IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.367 OF 1996

BETWEEN	RUEBEN GORDON	PLAINTIFF/APPLICANT
A N D	DAPHNE MAY GORDON	DEFENDANT/RESPONDENT

Mrs Doyen Fichette for the Plaintiff.

Mr. Richard N. Brown for Defendant.

May 29, 1998

SMITH, J.

By Originating Summons dated 27th August, 1996 the plaintiff Mr. Rueben Gordon, seeks the following declarations and Order:

(1) That the Plaintiff is entitled to an equitable interest in the property situate at Barnes Pen Road, Barnes Pen District, Lluidas Vale, in the parish of St. Catherine registered at Volume 799 Folio 52 of the Register Book of Titles.

(2) That the said property be valued and sold by public auction or private treaty and the Plaintiff be paid his share of the proceeds of sale commensurate with the value of his equitable interest in the said property.

(3) In the alternative, that the defendant purchase the Plaintiff's share in the said property as valued.

(4) Such further and/or other relief as may be just.

(5) Costs.

The parties were married on November 1, 1980 in Sheffield, England. At the time of marriage the plaintiff was a divorcee and the defendant a widow. He was 50 years of age and she was 65.

After the marriage the parties decided to return to Jamaica their native land. The defendant returned first and the plaintiff one and one half years after.

They lived together at premises situate at Barnes Pen Road, Lluidasvale, St. Catherine. These premises were registered in the names of Oscar Louden and his wife Daphne, the plaintiff, as joint tenants on the 20th May, 1964.

Oscar Louden died on the 17th April, 1977. By operation of law the land as a whole vests in the plaintiff on the death of her then husband. Unfortunately after five years the marriage started to flounder and eventually broke down. The plaintiff now claims an interest in the said property at Lluidasvale.

The Plaintiff's case

In his affidavit in support of the Originating Summons the plaintiff stated that the defendant told him that the house was owned by herself and her sister, Laurel Marr. That they (the plaintiff and her sister) had paid for the construction of the said house.

He swore that on June 10, 1982 he acquired an interest in the house by purchasing Laurel Marr's interest for three thousand dollars ($3,000.00) for which he received a receipt. A receipt dated 10-6-1982 is attached to his affidavit. It reads:

> Received from R.G. Gordon the sum of
> Three Thousand Ja. Dollars on behalf
> of Daphne Louden Gordon for cash I
> put in the building of her house
> situate at Barnes Pen, Lluidasvale P.O.
>
> $3000 Per Laurel Marr

In another affidavit filed on the 10th June, 1997 the plaintiff testified that because of representations made to him by his wife that he had acquired an interest in the property he "embarked on an extensive agricultural project."

He lived on the property from 1982 until November, 1995 when, he said, his wife and her sister put him out and changed the locks.

The defendant's case

In an affidavit sworn to on the 22nd day of September, 1997 the defendant rejects the plaintiff's claim to an interest in the house. She denied telling the defendant that the house was owned by herself and her sister Laurel Marr. She said that the property

was bought by her late former husband and herself. She asserted that her sister did not contribute to the building of the house.

She admitted that she had borrowed Three Thousand Dollars ($3,000.00) from her sister in 1982. The defendant lent her the money, she said, to repay the debt. "I was the one who had written the receipt. I never arranged with the defendant that if he paid the Three Thousand Dollars ($3,000.00) that he would have acquired an interest in the said house," she swore.

Submissions of Counsel

Both attorneys-at-law submitted written arguments.

Mrs. Doyen Fichette for the plaintiff contends that:

1. A Trust arose in favour of the plaintiff/applicant and that the defendant became a trustee of the applicant's beneficial interest.

2. There is a partly oral and partly written agreement between the parties that the applicant would acquire a legal and equitable share in the property

3. That the applicant's interest in the property may be determined by having regard to the maxim "Equality is Equity."

She asks the court to accept the plaintiff's evidence in affidavits sworn to on the 27th day of August, 1996 and 6th day of June, 1997 that the defendant made representations to him to the effect that he would obtain an interest in the property if he liquidated her debt. She relied mainly on the receipt referred to above. She submitted that the plaintiff acted to his detriment in the belief that he was acquiring a beneficial interest in the property. She relied on **Hussey v. Palmer** (1972) 3 All E.R. 744; **Abdool Hack v. Rahieman** (1976) 27 W.I.R. 109 and **Jansen v. Jansen** (1965) 3 All E.R. 363.

Mr. Richard Brown, for the defendant, submitted that for the plaintiff to succeed he must show that there was a common intention that both should have a beneficial interest and that the plaintiff has acted to his detriment on the basis of that common intention.

He contended that the evidence does not establish such an intention. He referred to **Gissing v. Gissing** and submitted that if

such common intention is absent, the law does not permit the Court to ascribe to the parties an intention they never had. He also relied on **Abdool Hack v. Rahieman** (1977) 27 W.I.R. 113.

