was in charge of the construction, so he would secure the workmen and oversee the construction. He sent money to the 2nd Defendant, through Western Union, to purchase material for the construction and pay the workmen on the construction site. It was his evidence that the 1st Defendant understood that she was doing this on his behalf and there was no intention on her part to have any interest in the said property.
- [5] When the building was almost complete he needed to obtain a loan for the decking so he asked the 1st Defendant to obtain a loan for his sole benefit sometime between 2005 and 2006. The evidence is that the 1st Defendant was only able to get J\$450,000.00 from the NHT and it was revealed that they disbursed about J\$428,400 plus 5% of the sum. He gave evidence that this was still not enough to complete the decking hence he put in additional funds. He said that he is currently repaying J\$5000 per month as a result of the combination of the construction loan and the mortgage.

- [6] He said that he travelled to Jamaica in 2018 and told the 1st Defendant that he wanted the title to be put in his name, and she never expressed any objection to this request. The 1st Defendant informed him that her contribution amounted to J\$600,000.00, and he was about to pay over this amount but she changed her mind and demanded that he buy her a house instead. He told the 1st Defendant that he could not do that and she refused to transfer the property to him. A valuation was done which showed that the land was worth J\$18,000,000.00, and it was from the valuation that he discovered that the property was registered in the Defendants' names.
- [7] His mother, stepfather, and sister all live on the property with his consent and he stated that he gave the 1st Defendant a one bedroom, one bathroom and kitchen apartment in the house. He testified that the money he sent was not to take care of bills because his mother, stepfather and sister worked and would therefore be able to take care of the bills. He further testified that he paid property taxes with money that was sent through Western Union and from the rental earned from the house.
- [8] Under cross examination the Claimant indicated that he had sent the deposit for the land to the 2nd Defendant but he could not recall the exact time that he sent it. He denied that it was in 2001 and then said that he was not sure if he had sent money in 2001 or 2002. He said that he had not seen or signed any documents relating to the purchase.
- [9] He stated that he did not need permission to build as he was the one paying for the land. He was paying the mortgage which he sent every month to the 1st and 2nd Defendants, but most of the receipts exhibited would be to the 2nd Defendant. It was sometime in 2006 that he asked the 2nd Defendant to handle paying over the mortgage sums to NHT.
- [10] He denied that there was a family agreement that his mother, stepfather and sister would get the property or have an interest in the property. He denied that his sister

contributed any money or paid the property taxes. In response to the court's question as to the first time he sent money in relation to the property, the Claimant answered that it was in 2006. Under re-examination he was asked to clarify said response to the court in light of his earlier evidence that he sent money for construction in 2005/2006. He indicated that he had sent money earlier, prior to construction.

Defendants' Case

- [11] The 2nd Defendant did not file an affidavit in response to the claim and has therefore not challenged the Claimant's assertions. However, the 1st Defendant testified that she worked as a machine operator for 17 ½ years and contributed to the NHT. She stated that in 2006 she was contacted by NHT and told that she had qualified for a piece of land in Mineral Heights. She told them she was interested and would purchase the land.
- [12] She testified that the land cost \$620,000.00 and she would have to make a down payment of \$213,000.00. She therefore contacted her husband who lives in Canada and told him she would need the money for the down payment. He sent the money via Western Union and the mortgage was calculated at \$1177.98 by way of salary deduction. She stated, however, that her husband did not want any interest in the property.
- [13] Her evidence was that she required a co-owner to purchase the property, so she added the 2nd Defendant, her step father, to the title but he was never involved in making any financial contribution. In 2007 NHT called her again and told her that she qualified for a construction loan and she told them that she was interested and would take it at a later date. That same year she was informed that the Claimant was digging the foundation to construct a house. She said that the Claimant was told about the land by her stepfather and he gave the Claimant approval to start construction.

