



[2020] JMSC Civ.231

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 03711

BETWEEN	FABIAN WILLIAMS	CLAIMANT
AND	SHERNETT CALLENDER	DEFENDANT

IN CHAMBERS

Ms. Tabia Hawkins instructed by Everton Dewar and Co. for the Claimant

Mr. Evan Evans and Ms. Cheffanie West for the Defendant

Heard October 26 and 27, 2020 and November 20, 2020

Joint Tenancy – Property held on trust – Test to be applied – Common intention of the parties.

Carr, J (Ag.)

Introduction

[1] The Claimant Fabian Williams (Mr. Williams) and the Defendant Shernett Callender (Ms. Callender) met in 2006 and were involved in a romantic relationship that lasted until sometime in 2013. Their union produced one child who is now ten years of age. During the course of their relationship they were engaged to be married and a property was purchased in their joint names. Mr. Williams contends that despite the fact that they hold the property as joint tenants he is the sole owner and Ms. Callender's name

was placed on the title out of convenience. Ms. Callender refutes this version of events and claims that both parties purchased the property with an intention for it to become their family home.

The Claim

[2] By way of Fixed Date Claim Form filed on the 13th of November 2018 Mr. Williams seeks the following orders:

1. A declaration that the Claimant is entitled to the sole beneficial interest in all that parcel of land part of Fairview Park in the parish of Saint Catherine being the Lot numbered twenty-eight on the Plan of part of Fairview Park aforesaid and being the land comprised in Certificate of Title and registered at Volume 1277 Folio 724 of the Register Book of Titles (hereinafter referred to as “the property”).
2. A declaration that the Defendant holds her interest in the property on trust for the benefit of the Claimant.
3. The Defendant shall execute an instrument of transfer and all other such documents as may be required to transfer the full interest and benefit in the said property to the Claimant and/or the Claimant's nominee/beneficiary to give effect to the Order of this Honourable Court within thirty days of being so required by the Claimant; failing which the Registrar of the Supreme Court shall be and is hereby empowered and authorized to sign any and all such documentations as are required to transfer and/or give effect to the Order of the Honourable Court should the Defendant fail or refuse to do so within ten days of being required in writing to so do.
4. That the Defendant provides an account to the Claimant of the rental income received from the said property and that the funds collected be paid to the Claimant.
5. That the Defendant should take no steps by sale or assignment in respect of the said property or do any act whatever to create any rights, title or interest therein.
6. Further or other relief the Applicant is entitled to and that the Court do order accordingly.

7. For an injunction restraining the Defendant from selling or otherwise disposing of any assets in which the Applicant claims interest until the determination by this Honourable Court the issues raised in this Fixed Date Claim Form.
8. That the cost of the proceedings and such costs incidental to these proceedings be paid to the Claimant by the Defendant.
9. Such further and other relief as this Court may deem just.

Issue

[3] Whether Mr. Williams can show on a balance of probabilities that he is entitled to the whole of the beneficial interest in the property despite the registration on title in the names of both parties as joint tenants.

Submissions

[4] It was agreed by counsel on both sides that this is a matter which turns ultimately on credibility. Apart from the fact of a relationship between the parties everything else was in contention, including the nature of that relationship.

[5] There are two main limbs on which Counsel Ms. Tabia Hawkins (for Mr. Williams) supported her case. The first was that Ms. Callender made no financial contribution to the acquisition or improvement of the house. As a result this should be sufficient to establish that she never intended to have any beneficial interest in it. The second is that she never showed by her actions an intention to occupy the home as her own. The weight of the evidence, she argued, showed that Ms. Callender gave Mr. Williams her National Housing Trust (NHT) benefit as a gift. The sole purpose of which was to assist him in owning his own home, and as such there was never an intention for her to hold any beneficial interest in the property.

[6] Counsel Mr. Evan Evans (for Ms. Callender) suggested that there was no reason Ms. Callender would have handed over her NHT benefit without an expectation of holding the property jointly with Mr. Williams. This was her only way of owning a home in Jamaica in circumstances where she was involved with a man with whom she was also

having a child. It was argued that Mr. Williams failed to put forward any proof of the facts he asserted. He had no documents to substantiate his contention that Ms. Callender gave him her NHT benefit as a gift nor that he was the only person who contributed to the purchase and renovations of the home.