He contended that the payment of the Three Thousand Dollars ($3,000.00) by the plaintiff to the defendant's sister on behalf of the defendant did not entitle the plaintiff to a beneficial interest in the defendant's property. He asks the Court to accept the defendant's evidence that this Three Thousand Dollars ($3,000.00) represents a loan and that the plaintiff refused the defendant's offer to repay it.

The Law

The plaintiff's claim to a beneficial interests in the defendant's property rests upon the existence of a constructive trust.

In **Grant v. Edwards** (1986) 2 All E.R. 426 which was followed by our Court of Appeal in **Azan v. Azan** Supreme Court Civil Appeal 53 of 1987 and **Paul Geddes v. Helga Stoeckert** the principle is stated as follows:

> "If the legal estate ..... is vested in only one of the parties (the legal owner) the other party (the claimant) in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters:
>
> (a) that there was a common intention that both should have a beneficial interest; and
>
> (b) that the claimant has acted to his detriment on the basis of that common intention.

Therefore for the plaintiff to succeed he must establish a constructive trust by demonstrating a common intention that both parties should have a beneficial interest in the property and also that he had acted to his detriment on the basis of that common intention and in the belief that by so acting he would acquire a beneficial interest.

Common Intention

It is not disputed that the plaintiff paid Three Thousand Dollars ($3,000.00) to the sister of the defendant on behalf of the defendant. A receipt was issued in respect of this transaction.

The plaintiff is claiming that the understanding was that he would acquire an interest in the property. On the other hand the defendant is saying that it was a loan to her from the defendant.

As said before Counsel for the plaintiff places much reliance on the receipt to establish the common intention. The respondent admits that she wrote the receipt - See paragraph 8 of her affidavit sworn to on the 22nd September, 1997.

The receipt clearly supports the applicant's contention that the respondent told him that her sister Miss Laurel Marr had an interest in the property.

I agree with Counsel for the applicant, that the receipt also supports Mr. Gordon's claim that there was an agreement between the parties that he should have a beneficial interest in the property. Otherwise why did she put Mr. Gordon's name on the receipt? Once there is evidence which clearly establishes such an agreement, arrangement or understanding the court may find a constructive trust even though such agreement was reached after the original purchase of the property. From the receipt, the inference may be drawn that there were discussions between the parties leading to an agreement that the property is to be shared.

Detriment

The Court will only find an implied or constructive trust, if the applicant shows that he had acted to his detriment on the basis of the common intention.

The plaintiff said he acted on the representation made by the respondent to him not only by the payment of the $3,000 to Miss Laurel Marr but also by embarking on a "substantial cultivation of crops."

Although the respondent denies this I accept the applicant's evidence that he has planted sugar cane, coconuts and citrus trees on a large scale. His evidence in this regard is supported by

affidavits sworn to on the 8th December, 1997 by Messrs. Lionel Knight and Oneil Brown. I also find as a fact that he embarked on this "substantial cultivation of crops" on the basis of his belief that he had acquired a beneficial interest in the property.

The applicant states that he also acted to his detriment by affording the respondent $8000 per month from his pension. On his evidence this arrangement began in 1995. He said he did this as a consequence of the agreement that the parties would share the beneficial interest in the property and his belief that he has a beneficial interest therein.

On the evidence before me I am satisfied on the balance of probabilities that the plaintiff acted to his detriment on the basis of the common intention to share the beneficial interest in the property at Barnes Pen Road.

Conclusion

The plaintiff, Mr. Gordon, has established on the standard required an agreement between Mrs. Gordon and himself that he is to have a beneficial interest in the property of Mrs. Gordon situate at Barnes Pen Road, Lluidasvale. The plaintiff has also shown that he has acted to his detriment as a consequence of this agreement. Accordingly, it is my view that it would be inequitable for Mrs. Gordon, the legal owner, to claim sole beneficial ownership.

On the evidence before me it is difficult to determine the plaintiff's share. The property, according to the plaintiff in his affidavit of August 27, 1996 was then valued at $3,000,000. The sum of $3000 which he paid in 1982 would be the equivalent of about $68,000.00 in 1996.

Mr. Gordon worked to improve the property. I must bear in mind that as a husband he has a duty to provide for his wife and to contribute to the house keeping expenses. He did not have to provide a roof for his wife.

On the evidence of the respondent the plaintiff drinks heavily and did not meet his obligations. She said she had to take him to Resident Magistrate's Court on account of damage he did to the matrimonial house.

On a close analysis of the evidence I am of the view that the

plaintiff's share should be put at one sixth (1/6) the value of the property.

I therefore make the following Declaration and Order:

1. That the plaintiff is entitled to one sixth (1/6) share of the beneficial interest in the property situate at Barnes Pen Road, Barnes Pen District, St. Catherine registered at Volume 799 Folio 52 of the Register Book of Titles.
2. That the said property be valued and the Defendant purchase the plaintiff's share in the said property as valued.
3. In the alternative that the said property be sold and the plaintiff be paid his share of the proceeds of sale.
4. Liberty to apply.
5. No order as to costs.