



[2023] JMSC Civ 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV01470

BETWEEN NEWMAN FRANCIS CLAIMANT
AND KENEISHA LENEISHA ANN-MARIE FRANCIS DEFENDANT

IN CHAMBERS

Mr. Glenroy Mellish and Mrs Sonia Andrea Byfield instructed by Byfield, Mellish & Campbell for the claimant.

Mr Everton Dewar instructed by Everton J. Dewar & Co for the defendant.

Heard November 14, 2022 and January 31, 2023

Beneficial interest in property- whether the defendant holds the legal interest on a resulting or constructive trust for the claimant – whether there is a presumption of advancement

CORAM: JARRETT, J

Introduction

[1] The key question in this case is whether lot numbered eighty-five part of Greendale formerly part of Bretts Pen and Graham Pen in the parish of Saint Catherine, known as 27 Gosford Road, Greendale, Spanish Town, in the parish of St Catherine (the property), is owned solely by the defendant or held by her on either a resulting or constructive trust for the claimant. The claimant and the defendant are father and daughter respectively. They are at odds over the ownership of the

property, where they both have lived and where they both call home. The claimant contends that the house is owned solely by him or alternatively, that the defendant holds a percentage of the legal interest on trust for him. In the event of the latter, he wishes the court to determine the amount of the percentage interest.

The claim

[2] In his claim form filed on April 11, 2018, the claimant seeks the following orders:-

- i. A declaration that the claimant is entitled to 100% interest in the land being Lot Numbered Eighty-Five part of Greendale formerly part of Bretts Pen and Graham Pen in the parish of Saint Catherine registered at Volume 1018 Folio 445 of the Register Book of Titles and that the Defendant holds the legal interest in the land in trust for the claimant.
- ii. In the alternative, a declaration that, by virtue of the doctrine of resulting trust and/or constructive trust and/or estoppel, the claimant is entitled to an equitable interest in the said property and an order as to the extent of such interest.
- iii. That the defendant is to transfer the interest as declared by this court to the claimant by executing a transfer of land and any other documents as are required to give effect thereto and to deliver the original duplicate certificate of title for the said property or to facilitate the release thereof to the claimant's attorney-at-law within fourteen (14) days of the date of this order.
- iv. In the event that the defendant is unwilling, unable or neglects to sign any requisite documents necessary to give effect to the orders herein, then the Registrar of the Supreme Court of Judicature of Jamaica is hereby empowered to sign the said documents on behalf of the defendant herein.
- v. Liberty to apply.
- vi. Costs and Attorney's costs; and

- vii. Such further and other relief as this Honourable Court may deem fit.

The evidence

- [3] At the start of the trial, counsel indicated that but for Facebook Messenger conversations between the parties and audio recordings of family meetings which the defendant notified that she had intended to rely on at trial, all the documents in the defendant's Notice of Intention to Tender Hearsay Documents filed on May 16, 2022, were agreed. Also agreed were all the documents in the claimant's bundle of documents filed on November 11, 2022. The agreed documents were all admitted into evidence. I have considered all the evidence but will outline only those aspects of it germane to my findings.

The Claimant

- [4] The claimant gave evidence by witness statement which was amplified at trial. He was extensively cross examined. He is 63 years old and a retired Jamaica Urban Transit Company (JUTC) bus driver. He is married to Donna Francis. The defendant is their daughter. He and his wife also have two sons. He has lived at the property for over 14 years but has been acquainted with it for more than 40 years. The property was purchased by Horatio Francis (Horatio) and his wife Emeline Francis (Emeline) in 1987. Horatio was his uncle. He used to live with the couple prior to his own marriage and he regularly took care of their needs. His relationship with them was a close one. In taking care of their needs, he often co-opted his entire family, including the defendant. There came a time when he asked the defendant to stay with the couple who were ailing to ensure that someone was with them at all times in the event of an emergency. On a daily basis he would pass by the house to see to their needs.
- [5] Horatio predeceased Emeline on January 13, 2003. Emeline died leaving a Will on November 28, 2004. By that will, she bequeathed 50% of the sale price of the property to the claimant. The Will, indicates that Emeline bequeathed the sale price of the remaining 50% as follows: 25% to her niece Ruby Edwards, 15% to another

niece Naomi Prince and, 5% each to Sophia Easy and the New Testament Church of God at Ellerslie, Spanish Town.

