



IN THE SUPREME COURT OF JUDICATURE

CLAIM NO. 2011 HCV 06715

**IN THE MATTER of a Family/Matrimonial Home
Situat at 42 Graham Heights, Kingston 8 in the
parish of saint Andrew comprised in Certificate
of Title registered at Volume 1108 Folio 899.**

**IN THE MATTER of shares in a Company,
Donaldson's Engineering Limited**

**IN THE MATTER of the Property Rights of
Spouses) Act, 2004.**

BETWEEN	AILEEN DONALDSON	CLAIMANT
AND	DONALDSON'S ENGINEERING LTD.	1st DEFENDANT
AND	KEVIN DONALDSON	2ND DEFENDANT
AND	KAREN DONALDSON	3RD DEFENDANT

Heard: 14th January, 15th January and January 24, 2014

**Trust – Matrimonial Home – Shares – Whether Claim can be sustained against
corporate entity – Whether trust declared or created.**

**Mr. Leonard Green and Ms. Sylvan Edwards instructed by Chen, Green & Co. for
the Claimant**

Mr. Lawton Heywood for the 1st Defendant

**Mrs. Judith Cooper-Batchelor instructed by Chambers, Bunny & Steer for the 2nd
and 3rd Defendants.**

Coram: David Batts J.

[1] This judgment was delivered orally on the 24th January 2014. I have used the Claimant's Counsel's notes as well as my own to provide this written record of the judgment.

[2] The claim concerns the entitlement to or the beneficial interest in property known as 42 Graham Heights, Kingston 8 in the parish of St. Andrew. The Claimant asserts that it is beneficially hers entirely or as to one half to her and the other half to all the children. The Defendants contend that the Claimant has no interest in the premises.

[3] At the commencement of the trial Counsel informed me that it was agreed that the Affidavits along with their attachments, would be the evidence in chief before the Court. The Claimant's evidence in chief consisted of 3 affidavits, one dated 26th October 2011 and two dated 10th January 2013. The Claimant was cross examined by Counsel for each Defendant. Also giving evidence on her behalf were Paula Donaldson-Phillips and Richard Donaldson. Their Affidavits and attachments were admitted and each was cross-examined.

[4] The 1st Defendant's evidence consisted of an Affidavit by Victor Keith Longshaw dated the 6th day of February 2012. He was unable to attend because of illness of an irreversible nature. After hearing submissions I admitted the document pursuant to the Evidence Amendment Act. I promised to state my reasons for doing so and will fulfill that promise in the course of this judgment. The 1st Defendant also relied on the evidence of Vincent Anthony Donaldson. His witness statement dated 31st December 2013 stood as his evidence in chief and he was cross examined by the Claimant's counsel.

[5] The 2nd and 3rd Defendants relied on their respective Affidavits of the 24th April, 2013 and 18th November, 2013 as well as the Affidavit of Vincent Donaldson dated 3rd December, 2013. All were cross examined by the Claimant's Counsel. In addition to the exhibits attached to the Affidavits, the parties put an additional 6 documents into evidence before the Court.

[6] I do not need to and therefore will not discuss in detail the evidence adduced or the documentation presented. In this case I had no difficulty in resolving the issues of fact. The legal consequence which flowed, has been more of a challenge. I will therefore make reference to the evidence only so far as it is necessary to explain my decision.

[7] Counsel for the Claimant was rather helpful in listing the issues factual and legal for the court's determination. Neither of the Defendants' Counsel demurred from that list. Having carefully considered it, I accept (with a slight modification of the order in which they were presented) that it accurately reflects the matters for my determination.

[8] Before embarking on that exercise however I will fulfill promises made in the course of this trial. The first relates to the reasons for admitting the evidence of Victor Longshaw. His affidavit was served on the Claimant and the 2nd and 3rd Defendants on the 9th February 2012. The Claimant responded by Affidavit on 10th January 2013. That Affidavit had already been admitted into evidence. The deponent Mr. Victor Longshaw suffers from senile dementia. See a medical report dated 7th January 2014 which is Exhibit 2. He was the other director of the 1st Defendant Company. Mr. Longshaw was a director of the company at a time when critical events took place and without his evidence the 1st Defendant would be unable to speak to certain issues.

