

NMLB

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 186/2003

BETWEEN RILEY ADOLPHUS DAVY CLAIMANT
A N D CECILLA MITCHELL DAVY DEFENDANT

Ms. Kayann Balli instructed by Taylor-Wright & Company for Claimant.

Gordon Steer instructed by Chambers, Bunny & Steer for Defendant.

Heard: 23rd , 30th January and 9th February, 2004

A. SINCLAIR-HAYNES J. (Ag.)

Mr. Riley Davy lived for sometime in the United States of America with his children. In 1984 he acquired property situated at 70 Catherine Close, Queen Hill. He subsequently met Mrs. Cecelia Davy whom he assisted to attend C.A.S.T. (now University of Technology) for three years. She entered in 1987 and graduated in 1990. The parties cohabited from 1987 to 1991. During this period Mr. Davy lived intermittently in the United States. They solemnized the union by entering into holy matrimony in 1991. The union produced one child who was born on 8th February, 1996. Prior to the marriage, Mr. Davy

fathered five children, four from a previous marriage, and one from another union.

On the 26th January 1995, he transferred the property to Mrs. Davy as a tenant in common with him. In July, 2002, they separated.

On the 23rd June 2003, Mr. Davy instituted proceedings against Mrs. Davy for the following remedies:

1. A declaration that he is solely entitled to the beneficial interest in the said property.
2. An Order that she transfers her legal interest in the property to him

The versions of the parties are diametrically opposed on all vital issues. There is no consensus as to when they met; when construction of the house commenced; and when they approached the National Housing Trust (NHT).

THE CLAIMANT'S EVIDENCE

Mr. Davy is adamant that Mrs. Davy's name was placed on the title only as a means of facilitating a larger loan from the National Housing Trust. He insists that he began construction before he met Mrs. Davy. He testified that he met Mrs. Davy in 1987 whilst she was employed to L. C. McKenzie. Sometime before 1995, but after they were

married, he desired to obtain a loan from NHT. A friend of Mrs. Davy who worked at NHT informed him that he would need to join with Mrs. Davy in order to qualify for one million three hundred dollars instead of the six hundred and fifty thousand dollars he was entitled to on his own application. Mrs. Davy, he told the court, agreed to give him her NHT benefit. He made it clear to her that she would not acquire an interest in the property. The transfer was only to enable him to acquire the larger mortgage. She understood he would be solely responsible for the repayments of the loan.

She consented to give him her benefit because she was grateful to him for putting her through C.A.S.T. for three years. As a consequence of this understanding he instructed his Attorney-at-Law Dr. Dennis Forsythe to have her name placed on the title. He was supported by Dr. Dennis Forsythe who testified that Mr. Davy told him he was not making a gift to Mrs. Davy but rather wished to obtain a mortgage.

The understanding was that they would live in the house until "life came up" then they would acquire something else. In other words, when he was in a better position he would provide something for both of them. Mr. Davy's evidence is that after Mrs. Davy's name was placed on the title, she requested that he give her a life interest in the property. He

refused, and told her that the property was for his five children. Consequently, she refused to sign the NHT documents. As a result the loan was never obtained and construction ceased in 1995.

MRS. DAVY'S EVIDENCE

Mrs. Davy vehemently disputed this claim. She contended that Mr. Davy intended exactly what was stated on the title. That is, she holds the legal and beneficial interest in the estate as a tenant in common with him. According to her, they met in 1984 and not 1987. Prior to their marriage in 1991, there was no construction on the property, except for one or two retaining walls. She was the main contributor to the construction of the house having contributed in excess of three hundred thousand dollars from her salary as a teacher at Holy Childhood High School and monies earned from teaching extra lessons.

Mr. Davy, she contended, was employed at a steady job for only three short years during the marriage. Thereafter, his trucks worked only intermittently, and the profits were either negligible or non-existent. They agreed that her name should be added to the title because that was to be their matrimonial home. There was never any promise to give Mr. Davy her NHT benefit. It was to benefit them both. It was she, she testified, who suggested, that they approach NHT because their funds

were being depleted. She learnt that they could obtain a loan from NHT. He was unemployed at the time, and so he was to apply as self-employed. However, he was required to pay up his arrears before they could access the loan. He failed to do so, and that was the reason they did not access the loan and construction ceased. They agreed to devise and bequeath their respective interest in the property to each other so that in the event of death, the property would belong to their daughter.

FIRST ISSUE: WHEN WAS THE HOUSE CONSTRUCTED?

It is important in light of the divergent accounts of the parties, as to when the house was constructed, to determine this issue at the very outset. Mr. Davy contended that he had already begun construction before he met Mrs. Davy. He was supported by Mr. Byron McKinson, who deponed in his affidavit of the 29th September, 2003, that work on the land commenced whilst Mrs. Davy was attending school, and not working.

