

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2008/0515

BETWEEN:

CATHERINE MARIA ST. BERNARD

Claimant

AND

OLIVE VIRGINIA MC EWEN

Defendant

Appearances:

Ms. A. Johnson, with her Ms. D. Mitchell, for the Claimant
Mrs. A. Ventour de Vega for the Defendant

2010: September 20,
November 29

JUDGMENT

- [1] **PRICE FINDLAY, J.:** By Fixed Date Claim Form and supporting affidavits the Claimant claims against the Defendant damages for trespass, an order for possession, costs and interest, in relation to a lot of land situate at Grand Mal in the parish of St. George's measuring Four thousand Seven hundred and Sixty-one square feet (4,761 sq. ft.).
- [2] The Defendant in her defence claims to have a beneficial interest in the same lot of land on the basis of a constructive trust created in her favour at the time when she was the common law wife of one Kenny de Souza.
- [3] The Claimant became the owner of the 4,761 sq. ft. of land on May 7, 2002 after having obtained Letters of Administration to her father's estate, her father having been the previous owner of the said lot. There was a wooden house on the land.

- [4] The wooden house was sold to Kenny de Souza, who was the common law husband of the Defendant. The Claimant testified that she did not know the Defendant living in the house with Kenny de Souza.
- [5] She testified that between 1995 and 2000 she knew Kenny de Souza to be living on the land.
- [6] She also testified that he was paying rent of \$100.00 per year for the land. Kenny de Souza confirms he was paying rent for the land but says that it was \$50.00 per year.
- [7] Between 1995 and 2001 the Claimant was living abroad and she returned to Grenada in August 2002.
- [8] She went to the lawyer, Mr. Bristol, and discussed the sale of the land with Kenny de Souza at that office, a fact confirmed by Kenny de Souza in his evidence. She had no meeting with the Defendant concerning the land. She did not send the Defendant to Mr. Bristol.
- [9] In October 2002 the Claimant offered the said lot for sale to the said Kenny de Souza for the price of EC\$19,044.00, which offer Mr. de Souza accepted.
- [10] Mr. de Souza was unable to pay the purchase price and he entered into a mortgage with the Claimant to secure payment of the purchase price.
- [11] The Claimant transferred the title to the said Kenny de Souza, with the Claimant being the mortgagee of the mortgage executed between the parties.
- [12] Mr. de Souza along with the Defendant and their children lived on the land from 1995 to 2007, with Mr. de Souza making payments totaling \$10,480.00 towards the agreed purchase price.
- [13] He was unable to keep up with the payments and he defaulted on the mortgage. The Claimant gave him Notice to Quit and Mr. de Souza re-transferred the land to

the Claimant and left the premises, leaving the Defendant and some of the children on the land.

[14] The Claimant has asked the Defendant to leave the premises but she refuses to go. The Defendant has indicated that she wished to purchase the property from the Claimant.

[15] Kenny de Souza confirms that he purchased the wooden house which was on the lot of land at Grand Mal. He also confirmed that the purchase monies came from the proceeds of a mortgage on the Defendant's mother's land. The paid the loan back with no help from the Defendant.

[16] He and the Defendant lived in the house for a number of years. They had three children together.

[17] The Defendant says she never worked regularly and she in large part, along with her daughter, agrees that this is so. She worked intermittently throughout the relationship.

[18] The wooden house was destroyed by Hurricane Ivan in 2004 and Kenny de Souza made a makeshift house which he, the Defendant and the children occupied until he left in 2007.

[19] In 2002 he agreed with the Claimant to purchase the land. He agrees that there was a mortgage and that he paid monies under the mortgage agreement.

[20] The land was conveyed to him. He said that there was no arrangement between he and the Defendant for her to have a beneficial interest in Kenny de Souza's property in or about April 2007.

[21] According to a letter written by the Claimant's Attorneys to the Defendant's Attorneys, it appears that the construction which had taken place on the property had been stopped by the Claimant when Kenny de Souza defaulted on the mortgage. It made clear that the Defendant had no permission to construct anything on the said lot of land.

- [22] In fact in a letter dated 15th October 2007, the Defendant's Attorney admitted that the agreement to purchase the land was between the Claimant and Kenny de Souza.
- [23] In that letter she speaks to having expended "substantial sums of monies" – in stark contrast to her testimony whereby she spoke of working only intermittently.
- [24] The Defendant asserts that the wooden house was purchased with the proceeds of a loan mortgage from the Bank of Nova Scotia over property belonging to her mother.
- [25] She asserts that the Claimant offered the land to both herself and Kenny de Souza. She says that there was an agreement between herself and Kenny de Souza that she would have a beneficial interest in the property.
- [26] She says that the arrangement was that she would get the funds to pay for the materials and that Kenny de Souza would pay for the land. In pursuance of this arrangement she testified that Kenny de Souza began to make payments and she began to get assistance for materials.
- [27] She became aware sometime later that Kenny de Souza had defaulted. At the time of this discovery their relationship had deteriorated. She attested that this deterioration had begun in the 1990's; she could not recall the year. The parties eventually separated in 2007 after living separate lives but in the same home for a number of years prior.
- [28] The Defendant says she asked the Claimant to allow her to pay for the land, but nothing came of this request, but the defendant and the children remained in occupation of the land.
- [29] She had a valuation prepared on the land. The valuation included a figure for the work she alleges she and Kenny de Souza did on the land prior to him vacating the property.