[6] Shortly after the death of Emeline, with the consent of her executors, the claimant moved into the property with his family. This was around February 2005. Prior to this, he and his family lived at his sister's property at Waterford, St. Catherine. He saw Emeline's bequest as "a significant opportunity" for him to make the property a permanent residence for himself and his family. Given his age, he considered this may be his last chance to "provide a proper roof over [his] family (sic) head". He therefore notified the executors that he did not wish the property to be sold, but instead he wanted to retain it if that were possible. The executors accepted his proposal, and he was advised that the property would have to be valued and he would have to purchase the other beneficiaries' 50% interest. He was also advised that he would need to pay the legal and other testamentary costs to allow the property to be transferred to him, since had the property been sold in accordance with the Will, those costs would be deducted from the sale price. According to the claimant, as far as he was aware, the other beneficiaries did not object to him purchasing their share in the property.

[7] The claimant said that he "agreed to the terms put to [him] by the executors and/or their attorney - at - law H. S. Rose" and he settled the attorney's fees. He paid Oliver's Property Services for a valuation report prepared by them to facilitate the sale. He paid Oliver Property Services in January 2005 and in March 2007. Four receipts dated March 19, 2007, March 7, 2007 and January 11, 2005 and January 3, 2005, respectively, from Oliver's Property Service, in the amounts of \$8,000.00, \$10,000.00, \$8,000.00 and \$4,000.00 (in that order), were part of the agreed documents. The March 19, 2007, January 11, 2005 and the January 3, 2005, receipts were said to be in respect of the valuation of the property. The March 7, 2007, receipt states that the money received was for the valuation and survey reports. All the receipts were issued in the name of the claimant. The property was valued at \$4,700,000.00.00.

- [8] According to the claimant, he could not purchase the property without a mortgage loan. When he checked with the National Housing Trust (NHT) he became aware that though eligible for a mortgage, his age would make the repayment extend beyond his retirement, and he would be unable to manage the monthly payments on a shorter-term mortgage. He had a meeting with his family, including his wife, their two sons and their daughter, the defendant to discuss how they could acquire the other 50% interest in the property, in light of “the predicament “surrounding his eligibility for a mortgage loan. His wife shared that there were no records of her NHT contributions. The defendant, who was 19 years old and working at NCB Capital Markets, volunteered to use her NHT entitlements to acquire the 50% interest.
- [9] After the defendant volunteered to take the NHT loan to acquire the property, the claimant said that he allowed her to take charge of the sale process, which included attending interviews and communicating with NHT. After one such interview, he said that the defendant came home and advised him that NHT indicated that she will have to have “full proprietary rights over the entire property in order to process a loan with the property as security”. She therefore suggested that he direct the executor to transfer his 50% interest in the property in her name to facilitate the loan. When he asked her if the application to the NHT could not be a joint one she told him no it could not. The claimant said he had great trust and confidence in his daughter and believed what she told him. He viewed the acquisition of the property as an advancement for himself and his family and therefore gave his approval to the executor and his attorney-at-law to transfer his 50% interest in the property into the name of the defendant.
- [10] The claimant said that the transfer of his 50% interest was not intended to give the defendant his interest in the property absolutely and to his “total exclusion”. He would never have relinquished his interest in the only real property he has ever inherited and would ever own especially given that he was close to retirement. Furthermore, he would never give this gift to one of his children to the exclusion of the others. Any inheritance rights would benefit all of them. The claimant said it

was his understanding that the defendant was only allotting her NHT points to facilitate his acquisition of the other 50% of the property, and the transfer of his 50% interest to the defendant, was a way to achieve this objective. He thought that the defendant would add his name to the certificate of title sometime in the future or that she would act upon his directive in relation to it.