Mrs. Davy, however, vigorously disputed this, and insisted that construction began after their marriage. Her evidence was that only retaining wall or walls was constructed on the land prior to the marriage. She was not quite sure if there were one or two retaining walls. Further,

in her affidavit dated the 7th August 2003, she contended that Mr. Davy worked at a steady job for only three short years after their marriage. Thereafter, he would irregularly obtain haulage contracts. From his earnings he would contribute very little to the household or otherwise spend on “matters the details of which are known only to him. “

Her evidence was that she was responsible for maintaining the trucks because they operated at a loss and whenever profits were earned they were trifling.

Her evidence in this regard was severely assailed under cross-examination by Mr. Gordon Steer. Upon the presentation of documents to the contrary, she resiled from her evidence that he worked only three short years during the marriage and agreed that he was steadily employed, up to 1995.

Her averment that he spent money “on matters the details which were only known to him” was at variance with her viva voce evidence which repudiated that assertion. However, when confronted by her affidavit she admitted she had so deponed.

Mrs. Davy’s evidence was that since their marriage one or two retaining walls, two bedrooms, living room, dining room, kitchen, wash-room and bathroom were constructed on the property. She also told the

Court that Mr. Davy employed men to break stones to construct the retaining walls. The building has reached a stage where it is plied up to receive the roof.

Mrs. Davy's evidence was that she almost entirely financed the construction. Her contributions were in excess of \$300,000.00.

Mr. Davy on the other hand disputed her claim that she financed the construction and told the Court that \$300,000.00 would be grossly inadequate to construct the building. He was supported by Bryon McKinson .

The question is, could \$300,000.00 indeed finance the construction of the building?

Mrs. Davy, would have the court believe that she financed the construction almost entirely, and that Mr. Davy's contributions were if any, *de minimis*. Yet, her knowledge of the construction, was almost non-existent. She did not know how many retaining walls were on the property, before the construction of the house. She did not know when they began constructing the house. She failed to exhibit the requisite level of interest in the progress of the construction of the house in that she rarely visited the site. Her reason was that she was busy. She did not know how long the construction progressed at any time. Nor could

she say for what periods Byron McKinson worked on the site, even though her evidence was that she was responsible for paying him.

SUBMISSIONS BY MRS. KAYANN BALLI

Mrs. Kayann Balli, Attorney-at-Law for Mrs. Davy, submitted that the evidence of Mr. Byron McKinson should not be relied upon because he has not indicated how far beyond the foundation the building had progressed. Further, he has not rebutted Mrs. Davy's evidence that only retaining wall or walls were built.

His evidence is helpful in so far as it contradicts her evidence that there was no construction before their marriage.

SUBMISSIONS BY MR. GORDON STEER

Mr. Gordon Steer submitted on behalf of Mr. Davy that Mrs. Davy's failure to go to the site and her limited knowledge about the construction is an indication that she never truly believed the property was hers. If she felt it was, she would have exhibited more interest.

FINDINGS

With Mr. Steer's submissions, I agree. I cannot, on a balance of probabilities, believe that she almost solely financed the construction of the house and yet she failed to demonstrate any or any sufficient interest in its construction. I prefer the evidence of Mr. Davy that construction of the house commenced before their marriage. I reject her evidence that his trucks were sporadically employed during the marriage and as a result his contribution to the construction was negligible. I therefore find that the construction of the house began prior to the marriage. I accept the evidence of Mr. Davy and Mr. McKinson that \$300,000.00 would not be adequate to construct the retaining walls; to pay for labour and to construct the building. I further find that she did not contribute to its construction.

SECOND ISSUE: WHETHER THE PRESUMPTION OF ADVANCEMENT OPERATES

Having so found, the next issue to be determined is whether or not the presumption of advancement arises in favour of Mrs. Davy by virtue of her name being placed on the title by Mr. Davy.

It is trite law that where a husband purchases property in the names of himself and his wife, a gift to the wife is presumed in the

absence of evidence to the contrary. See **Pettit v. Pettit** (1969) 2 All. E. R. 387, **Lynch v Lynch** 26 JLR 113.

The critical issue is what was the parties' intention at the time her name was placed on the title. Was it as Mr. Davy contended, only to facilitate the obtaining of a larger loan, or did he intend, as Mrs. Davy contended that she should acquire half share of both the legal and beneficial interest?

The evidence is so divergent that any attempt to ferret out the truth demands careful analysis.