- [30] She asserts that she and her children have nowhere else to live and that she is willing to get financing in order to buy the lot. She asserts that she has expended monies, effort and time on the land and asserts that she has a beneficial interest in the land.
- [31] The Defendant admits that she did not have permission to build a concrete structure but says this occurred while Kenny de Souza was paying the mortgage on the land. The construction of this foundation began prior to Hurricane Ivan in 2004.
- [32] She was unaware that the land was put in Kenny de Souza's name alone; she only became aware of this after the relationship between him and her broke down.
- [33] The Defendant's daughter, Lorin Mc Ewen, gave evidence largely in support of her mother's position. She confirmed that her mother worked part time but she had no idea what money her mother earned.
- [34] She left the home at Grand Mal in about 1997 after differences between she and Kenny de Souza.
- [35] The Defendant asserts that the single issue which the Court has to decide is whether the Defendant has acquired a constructive trust in her favour as a result of the history of possession on the land and the events that occurred between the parties to the claim and Kenny de Souza.
- [36] The Claimant states that the issue is whether or not the Defendant has a beneficial interest in the land and that this centres around the relationship between the Defendant and Kenny de Souza.
- [37] According to *Halsbury's Laws*, a constructive trust may arise where land is bought for the use and benefit of two or more persons but where only one is registered as proprietor of the legal estate.
- [38] The division of property with respect to unmarried couples depends in large part on the proprietary interests which they acquired while the relationship existed.

One then has to consider any trusts or contracts which might have arisen during the course of their relationship in order to determine their beneficial entitlements to their assets.

- [39] In the absence of marriage, when dealing with parties who live together, the Court will not make the same assumptions and draw the same conclusions from behaviour as with married couples.
- [40] Where property is purchased in joint names with no express declaration as to the beneficial ownership of that property, the Court will look to see if the money for the purchase was from jointly pooled resources and, if so, declare that an equitable joint tenancy exists. If the money was provided in unequal shares then there would be a trust resulting proportion with the shares contributed by either party.
- [41] Where property is purchased by way of mortgage, the Court has to assess each party's contributions in a broad sense, but the Court is only entitled to look at financial contributions or their real or substantial equivalent to the acquisition of the property.
- [42] If the purchase is financed in whole or in part by mortgage, the party who assumed liability for the mortgage payments as between the joint owners is to be treated as having contributed to the mortgage monies.
- [43] In the case where the property is bought in the man's name alone but both parties contribute to the purchase price, the woman would acquire an interest under a resulting trust commensurate to her contribution to the purchase price.
- [44] The party so contributing may also claim by way of a constructive trust. Under this head, one must look at whether independently of any inference to be drawn from the conduct of the parties in the course of sharing the home and in the ordering of their affairs, has there been any arrangement or agreement or understanding between them that the property is to be shared beneficially.

- [45] This so called "common intention" must relate to the beneficial ownership of the property and can only be based on evidence "of express discussions between the parties, however imperfectly remembered and however imprecise their terms may have been."
- [46] Once this common intention has been established, it is for the party asserting this common intention to show that they have acted to their detriment or significantly changed their position in reliance on this agreement in order for the proprietary estoppel or constructive trust to arise.
- [47] Looking at the facts of this case, the Defendant made no direct contribution to the acquisition of the land in question. She did not assist with the mortgage payments. In fact, she had little or no involvement in the matter. She did not take part in the negotiations for the land, she did not attend the lawyer's office for any discussions nor for the signing of the Mortgage Deed nor the Indenture of Conveyance transferring the property from the Claimant to Kenny de Souza.
- [48] I find it difficult to accept the Defendant's evidence that the land was offered to both she and Kenny de Souza by the Claimant yet she played no role in the actual acquisition of the land. She was completely shut out of all the negotiations which lead up to the actual acquisition. I find that there was no common intention here.
- [49] But even if there is a finding of a common intention between these parties, the matter does not end there. The party asserting this common intention must go further, and must show that he/she acted to their detriment or significantly altered their position in reliance on this agreement in order to give rise to the constructive trust.
- [50] The Court may look at the conduct of the parties and may infer from that conduct a common intention. As already stated, the conduct of the parties in this matter do not lead me to believe that there was any common intention. I prefer Kenny de Souza's evidence in this regard and not that of the Defendant. Even though the Defendant asserted that she was to make arrangements for the materials for the

home, I find that with her limited resources that it was implausible that such arrangement was even made.