- [14]** She gave evidence that she asked her stepfather what was going on and he said the Claimant told him to build a house. On hearing this, her evidence was that she told her stepfather that she had plans to build a one bedroom apartment with a kitchen and a bathroom. She went back to NHT and obtained the loan in the sum of \$420,000.00 which was disbursed over a period of time as the construction progressed. The 1st Defendant stated that the Claimant did not make any contributions towards the building of her house or the payments to the workers. She said that the money for the workers came from her husband.
- [15]** She further testified that on about four occasions she collected money sent by the Claimant and handed that money to their mother as he instructed. The money received from the Claimant was not intended to pay NHT or the construction loan, as she was the one who paid for those from her salary.
- [16]** In 2014, the Claimant let her know that his realtor would come to speak to her with regards to transferring the property to him. She refused to have the conversation with the realtor and told the Claimant that she was not signing any papers as she did not know what it was about. It was her evidence that this was around the time that she stopped working at the factory. She said that in 2018 the Claimant came back to Jamaica and proposed to give her \$600,000.00 as that was the value of the land when she got it. She refused the offer and told the Claimant that he should instead purchase a house for her and then she would sign over the documents to him.
- [17]** She stated that she never objected to the Claimant digging a foundation to build as he was doing it for their mother and stepfather. It was never her intention to build a ten (10) bedroom house, but she informed the Claimant that she had an intention of building a one bedroom one bathroom and he didn't object. She agreed that the Claimant sent money to her to give the 2nd Defendant for the construction and said that she did not contribute to the ten (10) bedroom construction but to her one bedroom and bathroom area. The workmen who completed the nine (9) bedrooms outside of her one bedroom, one bathroom and kitchen also constructed

her area as it was all done in one but she was paying the workmen separately for her work.

- [18] She also testified that after she stopped working in or about 2014 it was either her or her daughter who was responsible for paying the mortgage. She gave evidence that she and the Claimant had agreed that she would sign over the property to him on the condition that he build her a house, however, he changed his mind. She said that she told him that if he bought her a three (3) bedroom house she would leave everything 'give him'. She stated that she owned the entire property.
- [19] The court asked the 1st Defendant to explain to which house she was referring when she said that her brother had not made a contribution to her house and she responded that she was talking about her one bedroom, one bathroom and kitchen area.

Claimant's Submissions

- [20] Counsel for the Claimant has submitted that the Defendants hold their interest in the property on a constructive trust for the Claimant and cites, for support, the Halsbury's Law of England Volume 47 at paragraph 230, which states that,

“a constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee of an interest in it for another”

- [21] Counsel for the Claimant argues that there is an absence of documentary evidence to prove that the 1st Defendant's husband paid for either the deposit or the construction loan. Additionally, counsel submits that the Claimant's credibility has not been eroded under cross-examination as he maintains that he did not give the property to his parents or sister and that he is still paying for the property.
- [22] It is counsel's position that his not signing a document or having any paperwork is not relevant to the claim for an interest in the property as a constructive trust

recognizes that the Claimant is not the legal owner and he is contending that the Defendants hold their interest on trust for him. Counsel submits that the 1st Defendant demonstrates her intention for the Claimant to benefit by her evidence that when she discovered that the Claimant was digging the foundation she didn't have time to oversee the land, which is not consistent with a person who has sole interest in her land.

[23] Counsel points the court to the multiple times the Claimant wanted to show his interest in the land from 2012 to now and the fact that the 1st Defendant refused his offer of \$600,000.00 and told the Claimant that he has to buy her a house before she would sign over the house to him. It is submitted that this is indicative of the Claimant being entitled to the property.

[24] The court is also being asked to consider the 1st Defendant's evidence that her husband sent the money for the deposit but he did not want any interest in the property and also that she has stopped working since 2014 and has managed to pay the mortgage since then. Counsel argues that the 1st Defendant hasn't produced any evidence that she is repaying the mortgage and submits that such evidence would be easily obtainable since the mortgage is in her name. Further, that the court should also consider that despite her admission that it was never her intention to build a ten (10) bedroom house, she is claiming to own the whole house.