- [11] The mortgage payments were designed as monthly salary deductions from the defendant's salary and therefore the other "family expenses" were contributed to by himself and the other members of the family. The defendant's payment of the mortgage from her salary was viewed as her contribution to those expenses. This is a close-knit family. The defendant only paid 9 months of the monthly mortgage payments. She lost her job at NCB Capital Markets in January 2009, and after that he assumed the monthly mortgage payments to the NHT from that time until the present. Having lost her job, the defendant was unable to contribute to the family expenses. She got married in October 2009 and in 2011 she joined her husband in the Bahamas. The claimant said he, his wife, their two sons and the defendant's daughter (whom she left in the care of the claimant and his wife) continued to live at the property. According to him, he paid all the property taxes and maintained and repaired the property.
- [12] Sometime in 2013 the claimant said that he became suspicious of the defendant's intentions when she started to insist that one her brothers leave the property. She served him a notice to quit and despite his intervention, his son left the home. He then demanded that the defendant add his name to the certificate of title, but she refused. The defendant, her husband, and another child of the relationship, returned to Jamaica around December 2015 and: "asked if they could reside at the property". The claimant agreed. Disagreements eventually led to the defendant and her family moving out of the property on October 29, 2016. After that, she began threatening to sell the property. The claimant in response, lodged a caveat against it on December 16, 2016. The defendant paid property tax for the year 2016/2017 and started "intervening in the discharge of duties relating to the land ownership which she [had] not done previously..."

[13] On cross examination the claimant said he was not aware that the property had been sold to the defendant. He allowed her to put her name on the title in order for her to succeed with the mortgage loan. When asked if he sought legal advice, he said: -

‘No, because is a family. The anxiety was to find somewhere. As a family, a father struggles for all the years of his life in order to obtain a dwelling. I was very glad when 50% of a property was given to me after a hard struggle with those elderly people. In the middle of the struggle, I was really glad when my daughter agree to help me to achieve the property’.

The claimant said that he could not quite remember exactly when he became aware that his name was not on the title. He said it was after the defendant was successful with the mortgage. He started having issues with only the defendant’s name being on the title when the defendant began to: “claim it, like she have dominion over the property”. He denied selling his 50% interest to the defendant and denied entering into any agreement with her to pay rent.

The Defendant

[14] When the defendant sought to rely on her witness statement as her evidence in chief, several aspects of it were struck out as being inadmissible hearsay evidence. Her witness statement as redacted was ultimately treated as her evidence in chief and she was lengthily cross examined.

[15] The defendant is an author and business owner. She was born on October 23, 1987. She said that the property has been her home since she was a teenager. She lived with Horatio and Emeline before they died, caring for them and managing their wellbeing. According to her, she purchased the property from the executors of Emeline. The claimant, “along with his family”, came to live at the property after the death of Emeline. Under Emeline’s Will, the claimant had a 50% interest in the proceeds of the sale of property. It is not true that the claimant approached her

and she agreed to use her NHT points to aid in the purchase of the property on his behalf. The claimant could not afford to purchase the other 50% of the property, therefore it would be sold to: "another purchaser". She received legal advice that she could acquire the property by herself by using her NHT benefits. She was 19 years old, saw the opportunity to own her own home, approached the executors and told them that she was interested in buying the property and should get first preference as she had taken care of Horatio and Emeline by herself before their death.

[16] According to the defendant, she approached the claimant and proposed to him: "without conditions" that he give to her his 50% interest in the property as: "a gift for love and affection" as she was his only daughter. She could then use her NHT benefits to acquire the fee simple interest in the property "out right". To her certain knowledge, the claimant understood that he would have neither a legal nor an equitable interest in her property and that it would be owned by her alone since she would not be able to acquire another property from NHT, given that she had used her benefits to acquire the property and he could always use his NHT benefits to acquire his own property: "for himself and his family".

[17] The claimant agreed to her proposal and instructed the attorneys-at-law to prepare the papers to give her his interest in the property. She would not have accepted the claimant's 50% interest had conditions been attached to it because she did not want any issues to arise as to the ownership of the property. According to her, the attorney-at-law with carriage of sale advised the claimant against giving her his 50% interest and informed him of the consequences of doing so. The property was eventually sold to her by the executors. The claimant offered her the valuation report and a surveyor's identification report which he had obtained from his: "failed attempt to acquire the other 50% interest in the property". He offered her these documents because he was aware that she was attempting to obtain a mortgage from NHT to buy the property.

[18] The defendant said that no fees were paid by the claimant from his own resources, concerning her purchase of the property. He did not contribute money towards the deposit or any other required payment. The understanding between them was that the defendant would use her NHT benefits to acquire the other 50% interest in the property. There was never any agreement that the claimant would acquire any interest in the property.

