



[2013] JMSC Civ 66

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2010 HCV 02688**

**BETWEEN MARGO MARIA FRANCELLA SKEETE CLAIMANT**  
**AND ELAINE CUNNINGHAM 1<sup>ST</sup> DEFENDANT**  
**AND YVONNE CUNNINGHAM-WRIGHT 2<sup>ND</sup> DEFENDANT**

**Miss Carlene McFarlane instructed by McNeil and McFarlane for the Claimant**

**Mr. CJ Mitchell instructed by CJ Mitchell and Company for the Defendants**

**CHAMBERS**

**HEARD: 28<sup>TH</sup> SEPTEMBER 2012**

**AYTON-GEORGE J.**

[1] The Claimant is the mother of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Sometime in 1986 the claimant, with the agreement of her husband, purchased the subject property by way of a deposit of \$135,000.00 (monies obtained by way of an equity loan secured on property in the UK that she jointly owned with her husband). The balance of the purchase price of \$237,000.00 was obtained by way of a mortgage from Victoria Mutual Building Society, payable by monthly payments of \$2,445.00. The Claimant caused the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be placed on the title and therefore all three parties are reflected as owners on the legal title. In addition the claimant extensively extended the property.

[2] It is not in dispute that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants made no monetary contribution to the deposit nor to the subsequent extension of the said property

and that all of the monies for these purposes came from the claimant. There is however some dispute as to whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants contributed any or at all to the mortgage payments. The claimant denies that they made any contribution whilst the Defendants contend that they had indeed done so. This is therefore a fact in dispute to which I will deal with shortly.

[3] It is also not in dispute that prior to the completion of the purchase of the property, the 1<sup>st</sup> and 2<sup>nd</sup> defendants took up occupation for which rent was paid for one year, prior to completion of the sale. Following this they continued to reside at the property until the 2<sup>nd</sup> defendant went to live in the UK. The claimant had resided in the UK from prior to the purchase of the property until she returned to reside in Jamaica. The 1<sup>st</sup> Defendant has remained in occupation throughout and continues so to do.

[4] The claimant denies that she intended the property to be divided in equal shares for her and the defendants and asserts that she has always wished for the property to be divided equally among her eight children. She asserts that at the time of purchase she had no intention of conferring a gift on the defendants but that their names were placed on the title for convenience only, as they would be in occupation and she was abroad. It is significant to note that initially whilst they were in occupation, she was residing in the UK.

[5] It is the view of this assertion that she seeks inter-alia

- (i) A declaration that she is the legal owner of the subject lands registered at volume 567 Folio 63 of the Register Book of Titles.
- (ii) A declaration that she has 100% interest in the said property

### **Facts in issue**

- (i) According to the claimant, whilst in England she sent monies to Jamaica for the maintenance of her children, whom she had left in the care of her mother. The defendants deny this and contend that it was

due to lack of sufficient care which resulted in the hardship they suffered that played on their mother's conscience and motivated her generosity in placing their names on the title, thereby allotting them one third share each. This they contend was her way to compensate them for the hardship that they have asserted that they suffered.

- (ii) Whether the amount secured by the claimant by way of mortgage, was solely paid by the claimant with the assistance of rent collected from tenants or whether as the defendants contend, this was paid by way of monies from the defendants in addition to rent that they collected from the tenants.
- (iii) Whether the claimant had discussions with the 1<sup>st</sup> and 2<sup>nd</sup> defendants indicating that they were entitled to one third interest each or whether she had always maintained that the premises belonged equally to her eight children.

[6] I bear in mind that this case involves a dispute as to facts and that the legal analysis applicable thereto will ultimately depend upon the facts I find proven. I also bear in mind that in order to find facts proven, the credibility of the witnesses is paramount. It is of course true, that the standard of proof is the civil one, based on the balance of probabilities.

[7] In light of the foregoing, I have carefully evaluated both the affidavit evidence and evidence given under cross-examination. The evidence given under cross-examination was particularly enlightening as I thereby was able to observe the demeanour of the witnesses and their responses as both counsel sought to ferret out the truth.

[8] In making an assessment of the witnesses, I preferred by far the evidence of the complainant and her witness. They struck me as truthful and credible witnesses. The defendants on the other hand were evasive, inconsistent and did not strike me as witnesses of truth. Although there were some inconsistencies in the evidence of the Claimant, these were slight and not material. They did not go to the root of the case. I bear in mind that the court in ferreting for the truth, must

take into account that this is not a test of memory. I take into account the Claimant's age and fragility and that this may have had an effect on her memory, which appeared faded at times. She nevertheless comes across as an honest and forthright witness.