[25] Counsel highlights the evidence that the Claimant contributed a substantial amount to the construction of the structure on the property and submits that it can be inferred that having incurred this substantial expense, which would be to his detriment, there was an agreement or an arrangement or understanding that he would benefit solely. It is further submitted that the common intention can also be inferred from the 1st Defendant's conduct, and the 2nd Defendant not defending the claim.

Defendant's Submissions

- [26]** Counsel for the 1st Defendant submits that the Claimant has made no claims or allegations of fraud and thus it is clear that the Defendants are entitled to the legal interest in the property absolutely. Counsel relies on sections 68, 70 and 71 of the Registration of Titles Act while making this point. Counsel notes that this does not negate the fact that the Claimant has a claim in equity, but he would have to give clear evidence to establish a basis for this claim.
- [27]** Counsel contends that the Claimant has provided no evidence of monies sent in 2001 to purchase the property. Further that there is no question that the 1st Defendant took out a mortgage with NHT in 2001 and then a construction loan in 2005 which she repaid with no assistance from the Claimant.
- [28]** Counsel further contends that there is little to no evidence that shows that the Claimant sent money via remittance services for the mortgage or the construction of the rooms. It is argued that the Claimant must establish that the Defendants by their words or conduct induced the Claimant to act to his detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land. Counsel submits that no evidence has been led to provide a basis that the Claimant has a beneficial interest in the property and it would seem as though the claim was based solely on the number of rooms occupied by the parties, and that cannot be what determines interest. Counsel submits therefore that the Defendants did not hold the property on constructive trust for him.
- [29]** Counsel also argues that the Claimant resides and works abroad and has never lived at the property, while the 1st Defendant has been in possession since 2001 and has live there undisturbed therefore, the Claimant abandoned any interest he might have had or the 1st Defendant dispossessed him of same.

Issues

- [30]** The sole issue for this court's determination is whether the Claimant has any beneficial interest in the property.

Law and Analysis

[31] In **Gissing v Gissing** [1971] AC 886, Lord Diplock, in directing attention to the principles applicable to claim trust in favour of a person claiming beneficial interest in property, noted at pages 904-905:

“Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of ‘resulting, implied or constructive trusts.’...

A resulting, implied or constructive trusts – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.”

[32] In our own jurisdiction McIntosh JA stated, in **Eric McCalla & Ors v Grace McCalla** [2012] JMCA Civ 31, that,

“It is settled law, approved and applied in this jurisdiction in cases such as Azan v Azan (1985) 25 JLR 301, that where the legal estate in property is vested in the name of one person (the legal owner) and a beneficial interest in that property is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties.”

[33] The case of **Grant v Edwards** (1986) 2 All ER 426 provides guidance for the determination of common intention. In said case Sir Nicholas Brown Wilkinson referred to Lord Diplock in **Gissing v Gissing (supra)** as establishing the following elements for the courts to consider,

“The proof of the common intention:

(a) Direct evidence (905H):

It is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissability and relevance of other possible forms of direct evidence of such intention: see at page 907C and page 908C;

(b) Inferred common intention (906A-908D):

Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts

are most often asked to infer such intention viz. contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.”

- [34] In the case at bar the Claimant bears the burden of proving that he has a beneficial interest and therefore must satisfy me, on a balance of probabilities, that there was a common intention. Were express words used? Based on Lloyd’s Bank Plc v Rossett [1991] 1AC 107, did the parties prior to acquisition, or at some later date have an agreement to share in the beneficial interest based on evidence of express discussions or an agreement or an arrangement “however imperfectly remembered and however imprecise the terms”. Whilst the Claimant is adamant that the 1st Defendant had agreed to obtain the property for him through her NHT benefit, the 1st Defendant is equally adamant that there was no such agreement and the property is hers.
- [35] The court must therefore rely entirely on the conduct of the parties to determine whether an inference can be drawn of a common intention to share the property beneficially and whether there was a reliance on said conduct by the Claimant which resulted in his acting to his detriment. The conduct to be examined include payments towards the acquisition and maintenance of the property, the mortgage and any construction undertaken.
- [36] It is of note that the Claimant’s evidence is that the property was purchased and he subsequently sent the sum of J\$3000.00 on a monthly basis starting in 2001 to the 1st Defendant to repay the loan to NHT. Under cross examination he stated that he sent the deposit through Western Union to the 2nd Defendant but he was not sure if that was in 2001 or 2002.