[19] Agreement for Sale dated November 21, 2007, shows that she purchased the entire 100% interest in the property for the sale price of \$4,700,000.00. According to her:

“... although I was given the 50% interest from the claimant, I purchased the 100% value of the property and therefore I did not technically receive the 50% from the claimant.”

She therefore does not “think” that she received the claimant’s 50% gift as the certificate of title to the property makes no mention of it. She received a receipt from the executors’ attorney-at-law for the deposit of \$1,700,000.00. on the purchase price.

[20] When she lost her job in 2009, she informed the claimant that he needed to start paying rent. It was agreed that he would start paying rent of \$23,700.00 which he would pay to the NHT on her mortgage account. When she travelled to the Bahamas in November 2011, the claimant only occupied the part of her premises she rented to him and his family.

[21] On cross examination the defendant said that when the claimant, her mother and her two brothers moved into the property after the death of Emeline, she was under the age of 18 years. She disagreed with the suggestion that when the claimant moved in, he took charge of the property as a family house. She also disagreed that he went there to stay for an extended time. She said it is not correct that after the death of Emeline, the claimant expressed an interest in buying out the other

beneficiaries. Her father, she said, transferred his 50% interest in the property to her for love and affection when she tried to obtain the NHT mortgage.

[22] The defendant denied that there was a family meeting where discussions were had about the claimant's difficulties obtaining a mortgage to buy out the other beneficiaries' interest, and that at that meeting she offered her NHT points to assist with the process. She said that she approached her family "one on one" and then the claimant approached them. There were discussions, but with her father and herself. She admitted that the amount she borrowed from the NHT of \$3,000,000.00 could only pay out the other beneficiaries' 50% interest in the property with a small amount left over for costs, and that this amount could not cover the claimant's 50% interest. She could not recall if the claimant had been paid his interest as she is not sure how the mortgage proceeds were disbursed. In a suggestion to her that she did not pay the deposit of \$1,700,000.00 on the purchase price for the property the defendant's response was: "No sir I did not". The following exchange then took place between counsel for the claimant and the defendant: -

Q. Suggest the receipt was only to show that the rest of the sale price of \$4,700,000.00 was covered.

A. It was to facilitate the fact that I had made a deposit. It was to show I had made a deposit

In a later exchange it was suggested to her that \$1,700,000.00 was not paid towards the sale and that it was a sham. She agreed that this deposit was not paid and said she would suppose that the receipt was a sham.

[23] On further cross examination the claimant said that she does not know that she got the claimant's 50% interest as a gift and agreed that he is still entitled to his 50% interest in the property. She denied that he owns more than a 50% interest and said that she does not believe that he made any contribution towards its acquisition. She admitted that she only paid the mortgage for 9 months and that

for almost 13 years it was paid by the claimant, but, she said, he paid based on an agreement between them for him to pay rent.

Submissions

[24] I mean no disrespect to counsel for not referring in this judgment, to all the submissions advanced by them. I have however carefully considered all their arguments and the authorities cited and I wish to thank them for their industry and the economy with which they presented their respective cases.

The Claimant

[25] Mr Mellish for the claimant asked me to find as a fact that only \$3,000,000.00 of the NHT mortgage was spent on the property and that the sum of \$1,700,000.00 was not paid. He argued that the receipt for this sum, if it exists, is a sham. In his view there has been a misrepresentation by the defendant which is analogous to a fraud. He invited me to draw adverse inferences from this revelation in relation to the defendant and her credibility. As a matter of mathematics, counsel said that given the value of the property, the \$3,000,000.00 mortgage loan could not purchase both the claimant's 50% interest as well as that of the other beneficiaries. He asked me to find that there was no gift given to the defendant by the claimant. But if I were to find that there was a gift to the defendant by the claimant of his interest in the property, it fails because it was imperfect, there is no memorandum in writing in relation to it, and equity does not perfect an imperfect gift. He relies on the decisions in **Corrine Griffiths – Brown v Conrad James Brown [2015] JMCA Civ 172** and **Eric McCalla and Jenice McCalla and Jeffrey McCalla v Grace McCalla [2012] JMCA Civ 31**.