[9] I did not accept the submission by Claimant's counsel that as the affidavit was sworn in 2012 and as the doctor's treatment commenced in 2012, it followed that he was suffering from dementia at the time the affidavit was sworn. The Doctor's report says he had been treating the Defendant since October 2012 for several complaints. The report itemizes complaints such as rheumatoid arthritis, seizures, urinary urgency and inconsistency, hyperplasia and anemia. The report (dated 7th January 2014) said "presently he is suffering from senile dementia". There is no suggestion that this was the complaint in October 2012.

[10] In any event the Affidavit was sworn to many months before the doctor started to see him. In all these circumstances and as the said medical report was admitted by

consent and without challenge I exercised my discretion to abridge time, dispense with any requisite Notice and admitted the Affidavit.

[11] Secondly, I had in the course of the trial prevented Claimant's counsel from asking certain questions of the 2nd Defendant. These related to whether he had accounted to the 1st Defendant for the value of the premises which the 1st Defendant had transferred to the 2nd Defendant (who was its Managing Director.) I promised to put my reasons in writing and now do so.

[12] My view is that the answer to the questions posed could only serve to tarnish the 2nd Defendant's reputation. It had no probative value in relation to the issues to be determined. Claimant's counsel properly conceded that the claim to set aside the transfer was not premised on any breach of fiduciary duty. The only basis of the claim was an alleged breach of trust. The 2nd Defendant's duty as a director was not in issue. I therefore prevented that line of questions being pursued.

[13] Thirdly in the course of trial I ruled on certain objections to aspects of the Affidavit of Victor Longshaw, dated 6 February, 2012. After hearing submissions I struck out the objectionable lines in paragraphs 9 and 22. I allowed paragraphs 10, 13, and 15 to remain unchanged. My reasons may be briefly stated.

(a) Para 9 – The statement that the 2nd Defendant graduated from University with certain qualifications could only be based on information communicated and is clearly hearsay.

(b) Para 10 – The statement as to the reason the 2nd Defendant was given shares is admissible as the 1st Defendant's knowledge is deemed to be that of its director, the witness.

(c) Para 13 – As a Director of the 1st Defendant the witness is entitled to say the company's reason for allowing the elder Donaldson to occupy the house. The witness was a founding member & original Director.

(d) As regards, Para 15 the witness was entitled to know how many shares were subscribed and whether they were pledged or held in trust.

(e) As regards Para 22 – I struck out the sentence beginning with ‘that’ and ending in ‘cohabitation’ as the information as to when and whether the Senior Donaldson separated from his wife would be based on hearsay and therefore inadmissible.

[14] The issues for the court to determine have been laid out by Claimant’s counsel and as already indicated I have chosen to adopt them. I do so in the order I deem appropriate.

Issue 1

Did Harry Donaldson and his wife have a matrimonial home when they moved from the Harbour View premises sometime around 1976 and where was that matrimonial home?

[15] Having seen and heard the witnesses I have no doubt in my mind that the answer is in the affirmative. They were married in 1951. They had 4 children; the last of whom was born in 1967 (the 2nd Deft). He is now 47 years old. He admitted in cross examination that the move from Harbour View occurred in the mid 1970’s. He would have been old enough to recall that the family moved to a new address which was 42 Graham Heights. He admitted that his mother, father, himself and one sibling moved to that new address. I accept the Claimant’s evidence that 42 Graham Heights, St. Andrew was the matrimonial home and that there was no separation of Harold and Aileen Donaldson. Number 42 Graham Heights was the family home or to adopt the Claimants formulation the matrimonial home.

Issue 2

Were the premises described as 42 Graham Heights the matrimonial home of Harold & Aileen & what consequence would follow from that finding?

[16] As I stated earlier I accept and find as a fact that 42 Graham Heights was the matrimonial home. The Claimant clearly explained that the reason for her visits and stay in the United States was to secure a certain status for herself and the children and to facilitate their education. What is the consequence to this action of that finding? The Hon. Justice Lennox Campbell has explained quite clearly that the Property (Rights of Spouses Act (PROSA) could not be relied on by the Claimant. This is because (a) Her spouse is deceased & (b) Her application was not brought within 12 months of the dissolution of marriage, separation or annulment. The learned judge refrained from striking out the action because PROSA preserved the rules of law and equity and other enactments. They continue to apply although PROSA may not.