- [37]** The Claimant referred to receipts from Western Union which were admitted into evidence but these receipts are for periods commencing in 2004. He acknowledged that the receipts are mostly to the 2nd Defendant and explained that because the 1st Defendant had not been presenting proper receipts for the NHT payments, he stopped sending the money to her and sent it to the 2nd Defendant instead.
- [38]** The 1st Defendant stated that she was contacted by NHT in 2006, got the deposit from her husband and thereafter the monthly mortgage payments were deducted from her salary. The Claimant does not deny these salary deductions, but stated that he sent the monies to the 1st Defendant so she was not left out of pocket.
- [39]** There is a discrepancy in the evidence regarding the date of the purchase of the property. Based on the Claimant's evidence it was in 2001 and this was not challenged by the 1st Defendant. Based on the 1st Defendant's evidence it was in 2006, and that was not challenged by the Claimant. The Claimant has relied on the property's Certificate of Title registered at Volume 1399 and Folio 163, which was admitted into evidence. That document shows the transfer to the 1st and 2nd Defendants registered and endorsed on the 4th December, 2006.
- [40]** Regarding the commencement of construction, the Claimant said it was in 2005/2006 but the 1st Defendant said it was in 2007. If reliance is placed on the Certificate of Title, the evidence therein is more consistent with the time lines given by the 1st Defendant. The Claimant could not remember the date when the property was purchased or when exactly he sent the deposit to the 2nd Defendant. There are no receipts from the Claimant to support payment of the deposit or payments towards the mortgage in 2001.
- [41]** The Western Union receipts are also indicative of significant sums of money being sent by the Claimant to the 2nd Defendant starting in 2006/2007. The court does not believe that in relation to the dates of purchase and construction, the Claimant intended to mislead the court but recognises that the Claimant's recall of dates

would not be as accurate as the 1st Defendant's in light of the fact that she would have been in direct contact with NHT and dealt with all the transactions in Jamaica.

- [42] The court also notes that the valuation report admitted into evidence was prepared based on an inspection conducted in December, 2018. Said report states that the structure inspected was approximately 12 years old at the time of said inspection. That makes the time of construction no earlier than 2006. It is therefore accepted that the land was purchased in 2006 and construction commenced in 2007.
- [43] Both parties claim that the mortgage is paid by them, however neither has produced receipts from NHT evidencing same. It is not in dispute that the Claimant sent monies for the construction of the house. It is highly unlikely that the Claimant would have ordered the digging of the foundation and subsequent construction if he was not of the view that he had a beneficial interest. The 1st Defendant raised no objection to the Claimant's actions because, she said, he was building a house for their mother and stepfather. In her evidence she stated that the 2nd Defendant gave permission for the Claimant to build and then further on she said that the Claimant had ordered that a house be built for their mother and stepfather. Those are not consistent actions. He could not be getting permission from someone who had no authority to do so and then giving orders to said person to perform a task.
- [44] Significantly though, the Claimant sent money and constructed more than just a house for their mother and stepfather. He built a ten room structure, and the 1st Defendant did not object. The receipts exhibited are more consistent with a capital expenditure and not monies sent for the well fare of his mother and stepfather. Further, of the over forty receipts in evidence, the 1st Defendant only refers to four occasions when she collected monies sent by the Claimant for their mother. She also admitted that she collected monies sent by him and handed over same to the 2nd Defendant for the construction.
- [45] The Claimant testified that the 1st Defendant obtained a construction loan from NHT on his behalf so he could complete the decking. The 1st Defendant said she

got the loan so that she could build her one bedroom, bathroom and kitchen. She had workmen who were different from the Claimant's workmen building her apartment while the bigger construction was going on and her husband sent her money to pay those workmen. The only evidence that I accept from the 1st Defendant regarding the construction loan was that it was obtained in 2007. Both from the parties' evidence and the valuation report, this is one structure. I do not believe that two constructions were taking place on one structure at the same time. It is far more believable that the construction loan was used as part of the monies to complete the building.