[26] Counsel said the defendant was blowing hot and cold. In defending the claim, she sometimes relies on a gift from her father, yet at other times she claims to have purchased the property outright. The argument of an outright purchase is however not credible, given the amount of money involved. There was no purchase by the defendant of the claimant's 50% interest. The court is impelled to the conclusion, argued counsel, that the claimant's 50% interest remains in the property. He made

payments in relation to the property which secures his interest in the other 50%. This includes the cost of the valuation and the surveyor's reports, as well as mortgage payments for almost 13 years. His contributions to the mortgage should be treated as having contributed to the purchase price. For this proposition, counsel cited the decision in **Cowcher v Cowcher (1972) 1 WLR 425**. Effectively, argued Mr Mellish, the claimant was seeking to buy out the other 50% interest in the property, which did not come to him by Will. Accordingly, on the basis of a resulting trust, the defendant holds the legal interest on trust for the claimant.

[27] Counsel also argued that the conduct of the claimant is sufficient to establish a constructive trust in favour of the claimant. He submitted that despite the absence of writing, it can be inferred from the claimant's conduct that it was intended between the parties, that he would have a proprietary interest in the property. He relied in large measure, on the first instance decision of Sykes J (as he then was) in **Grace McCalla v Eric McCalla, Jenice McCalla and Jeffrey McCalla, Claim No 2005 HCV2335, unreported Supreme Court decision, decided on August 3, 2007**.

[28] In the event that I find that the defendant has a percentage interest in the property, Mr Mellish submitted that with the claimant retaining his 50% interest in the property and considering the financial contributions he made towards its acquisition, I should find that he is entitled to a 75% interest. This leaves the defendant with 25% based on the use of her NHT points and the payment of the mortgage for 9 months.

The Defendant

[29] Mr Dewar focused his submissions on the Agreement of Sale, which indicates that the defendant purchased the entire interest in property from the executors for the purchase price of \$4,700,000.00. He argued that the sale was a legitimate sale and any issues the claimant has relative to his 50% interest in the property, he must look to the executors and not the defendant, for redress. As to the receipt for \$1,700,000.00 which counsel for the claimant described as a sham, Mr Dewar

argued that even if it is considered a sham receipt: "it is not clear what exactly is a sham". There are several questions that need answering, submitted counsel, but those answers must come from the attorney-at-law who had carriage of sale. The only way to defeat a registered title, is by fraud, and such allegations must be specifically pleaded. Neither fraud nor misrepresentation was pleaded in this case. The decision in **Cynthia Bravo v Avis Baxter and Vincent Graham, consolidated with Avis Baxter v Vincent Graham v Cynthia Bravo, unreported Supreme Court decision delivered on October 12, 2006**, was relied on for this proposition. Counsel argued that the defendant purchased the entire 100% interest in the property and therefore the situation is not one involving a trust.

The issues

[30] The following issues of fact and law arise for determination:

- a) Whether the claimant gave to the defendant a gift of his 50% interest in the property.
- b) Whether the defendant purchased the property absolutely.
- c) Whether the defendant holds the property on a resulting or a constructive trust for the claimant.
- d) If the defendant holds the property on a resulting or a constructive trust for the claimant, what percentage interest is being held on trust.

Analysis and discussion

Whether the claimant gave to the defendant a gift of his 50% interest in the property

Whether the defendant purchased the property absolutely.

[31] There is no dispute that 50% of the sale price of the property was bequeathed to the claimant by Emeline in her Will. There is also no dispute that the claimant and his family moved into the property after her death. At the time of Emeline's death, the defendant was only 17 years old. She was a minor. I accept the claimant's

evidence that the opportunity to finally own a home was significant for him, as it meant that he would be able to put a proper roof over his family's head. The claimant's evidence that up to the time of the death of Emeline, he and his family, including the defendant lived with his sister, has not been contradicted by the defendant. The desire of the head of a family to find a permanent dwelling place for the family to call home is legendary. The claimant's evidence in this regard is credible. There is no dispute that in furtherance of this longing, the claimant took steps to purchase the 50% interest of the other beneficiaries in the property. The defendant calls this her father's "failed attempt" to purchase the property. I accept the claimant's evidence that he did not have the financial resources to purchase the other 50% interest in the property without a mortgage, but his advanced age and the lack of sufficient NHT benefits did not make mortgage financing an affordable option. I also accept and find that the claimant paid and obtained valuation and surveyors reports in furtherance of his efforts to purchase the other 50% interest in the property.