## **Findings**

[9] I accept that it is the claimant who sought and located the house at 25 Queen's Avenue, the subject of this claim; that at the time, she was the mother of eight children one of whom was born in the UK and resided with her there. She had left seven children the products of a previous marriage in the care of her mother in Jamaica. She and her previous husband had bought a house in which her mother was left with these children – It is said by the claimant that the house was sold by way of auction. In any event it is accepted that this house was sold in circumstances where the children had to be dispersed. The claimant admits that upon coming to Jamaica, she was dissatisfied with the condition that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were living. They were at this time adults.

[10] She along with the support of her husband, Mr. Ralph Skeete, bought the subject premises and provided the entire deposit, which came from an equity loan secured against premises owned by them both in the U.K .

[11] The house was registered in her name and the name of the defendants as joint tenants. It was the intention of the Claimant to return to live in Jamaica and that this was part of her reason for buying the said house.

[12] I do not accept that the 1<sup>st</sup> and 2<sup>nd</sup> defendants contributed to the mortgage payments any at all. Their evidence on this was inconsistent and there was discrepancy between them. I accept that the monies for the payment of the mortgage came from rental collected from the property and monies which came from the claimant. In any event, even if the defendants had made any contributions to the mortgage payments I do not accept that this was in furtherance of any agreement to share in the beneficial ownership of the property

and that this would in the circumstances of this case, constitute no more than payment for use and occupation of the said premises.

[13] The claimant and her husband later returned to Jamaica to live and lived in the premises along with the 1<sup>st</sup> defendant. Due to difficulties between the 1<sup>st</sup> defendant and the claimant's husband, the claimant and her husband bought another property in which they now reside and for which mortgage payments are made from the rental collected from the subject premises at 25 Queen's Avenue. It is significant to note that the rental income from this property flows solely to the Claimant. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant has sought to claim any beneficial interest in this rental income. This seems inconsistent with a belief that one is part beneficial owner of the property. In fact although the 2<sup>nd</sup> Defendant admits to making visits to Jamaica, she also admits that she has never visited the subject property on any of her visits. This again is inconsistent with the actions of a person who considers him/herself to be part owner of a property.

[14] Prior to this, the premises were modified to 8 apartments at the total cost and expense of the claimant through funds secured from joint funds belonging to her and her husband. It is the undisputed evidence that the 2<sup>nd</sup> Defendant lives in one of these apartments and so technically occupies 1/8<sup>th</sup> share of the property. Is it mere coincidence that the property has been divided into 8 apartments?

### **Defendants' case**

[15] The defendants contend that the claimant put their names on the title because she was ashamed for going abroad and leaving her seven children at a tender age and not having made proper and necessary arrangements for their care and accommodation.

[16] They contend that the claimant had expressed to them at the time of purchase of the property that her objective in putting their names on the title was to give them one third each to make up for the neglect and hardship she had caused them. In fact, they also gave evidence that their father had arranged for

them to go to England but they were unable to go as they were not registered. It is significant to note that it was the claimant's unchallenged evidence that she could not send for but two of the children. It is clear therefore that five of them would have remained behind in Jamaica. There is no evidence that better arrangements were made for the other three children and it therefore begs the question as to why the conscience of the claimant would have been pricked as it relates to only the two defendants for the reason they espouse. In fact the 2<sup>nd</sup> defendant did go to England twice and resided there from the time of her 2<sup>nd</sup> visit.

[17] It is true that the claimant indicated that she was concerned with the way both defendants were living. It is to be noted that at this time they were adults and at the very least, the 1<sup>st</sup> defendant had children and a boyfriend/father of her children that she was living with.

[18] I do not accept that the claimant subsequently offered them a trip to England and that the 1<sup>st</sup> defendant turned it down and said that a share in the house was more important. In fact this would not make sense in light of the Defendants' evidence of the circumstances of spontaneity in which the claimant had offered them a share. There was no indication of any negotiations or room for negotiation. Based on the evidence any such offer would have been made subsequent to the purchase of the house and inconsistent with their claim that at the time of the purchase, the claimant had made it clear that the premises was purchased with the specific intent to give them each one third interest and that she told them this at the time of purchase.

[19] In light of all the foregoing I have come to the conclusion (i) that the claimant provided the full amount of money for the purchase of the said premises (ii) that therefore a presumption of resulting trust arises in her favour.

### **Analysis**

[20] In our law there is a rebuttable presumption that one who puts up all the purchase price for a property, who conveys the legal title in his/her name along with others, did not intend to make a gift to the non-contributing parties and

retains the whole beneficial interest. This is by virtue of the doctrine resulting trusts. Another way of putting this is that:

- (i) Where A makes a voluntary gift to B or pays (wholly or in part) for the purchase of property which is rested either in B alone or in the joint names of A & B, there is a presumption that it did not intend to make a gift to B; the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A & B in the shares proportionate to their contributions.