SUBMISSIONS BY MRS. KAYANN BALLI

Mrs. Balli submitted that the presumption of advancement operates. She further submitted that Mr. Davy has failed to rebut the presumption. She argued that it was unreasonable to the point of incredulity to expect that Mrs. Davy would have given up her NHT benefits to construct a house for his children without any provision for her and their child. Further, to expect that she would be willing to await her own home "when life came up" was so improbable as to indicate it was fictional and ought to be rejected.

Mr. Davy's evidence was that he felt that she would willingly give him her NHT benefit because she was grateful to him for assisting her with her tertiary education, thus enabling her to obtain a profession. She resided with him for most of that period, and he was responsible for her, as she was unemployed. During that time he worked both in Jamaica and in the United States.

Is it unreasonable in light of the fact that the property and the construction began prior to her marriage, to accept that she felt it was not hers? Is it far-fetched to believe in circumstances where he acquired the property whilst he lived with his children in the U.S. and the fact that construction took place whilst he lived partially in Jamaica and partially in the U.S. that she recognized that the property was not hers? Is it straining credulity to accept his evidence, that she was willing to give him her benefit out of gratitude, and with the assurance that they would later acquire their own home in circumstances where they lived in amity?

Mrs. Balli further submitted that Mrs. Davy would not have consented to such an arrangement when only Mr. Davy's five children would benefit to the exclusion of their child. The evidence is that their child was not yet born. The transfer was effected on the 26th January 1995, her child was born on the 8th February, 1996. I believe that Mrs.

Davy, in the foregoing circumstances, would have consented to give Mr. Davy her NHT benefits. Mrs. Balli cited **Harris v. Harris** (1982) 19 JLR 319 in support of her submission that it was improbable that Mrs. Davy would have done so. However, the instant case, is distinguishable from *Harris v. Harris* for the following reasons.

1. The parties in the *Harris* case were not living in amity.
2. There was no evidence of any act of generosity on the part of the husband, for which it could be inferred that Mrs. Harris could be grateful.
3. Mrs. Harris, in circumstances, where the parties were not living in amity, was to undertake the onerous responsibility of paying a mortgage for property in which she had no interest.

In this instant case, Mr. Davy's evidence, which I accept, was that he understood that he was to be solely responsible for the mortgage.

4. Mr. Harris offered to sell Mrs. Harris the property at an undervalue. The reasonable inference to be drawn was that he recognized that she had an interest in the said property.

Mrs. Balli also submitted that the loan was not obtained because Mr. Davy failed to pay up his contributions and not that Mrs. Davy failed to

return to NHT to complete the documents because he refused to grant her a life interest in the property.

In support of this argument, she submitted that he has failed to show that his NHT contributions were paid up because exhibit RAD1 (the NHT document dated the 11th September 2003) indicated that the 1994 contributions were not made. However exhibit RAD2 (letter dated September 18th 2002, from the Equipment Maintenance Limited Department to NHT) stated that in 1994, Mr. Davy was employed to them and that he made his contributions.

She further submitted that he failed to provide the court with an explanation as to why he allowed his Attorney-at-Law to transfer the property by way of gift since he did not intend to give her a gift. Dr. Forsythe's testimony was that Mr. Davy attended his office, and advised him that he did not intend to give Mrs. Davy a gift of the property. However, he desired to obtain a mortgage. He further testified that the transfer could have been effected either by way of gift or for consideration. Since there was no consideration, he effected the transfer by way of gift.

Dr. Forsythe testified that he had no recollection of Mr. Davy attending his office with Mrs. Davy, when both Mr. and Mrs. Davy

testified that she did attend. Mrs. Davy's evidence was that Mr. Davy took her there. Inasmuch as Dr. Forsythe might be unreliable in his recollection as to whether she attended, I do believe Mr. Davy told him that he did not intend to confer a gift upon Mrs. Davy.

Assuming that the conversation took place in the absence of Mrs. Davy, it would nevertheless serve to strengthen the evidence of Mr. Davy as to the probability of that being their common intention.

Mrs. Balli submitted that the disposition of a life interest did not oust the interest of his children, and consequently it is not believable that that was the reason she failed to pursue the NHT loan. If it is accepted that Mr. Davy intended the property to benefit his children (theirs was not yet born) it is quite probable in light of the fact that he intended to acquire other property for himself and Mrs. Davy, that he did not wish to encumber that property with any life interest.

The evidence was that a half of the property was willed to his children. He told the court that the other half was to take care of his expenses. This I find, is not unreasonable in the circumstances.

Mrs. Balli also submitted that Mr. Davy's admission that the house was to be their matrimonial home supports Mrs. Davy's contention.