[32] The defendant was under the age of 18 years when Emeline died, and her family moved into the property. This was about February 2005. By then the claimant had paid Oliver Property Services towards acquiring a valuation report on the property which I accept as evidence of his intention to acquire the property to house his family, including the defendant.

[33] I must say that I find the defendant's evidence confusing and agree with Mr Mellish that she is indeed blowing hot and cold. On the one hand she says that at 19 years old, while living with her father and mother and her siblings, she saw the opportunity to solely own the very home in which they were all living. She says further that in order to accomplish this ambition, the claimant gave her a gift of his 50% interest without condition knowing that he would have no interest in the property. I cannot accept this evidence as being credible. Why would the claimant, who was advancing in years, and happy to finally have the chance to own a home for himself and his family, give as a gift to the defendant, his entire half interest in the property he desired to own? But what is baffling is that the defendant while she

claims to have received an unconditional gift, also says that she really did not get a gift from the claimant but purchased the entire property from the executor for \$4,700,000.00. This is remarkable. These two contentions cannot at the same time be true.

[34] I do not accept that the claimant gave his 50% interest in the property to the defendant as a gift. The defendant's contradictory evidence leads me to question her credibility. I accept the claimant's evidence that the defendant offered her NHT benefits to assist with purchasing the other beneficiaries' 50% interest in the property. I accept and find that discussions were had in the family about how to buy out the other beneficiaries' 50% interest and the defendant made her offer during those discussions. I find the claimant's evidence in this regard very credible, and I prefer it to that of the defendant. The claimant gave evidence of the way in which each member of the family took on certain obligations to defray the family's expenses. To offer her NHT benefits at a time when the claimant and by extension the family were in a "predicament", was a reasonable thing for the defendant to do within the context of this family's dynamics, which I accept to be as the claimant describes. I believe the claimant when he says that he trusted and had confidence in his daughter and believed her when she said that the NHT application could not be a joint one and that she would have to have full proprietary rights over the entire property. I accept his evidence when he says that it was never his intention when he decided to transfer his interest in the property to the defendant, that he would be excluded from having an interest in it.

[35] It is significant that Mr Dewar's submissions on the defendant's behalf focused almost entirely on that aspect of her evidence where she claims to have purchased the property outright without the aid of any gift from the claimant. I prefer and accept the claimant's evidence that he did not give the defendant a gift and that he would not have excluded his other children from any potential inheritance in the property. I therefore find that he did not give the defendant a gift of his 50% interest in the property.

[36] I am troubled by the defendant's evidence that she presumes that the receipt of \$1,700,000.00 (which was not produced), is a sham as she did not in fact pay this deposit towards the purchase of the property. Mr Mellish may well be right that this could potentially amount to a fraud on the NHT. Even so, having not paid this deposit, how did the defendant finance the purchase of the entire interest in the property at a purchase price of \$4,700,000.00 with a mortgage from the NHT of only approximately \$3,000,000.000? Having paid out the other beneficiaries 50% interest, and with no evidence of the claimant receiving money for his 50% interest, how can the defendant say that she purchased the property outright? To say, as was argued for the defendant, that the claimant must look for answers to this anomaly to the attorney-at-law who had carriage of sale, while implicitly conceding that the claimant is entitled to his 50% interest, is unacceptable. I reject that argument.

[37] What plainly happened in this case was that the defendant represented to the NHT that she had paid the deposit of \$1,700,000.00 on the purchase price of the property and this enabled her to receive a mortgage loan of the balance purchase price of \$3,000,000.00. Her NHT benefits clearly assisted with her obtaining the mortgage, but no deposit of \$1,700,000.00 was in fact paid by her on the purchase. The certificate of title clearly shows that the executors registered the property in their names on transmission, and thereafter transferred it to the defendant. I accept the claimant's evidence and find that the executors effected the transfer with the claimant's consent that his 50% interest was to be transferred to the defendant to facilitate her obtaining a mortgage. The fact is that the defendant acquired the legal interest in the property having paid only for the 50% interest of the other beneficiaries of Emeline's Will. The claimant's 50% interest having not been given to her as a gift or paid for, simply means that it remains in the property. I therefore find that the defendant did not purchase the entire 100% interest in the property.