[17] The significance to this case is that the Claimant has to establish her case in accordance with the law as it existed prior to PROSA, or more accurately without the existence of PROSA. At common Law it was not of great significance whether or not the asset in dispute was a “family” asset or the “family home.” Lord Denning’s attempt to create legal presumptions from property so described was rejected by the House of Lords see **Gissing v Gissing [1971] AC 886** and **Pettitt v Pettitt [1970] AC 777**.

[18] The cases establish that the court’s power under the existing legislation (our case the Married Women’s Property Act) was not to distribute interests in property but to declare them. This meant that the court had to find either a common intention at the time of acquisition or contribution towards, the purchase of the property. When such circumstances were identified the court of equity created a resulting or constructive trust in order to do substantial justice to the parties and to give effect to the beneficial ownership of the property.

[19] The fact that premises were the matrimonial home was only relevant to the extent it might aid the court to determine the facts, such as the intention of parties. No

automatic legal consequence flowed at common law from the property being the matrimonial or family home. In equity also, other circumstances involving reliance on representation to one's detriment, could provoke a court to declare a trust. This case is not premised on that.

[20] Mr. Green for the Claimant submitted that the fact that the house was the matrimonial home should provoke the court to declare a trust in the Claimants favour. I do not agree. I hold that it was the *raison d'être* of PROSA to give an automatic consequence to that status. The Act supplanted the pre-existing law so that no further enquiry was necessary once it was decided a house was the matrimonial or family home. PROSA does not apply and to give automatic effect to that categorization would be to make PROSA largely redundant. The answer to the second issue is therefore that in this case no automatic legal consequences flow from the designation matrimonial home as it relates to beneficial ownership.

Issue 3

Was Harry Donaldson controller of Donaldson's Engineering Ltd. beneficially the owner of 42 Graham Heights, which was legally owned by that company?

[21] The short answer is that there was no evidence to suggest that the company held the house in trust for Mr. Harold Donaldson. Indeed the fact that his will (Exhibit 5) makes no reference to 42 Graham Heights but treats in detail with the shares of the company, suggests that the deceased understood, appreciated and accepted the legal position. I find that Mr. Harold Donaldson was not the beneficial owner of the premises in question.

[22] The situation is to be distinguished from **Prest v Petrodel Resources Ltd. and others [2013] 3 WLR 1** delivered 12th June 2013. In that case all the properties (including the matrimonial home which was purchased before the company began trading) were bought with funds provided by the husband. Further, the assertion that

the matrimonial home was held in trust was not challenged on appeal. The case was therefore determined on classical resulting trust principles. The Corporate veil was not in fact pierced. Lord Sumption's dictum at para 52 on which the claimant placed great reliance, must be understood in that context. In the case before me the business was ongoing and the company incorporated some 2-3 yrs before the subject property was acquired. Mr. Victor Longshaw gave at paragraphs 11 and 12 an unchallenged account which is partly supported by notations on the title. There is no evidential basis to declare that the 1st Defendant Company held the matrimonial home in trust for the benefit of the Claimant's deceased husband.

Issue 4

Was Aileen, the wife of Harold and the mother of the 4 children by virtue of her "contribution" entitled to part of Harold's beneficial interest if the court finds that he was the beneficial owner at the time 42 Graham Heights was purchased?

[23] Having regard to my finding at issue 3, this question did not arise. Mr. Harold Donaldson is not the beneficial owner of 42 Graham Heights.

Issue 5

Was the fact of a registration of the property situated at 42 Graham Heights in the name of the company Donaldson Engineering Ltd. sufficient to disentitle the wife Aileen to relief and does the court have jurisdiction to grant the wife such relief?

[24] In this case the evidence does not support the wife having a beneficial interest in 42 Graham Heights. They were married in 1951, they acquired premises at Harbour View where the family lived from about 1960 to 1973. They then removed to 42 Graham Heights. the latter premises was purchased by the company. The Harbour View premises remain unsold. The issued shares of the company were divided between the husband (now deceased) and the husband's cousin, Mr. Victor Longshaw. Apart from working for 3 years in the company, the Claimant has given no evidence of any contribution or role or claim to ownership. There is not really before me any claim

to ownership of the husband's shares in the company. Such a claim would in any event have to be pursued against the estate of her deceased husband.