The law as yet does not recognize community of property nor any special rules of law applicable to family assets. Consequently, if a spouse purchases property for their common use, this cannot per se give the other any interest. See **Pettit v Pettit** (supra).

This admission therefore, does not confer necessarily a beneficial interest upon her. Lord Bridge of Harwicks in **Lloyd Banks P/L v Rosset and Another** 1990 1 ALL ER 1111 made the following observation at page 1117.

“I pause to observe that neither a common intention by spouses that a house is to be renovated as a “joint venture” nor a common intention that the home is to be shared by parents and children as the family home throws any light on their intentions with respect to the beneficial ownership of the property”.

Mrs. Balli further submitted that Mrs. Davy made contributions to the construction of the matrimonial home, pursuant to their joint intention as husband and wife that she would have an interest in the property, otherwise she would not have done so.

I have already rejected her evidence of any contribution towards the construction of the house. At this juncture I will nevertheless comment on Mr. Steer’s submission that contributions would serve to oust the presumption of advancement.

Had I accepted her evidence that the house was constructed after marriage and that she was responsible for the construction of the house, then the question of a presumption of advancement would not arise. A presumption of advancement is unlike a presumption of a resulting trust. It is not based on contributions but rather on the husband's intention to satisfy his obligations to make provisions for his wife or a child or a person in relation to whom he stands in loco parentis. (See **Harris v Harris**) supra.

However, had I found that she made contributions to the construction of the house, even though the construction began prior to their marriage, such evidence could be regarded as cogent evidence that the intention was that she should benefit. Campbell J.A. (Ag.) as he then was in **Harris v Harris** very eloquently expressed the law as follows:

“ It is undoubtedly true that the presumption of advancement which arises as a matter of law may be strengthened by showing contribution by the grantee to the purchase price of the property. or by the conduct of pooling the resources by the parties but certainly is not weakened or negated by proof or absence of contribution.”

Mrs. Balli submitted further that Mrs. Davy's name has been on the title for nine years. As a result she argued the principle of proprietary

estoppel is applicable in light of Mrs. Davy's contributions. **Halsbury's Law of England** 4th Edition Vol.16 para.1614 sets out the Common Law position.

“When one party has by words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualifications which he himself has so introduced”.

I have already rejected her evidence as to her contributions. I find that Mrs. Davy has not adduced any reliable evidence that she has in any way acted to her detriment or significantly altered her position in reliance on any promise that she was to have an interest in the property.

I accept Mr. Davy's evidence that she agreed to give him her benefit in circumstances outlined by him. I find that she reneged and refused to sign the NHT documents. She is still the owner of those benefits. Mr. Davy has not benefited in any way from the agreement. Nor has Mrs. Davy suffered any disadvantage.

DISCREPANCIES IN MRS. DAVY'S EVIDENCE

Mrs. Davy's evidence is replete with inconsistencies. She insisted under cross-examination, that her name was placed on the title, before they had any discussion to approach the National Housing Trust. However, is this really true? At paragraph 9 of her affidavit, she deponed as follows:

“It was agreed between us that the claimant would pay off all his arrears which he owed to the NHT and expedite the transfer of my name on the duplicate certificate of title for the abovementioned property, so that, we both could access the loan.”

Such a statement unequivocally asserts that the placing of her name on the title and the paying off of his arrears were pre-requisites to the acquisition of the loan.

Mrs. Davy in her affidavit, has therefore supported Mr. Davy that the discussions about approaching NHT indeed occurred before her name was placed on the title. Under cross-examination however, she denied making that statement even though her affidavit was signed by her, a teacher.

Under cross-examination by Mr. Steer, she testified that before construction commenced there were not many discussions that her

name should be placed on the title. However, when confronted by her affidavit she admitted she had so deponed.

Mrs. Davy's testimony was that because Mr. Davy was unemployed at the time they approached NHT he sought the mortgage as an unemployed person. The evidence was that he was employed in 1995. Also her affidavit evidence was that they approached NHT before 1995, and not after as she testified.

CONCLUSION

Mrs. Davy's credibility has been severely impugned under cross-examination. Upon examination of the evidence I have found Mr. Davy to be a more reliable witness. As a consequence in areas where their evidence conflict, I accept Mr. Davy's and reject Mrs. Davy's. I hold that the presumption of advancement to Mrs. Davy which arises on the facts of this case has been rebutted. As a consequence I hereby declare as follows:

1. The claimant is entitled to the beneficial interest in the property.
2. The defendant is to transfer her legal interest in the property to the claimant, and the claimant shall bear the costs of effecting the same.

3. The Registrar of the Supreme Court is empowered to sign all documents necessary to bring into effect any and all orders of this Court, in the event that the defendant fails to execute the same.