Whether the defendant holds the property on a resulting or a constructive trust for the claimant

[38] The reality is that the property is registered in the sole name of the defendant. The claimant's case is that he either owns the entire legal interest or a percentage interest which the defendant holds on a resulting or a constructive trust for him. A good starting point in relation to this issue is the following very helpful definition of a trust in **Thomas and Hudson's *The Law of Trusts***, at para 1.01: -

“The essence of a trust is the imposition of an equitable obligation on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognised by equity in the property. The trustee is said to hold the property on trust for the beneficiary. There are four significant elements of the trust: that it is equitable, that it provides the beneficiary with rights in the property, that it also imposes obligations on the trustee and that those obligations are fiduciary in nature.”

[39] The learned authors go on to identify the different types of trusts at para 1.02:

“A trust comes into existence either by virtue of having been established expressly by a person (the settlor) who was the absolute owner of property before the creation of the trust (an express trust); or by virtue of some action of the settlor which the court interprets to have been sufficient to create a trust but which the settlor himself did not know was a trust (an implied trust), or by operation of law either to resolve some dispute as to ownership of property where the creation of an express trust failed (an automatic resulting trust) or to recognise the proprietary rights of one who has contributed to the purchase price of property (a purchase price resulting trust); or by operation of law to prevent the legal owner of property from seeking unconscionably to

deny the rights of those who have equitable interest in that property (a constructive trust)”

[40] Having found that the defendant did not purchase the entire 100% interest in the property and that the claimant’s 50% interest was not a gift to her, it is my view that it would be unconscionable for the defendant to deny the claimant his equitable interest in the property. In **McCalla v. McCalla (2012] JMCA Civ 31**, McIntosh JA said in relation to the constructive trust that: -

“It is settled law, approved and applied in this jurisdiction in cases such as **Azan v Azan (1985) 25 JLR 301**, that where the legal estate in property is vested in one person (the legal owner) and a beneficial interest in that property is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties.”

[41] I have accepted the claimant’s evidence that the defendant offered to use her NHT benefits to facilitate the mortgage financing to acquire the other beneficiaries’ 50% interest in the property. I also accept his evidence that having allowed his 50% interest in the property to be transferred to the defendant to assist with obtaining the NHT mortgage, it was his understanding that the defendant would at some point add his name to the title or act on his directions in relation to it. This was a rational understanding for him to have given his desire to own a home for his family and his wish to own the home bequeathed to him by Emeline. He was the head of the household and had two other children and a wife. The defendant was by then merely out of childhood. I find that the offer to the defendant of the valuation and surveyors reports was also intended to further the purchase of the other 50%

interest in the property. I find that the conduct of the parties certainly evinces a common intention between them that claimant would have a beneficial interest in the property. I have found that the claimant did not intend to give his 50% interest as a gift to his daughter. I find therefore that in reliance on their common intention that he would have an interest in the property, the claimant acted to his detriment by directing the executor to transfer his interest to the defendant. I accordingly find that the defendant holds the claimant's 50% interest in the property on a constructive trust for him.

[42] The defendant has not disputed the claimant's evidence that he has been paying the mortgage since January 2009, after she lost her job, and that he continues to make the monthly payments up to the present time. The claimant said he had no agreement with the defendant to pay rent. I believe him. It would, in my view, be rather odd and irrational for him to agree to pay the defendant rent given that he did not give her his 50% interest in the property as a gift and given this family's dynamics. Based also on my earlier finding that the defendant did not purchase the property absolutely, I do not accept her evidence that the claimant's payments to the NHT constituted rent. The defendant has also not denied that she has paid only about 9 monthly mortgage payments. I accept the claimant's evidence that prior to January 2009, when the defendant lost her job, her payment of the mortgage was her agreed contribution to the family's expenses.