- [51] But if I am wrong, I will go further to look at the other aspect of establishing the constructive trust, that of detriment, or significantly altering one's position.
- [52] Lord Bridge of Harwich in **Lloyd's Bank PLC v Rosset** stated that while direct contributions to the purchase price by a party who is not the legal owner, whether initially or by payment of mortgage installments, would readily justify the Court in drawing the inference of a common intention, it has been said to be very doubtful whether anything less would suffice.
- [53] However, later cases have decided that indirect contributions would suffice provided they were referable to the acquisition of the property.
- [54] The Defendant's evidence is that she was to make arrangements for the materials for the home that was to be built on the land. She said that she and Kenny de Souza had begun to construct a concrete foundation on the land, but does not indicate directly who had paid for this structure to be erected or what, if anything, her contribution was to this structure.
- [55] Further I repeat here for emphasis, the Defendant by her own account, that of her daughter and that of Kenny de Souza, was not regularly employed nor did she earn any substantial income while she and Kenny de Souza lived together at Grand Mal.
- [56] She earned, according to her testimony, \$100.00 per week working for people. She would earn \$60.00 per day cutlassing, and she did this cutlassing about three times per month.
- [57] In November 2002 when both the Indenture and Mortgage Deeds were executed, the Defendant did not have a permanent job, according to her, she was taking care of children, washing and cutlassing part time.

[58] She further testified that she used the monies she earned to prepare food, buy clothes and other little things such as roll-on and hair grease. Kenny took care of the household bills. Lorin Mc Ewen stated that when she resided with the Defendant and Kenny de Souza, "My mother was most times not working. She was a homemaker." And further on in her testimony, "For the majority of the relationship, my mother did not work. She worked part time."

[59] It is clear that even if a common intention is established, a claimant will not succeed unless she establishes that she acted to her detriment on the basis of that common intention.

[60] The fact that the woman gratuitously cooks, cleans and looks after the children does not alone entitle her to any share in the house.

[61] As stated in **Burns v Burns** Fox LJ stated,

"There was no express trust of an interest in the property for the benefit of the plaintiff; and there was no express agreement to create such an interest, and the plaintiff made no direct contribution to the purchase price. Her case must therefore depend upon showing a common intention that she did have a beneficial interest in the property. Whether the trust which would arise in such circumstances is described as implied, constructive or resulting, does not greatly matter."

[62] Looking at the evidence in this matter, I can find nothing which would indicate any intention between the Defendant and Kenny de Souza that the Defendant should have an interest in the property. The price of the land was \$19,044.00. This entire sum was to be raised by mortgage, a mortgage between Kenny de Souza and the Claimant. The mortgage was in the name of Kenny de Souza, he paid the mortgage. The Defendant made no financial contribution.

[63] By her own evidence she was not in a position to do so. There was no arrangement that the Defendant would work and assist with the family finances, and Kenny de Souza did nothing to lead her to alter her position in the belief that she would have an interest in the property. The household chores which she did, the housekeeping and seeing after the children, do not "carry with them any

implication of a common intention" that the Defendant would have an interest in the property.

[64] In **Burns v Burns** the Claimant in that matter spent monies on rates and taxes, telephone bills, brought chattels for domestic use and also expended monies to have the entire house wallpapered. Fox LJ in his considered opinion stated:

"None of this expenditure, in my opinion, indicates the existence of the common intention which the plaintiff has to prove. What is needed, I think, is evidence of a payment or payments by the plaintiff which it can be inferred was referable to the acquisition of the house."

[65] In the circumstances, looking at all the evidence, I cannot find that the contributions made by the Defendant give rise to her having any beneficial interest in the property in question.

[66] As a result, the Claimant is entitled to absolute possession of the property, there being no contractual relationship between the Claimant and the Defendant.

[67] I will order as follows:

- (1) The Defendant is to pay the Claimant the sum of \$5,000.00 representing damages for trespass;
- (2) The Defendant is ordered to vacate the premises situate at Grand Mal in the parish of St. George's in the State of Grenada measuring Four thousand Seven hundred and Sixty-one square feet (4,761 sq. ft.) English Statute Measure described in the plan or diagram marked with the letter "S" annexed to an Indenture of Conveyance made the 7th day of May 2002 between the Claimant in her capacity as Administratrix of the Estate of Philbert Roberts of the One Part and the Claimant in her capacity as Beneficiary of the Estate of Philbert Roberts of the Other Part on or before the 28th February 2011;
- (3) Costs to the Claimant in the sum of \$2,500.00.

(4) Interest to run on the special damages at the rate of 6 % per annum from the date of judgment to date of payment.

[68] The following authorities were cited in the matter:

1. **Bernard v Josephs** [1982] 2 WLR 1052 (Court of Appeal)
2. **Burns v Burns** [1941] Ch 317 at 344
3. **Halsburys Laws of England 4th Edn. Vol 32** para 612
4. **Snell's Equity 21st Edition**
5. **Halsburys Laws of England 4th Edn. 2000 Reissue Vol. 48**
6. **Commonwealth Caribbean Property Law 2nd Edn.**

[69] I would like to thank Counsel for their assistance in this matter.



Margaret Price Findlay
High Court Judge