The Law

[7] It is well established that the court, in determining matters as to ownership in cases of joint tenancy, starts from the premise that joint legal ownership is tantamount to joint beneficial ownership, **Stack v. Dowden** [2007] 1 F.L.R. 1858. The burden of proving that the beneficial interest was intended to be otherwise rests with Mr. Williams.

[8] The test to be applied was also set out in the House of Lords Judgment at page 1858;

“In identifying the extent of the parties’ beneficial interests in a property, the court was seeking to ascertain the parties’ shared intentions, actual, inferred or imputed, with respect to the property, in the light of their whole course of conduct in relation to it.”

[9] The case of **Stack v. Dowden** was revisited in the later decision of the English Court of Appeal case of **Jones v. Kernott** [2012] 1 AC 776. This decision highlighted the need for the court to be careful in disturbing a conveyance into the joint names of persons who were engaged in an intimate relationship. At page 784 paragraph 19 it was stated;

“There are two much more substantial reasons (which overlap) why a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on. The first is implicit in the nature of the enterprise. If a couple in an intimate relationship (whether married or unmarried) decide to buy a house or flat in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise. That is so even if the parties, for whatever reason, fail to

make that clear by any overt declaration or agreement. The court has often drawn attention to this.”

[10] Although the burden is a heavy one it is not insurmountable. Mr. Williams must establish on the evidence that the common shared intention was that he would have the sole beneficial interest in the property. It is therefore necessary to examine the conduct of the parties at the time of purchase and thereafter having regard to not only what was expressed in words but also what inferences can be drawn from their conduct.

Analysis and Discussion

[11] What then are the circumstances surrounding the purchase of the home that the court needs to examine? Although the list is not exhaustive these are the areas which both parties referred to in their Affidavits and cross examination.

The relationship between the parties

[12] Mr. Williams described the relationship with Ms. Callender as one which was ‘on again off again’. He said that the two never lived together and that even after the acquisition of the home Ms. Callender never moved in. This was vehemently denied by Ms. Callender as she insisted that immediately following the renovations to the property she moved into the home and they both lived there together. It was her evidence that the couple were in a common law union.

[13] It is observed that the first affidavit filed by Mr. Williams does not give the impression that he and Ms. Callender were in a serious relationship. It was Ms. Callender in her Affidavit that raised the fact that around 2014 the couple were engaged to be married. Subsequently, in answer to this affidavit Mr. Williams admitted to the engagement but gave an earlier date of 2010. Why would such an important event be omitted at first instance? In fact, under cross examination, Mr. Williams agreed with Counsel that he had every intention of having a long term relationship with her. It would seem that Mr. Williams was not forthcoming in his first affidavit as to the nature of their relationship. I did not find him to be credible on this point. I accepted the evidence of Ms.

Callender. I found her to be a truthful witness. Whether they had a visiting relationship or not, their relationship was far more serious than Mr. Williams would like this court to believe. I accept that they were in fact in a common law union.

The reason for the purchase

[14] It is well established that intention can be ascertained by looking not only at what was said but also at what was done. Mr. Williams said that he discussed with Ms. Callender from the outset his intention to own the property solely for himself. He said that it was always understood between them that the property belonged solely to him and that her name was added in order for him to access her NHT points or benefit. Ms. Callender averred that it was never her intention to hold the property in trust for him, instead they were to own the property together and to live as a family raising their children.

[15] I find Ms. Callender to be credible in this regard. I do not find based on the evidence that she intended to just give away her NHT benefit without the thought of any future with Mr. Williams. The reality is that she, like Mr. Williams, would have been obligated in the event of any mishap to pay the mortgage debt. Why would she have entered into this arrangement without any benefit to herself? Mr. Williams' explanation is that she already owned a home and so did not require the use of her NHT. However, he did not exhibit any evidence of this by showing any title with her name on it other than Exhibit 1. Ms. Callender denied that she owned property and said that the home she resided in belonged to her mother and her sister. At the time of the relationship both ladies were alive.

[16] The court also takes note of the fact that counsel's argument was that Ms. Callender could not have been able to afford to assist with renovations or to pay the mortgage given her salary. If she was unable to assist in that regard how could she reasonably have managed to own her own home without the use of her NHT benefit?

