[2013] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 49/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ALLECIA CODNER**	**APPELLANT**
AND	**OWEN CODNER**	**RESPONDENT**

Miss Audrey Clarke instructed by Judith M Clarke and Co for the appellant

Mrs Denise Kitson and Miss Kimberly McDowell instructed by Grant Stewart Phillips and Co for the respondent

12 and 15 February 2013

ORAL JUDGMENT

BROOKS JA

[1] On 1 July 2005, Mr Owen Codner went home to find that a drawer in his bedside table had been broken into and that a certificate of deposit (CD) and some money, which he had been keeping in the drawer, were missing. In addition to that, undoubtedly distressing situation, Mr Codner realised that his daughter, Allecia, with whom he shared the accommodation, was gone, as were some of her belongings.

[2] The two had had a quarrel earlier in the day. Mr Codner did not delay. He went straightway to the Victoria Mutual Building Society (the Society), which had issued the CD, where his fears were realised. His enquiries revealed that earlier that day, Miss Codner had gone to the Society and had encashed the CD and received two cheques from the Society. One was in the sum of $4,400,000.00 and the other in the sum of $2,021,349.78. The latter cheque was made payable to Mr Nigel Rambaran, to whom Miss Codner was romantically linked.

[3] Mr Codner contended that although the CD was in their joint names, Miss Codner had made no contribution to the monies on deposit and had no authority to encash it without his permission. Miss Codner contended otherwise. She asserted that the account represented by the CD was started with her money. She accepted that she had not contribute any further monies after that initial sum but insisted that Mr Codner had always assured her that the monies, that had been put on deposit, were hers. It was to be her investment, which she was to use, in due course, to purchase a house for herself. That, she said, is exactly what she had done. The cheque for the larger sum was used for the purchase of a house from Mount Royal Development Limited and the smaller for the purchase of furniture and fittings for the dwelling.

[4] The situation led to Mr Codner filing a claim in the Supreme Court against both Miss Codner and Mr Rambaran. They contested the claim and it came on for trial before G. Brown J (Ag, as he then was), who, on 27 October 2009, gave judgment in

favour of Mr Codner against Miss Codner. During the course of the trial Mr Codner discontinued the claim against Mr Rambaran.

[5] Miss Codner is aggrieved by that judgment and has appealed against it. Although the legal principles of the presumption of advancement and resulting trusts were raised during the course of the arguments before this court, it is clear that the major issue for resolution before Brown J and, indeed, this court, was that of the credibility of the witnesses.

[6] The issue of credibility turned on questions of fact joined between the parties. Brown J made certain findings that made it clear that he generally accepted Mr Codner's account of the transactions between the two Codners. The findings of fact may be summarised as follows:

a. The CD account was opened with the sum of $600,000.00 taken from another account. That account was in the names of Miss Codner and her mother.

b. At the time of opening the account, either party could make deposits or withdrawals. There were no restrictions. It was Mr Codner's intention that Miss Codner could withdraw monies if he became ill.

c. Mr Codner retained total freedom of action over and control of the funds in the account.

d. Mr Codner had not given the money in the account to Miss Codner and she "breached his trust when she withdrew the money and converted it for her own selfish use".

e. Mr Codner never told Miss Codner that the money could only be used by her to purchase a house. "This was a contrived defense [sic] on her part as she sought to justify her fraudulent action".

The learned trial judge expressly stated that he preferred Mr Codner's evidence to Miss Codner's. We find, contrary to the submissions of Miss Clarke, on behalf of Miss Codner, that there was evidence to support each finding made by the learned trial judge.

[7] Based on those findings of fact, Brown J concluded that Mr Codner had rebutted the equitable presumption of advancement. He therefore found that Miss Codner was "a mere trustee" and that she "had no beneficial interest in the funds".

The grounds of appeal

[8] It was against the learned trial judge's findings of fact that Miss Codner aimed her attack in this appeal. The grounds of appeal state as follows:

"1. The learned judge erred in that contrary to the evidence presented, he found that [Miss Codner] has no beneficial interest in the funds

2. The learned judge erred in his interpretation of evidence relative [to] Fraudulent Conversion as reported to the Matilda's Corner Police.

3. The judgment is unreasonable having regard to the evidence."

The analysis

[9] During the course of the submissions, it was pointed out to Miss Clarke, and she candidly accepted, that an appellate court will not lightly disturb findings of fact that are made by the tribunal entrusted with that authority. The principle involved is that the tribunal of fact has had the advantage of seeing and hearing the witnesses, whereas the appellate court has only had the witness statements and the learned trial judge's notes of the evidence. In the instant case, it is the evidence given by Mr Codner and Miss Codner. The principle is underscored when there is no transcript of the shorthand notes but instead only the judge's notes of the evidence (see **Chow Yee Wah v Choo Ah Pat** [1978] 2 MLJ 41 at page 42).

[10] In the Privy Council decision of **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, at page 40E, their Lordships approved the principle that it is only in the absence of oral examination of the witnesses at first instance, that the tribunal of fact has no such advantage over the appellate court. They said, in part, at pages 39G – 40C:

"The principles governing the approach of an appellate court to the review of the decision of the judge of trial on disputed issues of fact are familiar, but it is worth stressing yet again what has been said both by the House of Lords and by this Board.