[25] I am prepared to assume that the wife did work in the company without remuneration (See Para 13 of her Affidavit dated 26th October, 2011). However the company paid household bills, utilities, food and other expenses. It is significant that the Claimant started working with the Company many years after the business started (See Para 11 of her Witness Statement). Even if a claim had been made by her for her husband's shares or an interest in them, the evidence to support a common intention to a joint interest in the shares of the company does not reach anywhere near the standard set in ***Chin v Chin PCA #3 of 2007***.

[26] Let me hasten to add that I regard the evidence of the Claimant at para 18 of her Affidavit dated 26th October 2011 as relevant. In that paragraph the Claimant stated that she agreed with her husband to have the house registered in the name of the Company "in order to use this asset as a tool for accessing loan funds to finance projects that the 1st Defendant would undertake..." If true, this means the Claimant agreed to the Company while she knew it had no beneficial interest, raising funds on the pretext that it had such a beneficial interest. The Claimant denied that there was such an agreement in the course of giving oral evidence. It is clear to me that the Claimant knew the property was registered in the name of the company and that funds were raised by the company which used the property as collateral (See Para 17 Victor Longshaw Affidavit dated 6th February 2012).

[27] Strangely Mr. Longshaw denied (at para 14) that the property was purchased with the contemplation that it be used to access loan funding and also denied at (para 13) that it was ever the family home. I find that these assertions of Mr. Longshaw lacked credibility. I do not rely on the assertion in his Affidavit which seem largely born of convenience and not of truth. I find that the premises were purchased by the company. It was Mr. Harold Donaldson's intention that it would serve as the family home but would be on the company's balance sheet and reflect positively on it. I take judicial notice that Engineering Companies and companies in construction often bid for

projects. Prospective clients tend to be favourable to companies which are sound and have worth.

[28] This significant digression notwithstanding, it is not registration in the Company's name that disentitles the Claimant. Rather it is the transfer of the company's shares to the 2nd Defendant and the fact as she admitted that it was discussed with her and she did not object. This is more fully discussed below.

[29] The answer to issue 5 therefore is, as the company was the registered proprietor of the premises, any claim ought to be for an interest in the shares of the company. The Claim ought to be brought against the estate of the husband Mr. Harold Donaldson. Furthermore the Court will not assist companies to be used as instruments of fraud and the Claimant knew or ought to have known that the registered title was notice to the world that the company had a beneficial interest in the land. The Claimant knew or ought reasonably to have known that parties doing business with the company might be reliant on that. Her claim that the Company did not beneficially own the shares will therefore not be sustained.

Issue 6

Did the transfer of the 540 shares to Kevin around 2007 make him controller of the company and what if any effect would that have on the beneficial entitlement of Harold and/or Aileen Donaldson's beneficial entitlement to 42 Graham Heights?

[30] This issue can be shortly disposed of. Mr. Harold Donaldson transferred the majority shares to Kevin Donaldson. The Claimant when cross examined admitted that Harold discussed this with her prior to doing so. She agreed. The evidence is as follows: 'Q: When he transferred the shares to Kevin Donaldson he told you.

A: Yes he did

Q: When was this in 2007

A: When he was about to do it he said he was going to do it.

Q: 540 shares

A: Yes

Q: what was your contribution to the discussion?

A: When he was about to do it I ask him what about balance to give it to the other children Richard and Paula Yvonne and he agreed.”

[31] The evidence demonstrates at best acquiescence and at worst agreement to transfer of shares to the 2nd Defendant. The Claimant does not ask about her interest in the shares. This suggests and I so find that she recognized that she had none. Her husband and herself both recognized that the shares were his to dispose of as he saw fit. In any event she agreed that they should be given to the 2nd Defendant. There is no suggestion that the 2nd Defendant was a party to any agreement in relation to the shares. The Claimant was concerned about the other children. The evidence is they each in fact received shares but individually or collectively they did not constitute a majority. I pause to say that it is no small wonder that the controlling interest was given to one person. This prevents deadlock in decision making and the smooth running of the company. Equally it is not surprising that Harold Donaldson gave the majority shares to the 2nd Defendant as this son trained as an Engineer. He returned to Jamaica and worked alongside his father in the business.

[32] The answer to Issue 6 is that the transfer of shares to the 2nd Defendant renders him the controller of the Company. The Company owned 42 Graham Heights beneficially and legally and hence he would be able to control the Company's actions in relation to the property.

Issue 7

What if any is the effect of the transfer of the legal interest in 42 Graham Heights from Donaldson Engineering Ltd. to the 2nd and 3rd Defendants?