[17] Further, if Ms. Callender had no intention of holding a beneficial interest in the property, her child no longer residing in Jamaica, why would she rent the premises and use that rental to pay the mortgage? She said that after he migrated to Canada he called

her asking her to sever their joint tenancy and that he was offering her an option to purchase. She advised him that she was not in a position to do so at the time and asked instead if the place could be rented in order for the mortgage to be paid. He was not in favour of that option. Subsequently her mother became ill and she moved out of the property to assist her. She once again told Mr. Williams that it would be best to rent the property and he told her he wanted the place sold. She proceeded to rent the premises and used the proceeds of the rent to pay the mortgage (Exhibits 2, 3A – 3C). Had Ms. Callender not had an interest in the property it would have been so easy for her to let it rot, instead she says that she maintained it and rented it. When NHT contacted her to tell her that the mortgage was in arrears she used the rental to pay the mortgage. I find that her decision to pay the mortgage out of the rental is consistent with her intention to hold an equal interest in the property.

[18] Mr. Williams' explanation for how Ms. Callender had access to his premises came belatedly. He said that when he was leaving he gave his keys to Ms. Callender so that she could look after the place for him. This is after he said that he had to pay her in order to take their child out of the country. He said that in hindsight he ought not to have given her the keys but he did. Ms. Callender maintained that she always had keys to the premises because she in fact resided there and it was never her intention to give Mr. Williams her NHT benefit without expectation of an interest. I did not find Mr. Williams to be truthful, I accept and find as a fact that Ms. Callender's intention was not to 'give' Mr. Williams her NHT benefit but that they would own the property together jointly in order to raise their children in their own home.

Financial Contribution

[19] The evidence in respect of the financial contribution of both parties to the purchase of the property is sparse. Mr. Williams told the court that he alone paid the sums associated with the purchase to include the deposit, stamp duty, registration fees, and Attorney's costs. The property at the time of purchase was incomplete and he bought raw materials and paid workers in order to renovate the house. At no time was he assisted

financially by Ms. Callender. Ms. Callender's evidence was quite the opposite. She indicated that she contributed to the deposit using funds from her savings. She paid workmen and assisted in the purchase of materials used in the renovations.

[20] Neither of the parties presented any documentary proof of any payments that they made in support of their case. The failure to keep receipts or documents cannot be seen as detrimental to either party. It is not expected that a couple in the throes of happiness will keep track of all their financial obligations, since they are now acting as one. This aspect of the evidence therefore is unhelpful in the ultimate determination of the matter.

The place of residence

[21] At the time of the purchase of the home the couple was expecting their first child together. Mr. Williams told the court that they had a visiting relationship and that Ms. Callender would come and spend days at a time and then leave and return. When asked about the child he said the child would go with her when she left and at other times would be at daycare. Under cross examination as previously stated he accepted that he had every intention of having a long term relationship with Ms. Callender.

[22] Given the nature of the relationship, the fact of the engagement, as well as the birth of their child, I find it hard to believe that Ms. Callender was not permanently resident at the home the couple bought together at such a pivotal time in their lives. Even if she did not spend all her time there I accept that this was their principal place of residence while they were involved.

The type of tenancy

[23] The parties took the property as joint tenants. They must have determined from the outset of the transaction that they intended to hold their shares jointly. There was no decision to hold as tenants in common which would have given them a distinctive share. The principle of joint tenancy is that they hold together as one. I find as a fact that this

decision as to the type of tenancy was indicative of the relationship that they had prior to their break up.

Determination

[24] The overall conduct of the parties at the time of purchase was consistent with an intention to hold as joint tenants in both law and equity. In the circumstances I am not satisfied on a balance of probabilities that Mr. Williams has displaced the burden which rests upon him. He has not shown by the evidence that there was an intention to hold the property in any way other than what was stated on the title. The parties therefore are each entitled to a 50% share in the property registered at Volume 1277 Folio 724 of the Register Book of Titles.

[25] As an aside it is noted that an Affidavit presented by Mr. Williams sought the sum of \$1,500,000.00 that represented rent and property which it is claimed was converted to the sole benefit of Ms. Callender. This was never pleaded in the fixed date claim form and there was no attempt by Counsel to amend the claim to have it included. In the circumstances there can be no basis of a finding in law on this issue.

Order:

1. Judgment for the Defendant.
2. The orders sought in the Fixed Date Claim Form are refused.
3. The Claimant and the Defendant are each entitled to a 50% share in all that parcel of land part of Fairview Park in the parish of Saint Catherine being the Lot numbered twenty-eight on the Plan of part of Fairview Park aforesaid and being the land comprised in Certificate of Title and registered at Volume 1277 Folio 724 of the Register Book of Titles.
4. Costs to the Defendant to be agreed or taxed.