The matter is summed up in the well known passage from the speech of Lord Thankerton in **Watt or Thomas v Thomas** [1947] AC 484 at pages 487 and 488: -

> '(i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> (ii) the appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (iii) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because, it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

...The importance, in these circumstances, of the advantage enjoyed by the judge who heard and saw the witnesses at first hand can, therefore, hardly be over-estimated, and it is appropriate to bear in mind the caution uttered by Lord Shaw in ***Clarke v Edinburgh Tramways Co.*** (1919) SC (H.L.) 35 at page 36: -

> 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put [to] himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'"

[11] We have found no basis on which the learned trial judge's findings of fact and conclusion in law may be said to be "plainly wrong". The appeal against those findings and conclusion must therefore fail.

[12] We do, however, have some concerns about the orders made by Brown J. The learned trial judge, in finalising the claim, made the following orders:

> "1. A Declaration that the Claimant [Mr Codner] is the sole beneficial owner of Certificate of Deposit No. 22637706 [the CD account].
>
> 2. That the dwelling house at 119a Mount Royal Estate be transferred to the Claimant and the Registrar of the Supreme Court is empowered to execute the transfer if the Defendant [Miss Codner] fails to sign it.
>
> 3. The Defendant is to surrender the registered title forthwith to the Claimant or his Attorney at law.
>
> 4. The Defendant is to quit and deliver up possession of the said premises within seven (7) days of the date hereof.
>
> 5. Judgment for the Claimant on the claim and counterclaim in the sum of Two Million, Twenty-One

Thousand Three Hundred and Forty-Nine Dollars and Seventy-Eight Cents ($2,021,349.78) with interest at twelve percent (12%) per annum from the 1st July, 2005 until paid against the First Defendant [Miss Codner] with costs to be agreed or taxed.

6. Judgment for the Second Defendant against the Claimant with cost[s] to be agreed or taxed."

[13] Our concerns are based, in large measure, on the absence of any evidence or information about the status of the property at Mount Royal Estate. No certificate of title has been produced to establish that Miss Codner is, in fact, the registered proprietor of the property and as such capable of transferring the title to the property. There is also an absence of any information concerning the financing of the purchase of the property, for example, whether the sums taken from the CD account represented the full purchase price. Indeed, it is noted that in his particulars of claim, Mr Codner sought rather different reliefs, namely:

"a. An order restraining the 1st and 2nd Defendants from selling, transferring, or taking any step to dispose of property purchased from Mount Royal Development Limited, which property was purchased with the proceeds taken by the 1st Defendant from the Claimant's Certificate of Deposit and/or Account at Victoria Mutual Building Society, Liguanea Branch.

b. A Declaration that the 1st Defendant was at all material times the trustee of funds held on Certificate of Deposit No. 22637706 and Account at the Victoria Mutual Building Society, Liguanea Branch, in the joint names of the Claimant and the 1st Defendant and that at no time was the 1st Defendant a joint beneficial owner of the said funds.

c. An Order restraining the 1st Defendant and/or her agents or servants from withdrawing any further

sums from the Claimant's account at Victoria Mutual Building Society, Liguanea Branch.

d. Interest thereon at one percentage (1%) point above the prime commercial lending rate and compounded monthly from the date of the withdrawal of the funds from the Certificate of Deposit and/or the Account to the date of actual repayment.

e. Costs and Attorneys' costs.

f. Such further and other relief and orders as this Honourable Court shall think fit in the circumstances of the case."

[14] Based on our concerns, we asked learned counsel, representing the parties before us, for their suggestions as to the appropriate orders in the circumstances. Mrs Kitson, on behalf of Mr Codner, has informed us that no certificate of title has yet been issued for the property and that the sum paid would, most likely, cover all the costs of acquisition.

[15] Learned counsel has, after consultation with Miss Clarke, provided us with a suggested adjustment to the order made by Brown J. We have also considered the issue of the injuction which Mr Codner had sought and find that it would be an appropriate interim measure to be imposed pending the production of a certificate of title. The resultant orders will be set out below.

Conclusion

[16] The issues which Brown J had to decide were issues of fact. There was evidence upon which he could make the findings that he did. He specifically stated that he

preferred the evidence of Mr Codner. It was the learned judge who saw and heard the witnesses and this court finds no reason to disturb his findings.

[17] With the assistance of learned counsel we have, in an effort to secure the most appropriate outcome in the circumstances, made the following orders:

1) The appeal is dismissed with costs to the respondent to be taxed if not agreed.

2) The judgment of Brown J is affirmed, save for orders (2), (3), (5) and (6) which are varied to read as follows:

> (2) That all that parcel of land with dwelling house thereon, known as 119a Mount Royal Estate, purchased with the proceeds of Certificate of Deposit No. 22637706 be vested in the claimant by the developers, Mount Royal Development Limited or if title has been registered in the name of the defendant Allecia Codner, be transferred to the claimant and that the Registrar of the Supreme Court is empowered to execute the instrument of transfer if the defendant fails to sign same.
>
> (3) The defendant shall surrender the registered title if and whenever same comes into her possession forthwith to the claimant or his attorneys-at-law.
>
> (5) Judgment for the claimant on the claim in the sum of Two Million, Twenty-One Thousand Three Hundred and Forty-Nine Dollars and Seventy-Eight Cents ($2,021,349.78) with interest at twelve percent (12%) per annum from the 1st July, 2005 until paid against the defendant with costs to be agreed or taxed.

(6) The claim against the 2nd defendant Nigel Rambaran having been discontinued, costs to the 2nd defendant against the claimant to be taxed if not agreed.

3) The appellant is hereby restrained from selling, transferring, or taking any step to dispose of property purchased from Mount Royal Development Limited, which property was purchased with the proceeds taken by the appellant from the claimant's certificate of deposit and/or account at Victoria Mutual Building Society, Liguanea Branch.