[46] The Claimant said that he asked the 1st Defendant to have someone prepare the drawings for the structure to be built and he paid for it and she understood that she was doing that on his behalf and not with an intention to have any interest in the property. The 1st Defendant has not denied this aspect of the Claimant's evidence. The Claimant also testified that he came to Jamaica in 2012 and spoke to the 1st Defendant about getting the property transferred to him. They both went to NHT to get information about the process and were instructed to get a lawyer. This has also not been denied by the 1st Defendant.

[47] Whilst the Claimant has not produced any evidence that he paid the deposit, neither has the 1st Defendant. However, the court finds it unusual that the Claimant would be in discussions with the 1st Defendant about using her NHT benefit, but then send the deposit to the 2nd Defendant and thereafter send monies for the mortgage to the 1st Defendant. I therefore accept that the deposit was paid by the 1st Defendant.

[48] Regarding the mortgage payments, I accept that the sums were being deducted from the 1st Defendant's salary and that the Claimant was sending money to reimburse same so that she was not out of pocket. Whilst neither has produced any receipts from NHT, it is of note that mortgage and loan payments continued to be owed after the 1st Defendant stopped working. Although the 1st Defendant claimed that the mortgage thereafter was being paid by her or her daughter, the

Claimant's evidence that the mortgage was now being paid from the proceeds of rental of the property was not challenged. The court therefore accepts that the Claimant secured and protected his beneficial interest by sending money to pay the NHT mortgage and loan and continues now to pay same through rental proceeds.

[49] The court also takes note of the utterances made by the 1st Defendant. It was her evidence that she was prepared to transfer the property to the Claimant once he either built or bought a house for her. Said utterance, her lack of objection to the Claimant's construction, her securing the drawings on his behalf and her accompanying him to NHT to enquire about the transfer process are more indicative of one who is saying that the Claimant has a beneficial interest. She however is clearly concerned about securing her own interest since she has used her NHT points and loan benefits and would not be able to secure any further NHT benefits.

[50] Equity protects. "Justice and good conscience so require," per Denning MR in **Hussey v Palmer** 1 WLR1286 at page 1290, paragraph H. I find that based on the conduct of the parties there was a common intention that the Claimant and the 1st Defendant would share the property beneficially and as a result the Claimant expended monies on the mortgage and the construction of a ten (10) bedroom house, thereby acting to his detriment. I find on a balance of probabilities that the Claimant is entitled to an interest in the property.

Disposition

[51] It is declared that the Claimant is entitled to an 80% interest in the property being that parcel of land part of Curatoe Hill in the parish of Clarendon registered at Volume 1399 Folio 163 of the Register Book of Title.

[52] The remaining 20% interest is held by the 1st Defendant. The 2nd Defendant has no interest in the property.

It is ordered that

- [53]** The property be valued by a valuator agreed by the parties and the cost borne equally by the parties and in the event that the parties cannot agree a valuator within 14 days of the order of the court, a valuator shall be appointed by the court.
- [54]** The Claimant is given the first option to purchase the 1st Defendant's 20% interest in the property within 90 days of the receipt of the valuation report.
- [55]** The Claimant's Attorney shall have carriage of sale.
- [56]** The Registrar of the Supreme Court is empowered to sign any transfer or other documents to give effect to the transfer of the property in the event that the Defendants fail, refuse or neglect to execute the transfer.
- [57]** The parties shall bear their own costs.
- [58]** Liberty to apply.
- [59]** The Claimant's Attorney to prepare, file and serve made herein.