[21] This is only a presumption and is rebutted either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer.

[22] This presumption arises even if B anticipated that he was the beneficiary of a gift from A.

[23] Thus " A resulting trust arises because there is a presumption that A did not intend to make a gift to B. A resulting trust will arise in favour of A in such circumstances when though B anticipated that he was the beneficiary of an absolute gift and in this sense, B will be required to hold the property on resulting trust against his intentions. Therefore it should not be thought that a resulting trust will only arise on the basis of the mutual intentions of the parties" – See **"The law of Trusts and Equitable obligations"** 4<sup>th</sup> edition by Robert Pearce and John Stevens page 236.

[24] This presumption is rebuttable and the defendants sought to do so by providing evidence to show that in fact the claimant intended to make a gift to them. This I reject. They have not satisfied me on a balance of probabilities that this is so. A presumption in favour of the provider of purchase money was discussed by Eyre CB in *Dyer v Dyer* (1788) 2 Cox 29 Cas 92 at 93 and see **Sekhon v Alissa** where a mother had provided £22,500 to help her daughter to purchase a house. In the absence of sufficient evidence to rebut the

presumption of a resulting trust, the mother was entitled to an interest of the property.

[25] I turn now to consider the presumption of advancement which arises as a counter presumption in cases where at first blush the presumption of resulting trust arises. This presumption of advancement usually arise in the context of certain relationships such as son and father and husband and wife.

[25] The presumption of advancement arises as a consequence of a pre-existing relationship between the parties to the transfer or acquisition, where the transferor/contributor is regarded as morally obliged to the party benefitting.

[26] The range of relationships where equity recognises a presumption of advancement reflects a 19<sup>th</sup> century understanding of family responsibility, and it is clear that, today the strengths of the presumptions vary to reflect differing social circumstances.

[27] With that being said, even so today the law continues to be that there is no presumption of advancement between a mother and child and therefore if a mother as in this case provides the purchase price for property conveyed to herself and her children, she is presumed not to have intended a gift to them of the beneficial interests and the property is therefore held on trust by them for her.

[28] However, in the event that the presumption of advancement is applicable, in light of the evidence and my findings, it is my view that the claimant has successfully rebutted any such presumption and the presumption of resulting trust applies. See **Gross v French** (1975) 238 Gazettes 39 and Hoffman J in *Sekhom v Alissa* [1989] 2 FLR 94.

[29] **Constructive trust –**

In the leading case of **Stack v Dowden** (2007) Lord Baroness Hale in the leading judgment stated at paragraph 56 “Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership The

onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in the sole ownership cases, it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest”.

[30] The defendant’s submit that the issue of constructive trusts arises. This I do not accept, especially because for this to arise there has to be shown that the parties had a common intention in relation to the share of the property. My findings have not disclosed any evidence that I have accepted upon which a common intention in relation to the share of the property can be founded. The Claimant has satisfied me, that no such intention existed and I am satisfied that she has “other than a joint beneficial interest” and that she is solely entitled to 100% of the beneficial share of the subject property.

[31] In view of the foregoing, I make the following orders:

- (1) A declaration that Margo Maria Francella Skeete is the legal and equitable owner of all that parcel of land part of Richmond Park in the parish of St. Andrew and registered at Volume 517 Folio 63 of the Register Book of Titles and
- (2) A Declaration that Margo Maria Francella Skeete has a 100% beneficial interest in the said property registered at Volume 517 folio 63 of the Register Book of Titles of Jamaica
- (3) That Elaine Cunningham and Yvonne Cunningham – Wright have no legal or beneficial interest in the said parcel of land registered at Volume 517 Folio 63 of the Register Book of Titles of Jamaica
- (4) The Registrar of Titles is directed to rectify the Certificate of Title registered AT Volume 517 Folio 63 by removing the names of Elaine Cunningham and Yvonne Cunningham-Wright from the Register Book of Titles registered at Volume 517 Folio 63.

- (5) That the claimant is granted relief from paying transfer tax and stamp duty pursuant to the removal of the names, Elaine Cunningham and Yvonne Cunningham-Wright from the Register Book of Titles registered at Volume 517 Folio 63.
- (6) In the event of refusal by the defendants to sign and return to the claimant or the claimant's attorney-at-law any document of transfer as may be required to transfer the entire estate in the property to the claimant and/or the claimant's nominee within a period of 30 days of presentation the Registrar of the Supreme Court is hereby empowered to sign the same.