[43] The purchase price resulting trust is based on the presumption that the person who purchases property either in the name of another or in their joint names, intended to create a trust. This is because equity presumes against gifts. The presumption is that the property results to the person paying the purchase price if bought solely in the name of another, or if both contribute to the purchase price, the property results on trust to each in proportion to their respective financial contributions. In **Dyer v Dyer [1775-1802] All ER Rep. 205** at **page 206**, Eyre CB after considering several authorities, said this in relation to the resulting trust: -

“The clear result of these cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchasers and others jointly or in the name of others without that of the purchaser, whether in one name or several, and whether jointly or successively, results to the man who advances the purchase money. This is a general proposition supported by all the cases and there is nothing to contradict it and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffer”.

[44] The presumption can be rebutted, and, in cases of close relationships, the presumption is inverted to one of an advancement or gift. So, for example, where property is transferred from father to a child, there is the presumption of advancement that he intends to make an outright gift to his child. Direct evidence to the contrary can however rebut that presumption. In **Scott v Robinson - Scott [2009] HCV01775**, unreported Supreme Court decision delivered January 27, 2010, Brooks J (as he then was) said in relation to the presumption of advancement that:

“The presumption of advancement may be simply summarized as the courts deeming the purchase of property, by a father or husband in the name of his offspring or wife separately as a gift of the beneficial interest to the latter. Eyre CB explained in **Dyer v Dyer** the origin of the difference in approach in such relationships, as opposed to the application to strangers. He said at page 207B:

“Natural love and affection raised a use at common law: surely then it will rebut a trust resulting to the father”.

Jessell, M.R. in **Bennet v Bennet (1879) 10 Ch D 474**, held that the presumption of advancement applied in the case of father

and his child because a father was under a moral obligation to provide for his child (see page 477).

As with the resulting trust, the presumption of advancement may be rebutted by evidence that a contrary effect was intended”.

Where property is purchased by a mortgage, payment of the mortgage instalments has long been treated as contributions toward the purchase price. (See the judgment of Lord Walker in **Stack v Dowden [2007] UKHL 17 at paragraph 34** as well as **Cowcher v Cowcher**).

- [45] The claimant started paying the mortgage in January 2009 when the defendant lost her job and he has continued to do so for almost 13 years. This evidence has not been contradicted. There is no evidence to suggest that these monthly payments were made as a gift to the defendant. On the contrary, they support the claimant’s evidence that he saw the bequest from Emeline as his chance to finally own a home to house his family and his desire to purchase the other 50% interest in it. I have found that these payments were not rent, and I find that neither were they a gift to the defendant. The evidence therefore plainly rebuts any presumption that they were an advancement. I am consequently prepared to treat them as the claimant’s contribution towards the purchase price of the property. I find the evidence of these payments for almost 13 years weighty and compelling.
- [46] I believe that broad justice requires that the value of the defendant’s NHT benefits, which were critical to the mortgage being obtained in the first place, should be deemed as the defendant’s contribution to the purchase price. I also believe that the mortgage payments she made should also be included in her contribution. In the result I will quantify the claimant’s interest in the property based on his contribution to the purchase price of the remaining 50% interest in the property at 30% and the defendant’s interest at 20%.

Conclusion

[47] In the result I make the following orders:

- a) Subject to the mortgage in favour of the NHT, the defendant holds the legal interest in land being lot Numbered eighty-five part of Greendale, formerly part of Bretts Pen and Graham Pen in the parish of St Catherine registered at volume 1018 Folio 445 of the Register Book of titles (the property) on the following trusts in favour of the claimant:
 - i. 50% on a constructive trust and,
 - ii. 30% on a resulting trust.
- b) Within 14 days of this order, the claimant's attorneys-at-law and the defendant's attorneys-at-law are to jointly make arrangements with the NHT for the release of the duplicate certificate of title for the property to the claimant's attorneys-at-law for purposes of the transfer from the defendant to the claimant of his 80% interest. The claimant's attorneys-at-law shall have the responsibility to prepare the documents necessary to effect the transfer.
- c) In the event that the defendant is unwilling, unable or neglects to sign any requisite documents necessary to give effect to the orders herein, then the Registrar of the Supreme Court of Judicature of Jamaica is hereby empowered to sign the said documents on behalf of the defendant herein. Any rates and duties payable on the transfer shall be borne equally by the parties.
- d) Costs to the claimant
- e) The claimant's attorneys-at-law are to serve this Order on the NHT.
- f) The claimant is to make arrangements with the NHT to formally assume liability for the mortgage.

g) Liberty to apply.