[33] The evidence indicates that the company transferred its interest in 42 Graham Heights to the 2nd and 3rd Defendants. I have already stated that the company owned

the premises legally and beneficially. Certainly the court could not condone the company being used to pledge credit or obtain mortgages with the use of the property it doesn't beneficially own. The Claimant knew that this was one reason it was registered in the Company's name. She says in her witness statement, and I do find as a fact, that one reason for placing it in the company's name was to enhance its balance sheet and enable it to obtain loans, credit or financing. A Court of equity should not assist this Claimant given her knowledge, by raising an equity against the Company. The Company can therefore deal with the property as it wishes.

[34] The Claimant wishes the corporate veil to be pierced and It was submitted that the 2nd Defendant as the majority shareholder who orchestrated a transfer to himself & his wife be regarded as a trustee of the property. I gave the submission much thought. The 2nd Defendant acted most dishonourably in that he locked his mother out of the house. He has come to this court and, pretended that he got no or very little love and attention and care from his mother. He denies even being taken to and/or picked up at school by the Claimant. I did not regard him as truthful. I prefer the evidence of his siblings. I accept that which was stated at Para. 8 of the Claimants Affidavit dated 10th January, 2013.

"I have done my best to school him including transporting him to and from school up to the time he went to Campion College High School in the parish of St. Andrew and house him even while he was studying in the United states and provided comfort for him when he had personal and emotional problems during the course of his studies."

[35] I accept the evidence of the Claimant and witnesses that the marriage remained alive and continued until the death of her husband. I accept that the Claimant's travels and sojourn abroad was consensual. It may have brought some strain on the marriage due to distance and time, however. I accept that the marriage remained alive. I accept also that it was the joint intention of the husband and wife that the property be used as a family home and was in fact so used. However, whatever may have been their hopes and expectations there is no evidence that this was communicated to the 2nd Defendant

at the time the shares were transferred to him. Nor is there evidence that he was accepting it with any promise to that effect.

[36] If his mother and father thought it sufficiently important, they might have had the 2nd Defendant execute a deed of trust, or they could have called a family meeting and have this outlined explained and orally declared. Nothing of the sort was done. At the time her husband told her of his intention the Claimant's concern was that the other children received some of the shares. This is not surprising by then the dynamics of the family had changed. She owned her own house abroad and the children were all grown and living in their own accommodation. It may have been hoped that the 2nd Defendant would do right by allowing his mother and father to occupy the premises but that was all. He has not acted in a manner to be expected of a son towards his mother however that by itself is not sufficient to raise an equity. The 2nd Defendant was not a trustee of shares or premises.

[37] This is not a case of personal hardship nor a case where the Claimant has acted to her detriment in reliance on a promise or representation by the Company or the 2nd Defendant. The Claimant and other children were well provided for in her husband's Will. (Exhibit 5). It is clear the deceased decided that the 2nd Defendant having assisted him in the business ought to take over as Managing Director and majority shareholder. In that position he would have the premises to enjoy in much the same way as his father's family had enjoyed it.

[38] It is beyond the reach of the pleadings (now called statements of case) for any finding or investigation into whether the transfer of the Company's asset to a shareholder without consideration was in breach of any fiduciary duty to the Company. I make no comment on that. The company is a Defendant and was represented by counsel and the company has supported the transfer to the 2nd Defendant. My findings and decision are limited to the question whether the 1st or 2nd Defendant was fixed with a trust resulting or constructive relative to the premises in question.

[39] On the evidence and on the law as I understand it, the answer to the 7th issue is that the effect of the transfer of 42 Graham Heights to the 2nd and 3rd Defendants insofar

as the Claimant's case is concerned, is to grant to the 2nd and 3rd Defendants legal and equitable ownership of the said premises.

[40] Before concluding, let me thank all counsel for their industry. I would also like to record my appreciation for the civil manner in which Counsel conducted themselves in what is really an uncivil situation. When families turn on themselves it can get rather distasteful. However in the finest tradition of the bar, Counsel appearing in this matter, did not allow this dispute to so descend.

[41] In the result however there is judgment for the 1st, 2nd and 3rd Defendants against the Claimant.

[42] Having heard submissions on the question of costs, and the 2nd and 3rd Defendants not having asked for costs, I make no order for costs in the matter.

David Batts
Puisne Judge
24th January 2014