NMCS

[2011] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 59/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**BETHUNE JOHNSON-LAMIE**	**APPELLANT**
AND	**THE ADMINISTRATOR GENERAL FOR JAMAICA (Administrator of estate NEVILLE DONALD LAMIE otherwise known as NEVILLE LAMIE dec'd)**	**RESPONDENT**

Rudolph L. Francis for the appellant

Miss Cassandra D. Anderson for the respondent

18 January and 29 July 2011

MORRISON JA

[1] Neville Donald Lamie ('the deceased') died tragically, a victim of gun violence, on 25 August 1997. He died without leaving a will and Letters of Administration were granted in his estate to the Administrator General for Jamaica ('the respondent') by the Resident Magistrate's Court for the parish of Saint Catherine on 27 January 2003. The sole beneficiary of his estate is his daughter, Judene Decoda Lamie, who was born on

31 July 1988. He was also survived by his mother, Mrs Bethune Johnson-Lamie ('the appellant').

[2] The deceased's estate consisted of three motor vehicles, and property situated at Lot 567, 5 East Greater Portmore, in the parish of St Catherine and registered at Volume 1291 Folio 251 of the Register Book of Titles ('the property'). In an action commenced by fixed date claim form in the Supreme Court on 16 May 2006, the respondent sought declarations that the deceased was the sole proprietor of the property and that the appellant was not entitled to any share of the property. The respondent also sought consequential orders for recovery of possession, mesne profits and other remedies. On 30 April 2008, after a hearing in chambers, Gayle J (Ag) (as he then was), granted the following declarations:

> "(a) That the deceased NEVILLE DONALD LAMIE whose name is endorsed on the Duplicate certificate of Title registered at Volume 1291 Folio 251 is the sole proprietor of the said property;
>
> (b) That the Defendant, BETHUNE JOHNSON-LAMIE, is not entitled to any share of the said property and as such she should deliver up possession of the said property within three (3) months of the date on which the Order is made by this Honourable Court;"

[3] This is an appeal from the judge's order, on the following grounds:

> "(1) The findings of the learned trial Judge that Judene Decoda Lamie was the sole beneficiary of the deceased, Neville Donald Lamie o/c Neville Lamie, at the time of his death is [sic] not supported by the evidence.
>
> (2) The finding of the learned trial judge that Judene Decoda Lamie was a minor on the 30th day of April, 2008, is wrong in law.

(3) The learned trial Judge failed to consider the equitable doctrine of resulting trust in considering whether the Defendant/Appellant is entitled to an interest in Premises Lot No. 567, 5 East Greater Portmore, in the parish of Saint Catherine, registered at Volume 1291 of The Register Book of Titles."

The appellant seeks an order from this court that her interest in the property be declared to be 50% of its current market value, or any other percentage that will give effect to her interest.

[4] The deceased was the sole registered owner of the property, a transfer to him (from the Minister of Housing) having been registered on 18 October 1996. Ever since his untimely death in 1997, the property has been the subject of a dispute involving the respondent, as the deceased's legal personal representative and Ms Joy Sterling, in her capacity as the mother of the minor beneficiary, on the one hand, and the appellant, on the other. The respondent has contended that she, as the deceased's legal personal representative, is entitled to possession of the property, in order to secure it for the benefit of the minor beneficiary, while the appellant has maintained that she is entitled to an interest in the property, by virtue of direct and indirect financial contributions made by her towards the acquisition and improvement of the property.

[5] Gayle J (Ag) having found against the appellant's claim, the single question that arises on this appeal is therefore whether he was right to do so on the basis of the evidence, or whether the appellant's claim to a beneficial interest in the property had been made good. Consideration of this question necessarily involves careful scrutiny of the appellant's evidence of the circumstances surrounding the acquisition of the

property, given that the respondent, who based her case primarily on the fact that the deceased was the sole registered proprietor of the property, frankly acknowledged that she was not able "to speak to the personal affairs and relationship of the deceased and the [appellant] as same would not be within my personal knowledge" (see para. 3 of the respondent's affidavit sworn to on 28 June 2007). It is a matter for regret that in approaching this task we have not had the benefit of any reasons from the learned judge for his decision.

[6] The appellant's case is set out in her affidavit sworn to on 20 March 2007. In that affidavit, the appellant stated that the property had been purchased by the deceased and herself "to be our place of residence until we die". She maintained that the purchase transaction had been carried out by the deceased "using money we both accumulated, as we had always lived together, at the time of purchase it was never anticipated that my son would predecease me, but that the older would die first". As regards the actual circumstances of the purchase of the property, the appellant said the following:

> "My late son and I had a joint account at Workers Bank Tower Street Branch. In this account we both saved a portion of our earnings.
>
> I always worked as a dressmaker, I worked [sic] MAC's Dressmaking shops, located at 1A Temple Lane, Kingston for more than 20 years, and would also work at home. I was engaged in this profession until hurricane Gilbert in 1988.
>
> My late son was a woodworker, he later worked as a Security Guard with the then Metropolitan Park and Market and in 1996 a car was purchased with our saving, the car

was used as a Taxi and after a while two more cars were purchased and were also used as Taxis.

In about June of 1994, my late son and I started making preparation for the purchase of Lot 567, 5E Greater Portmore, from West Indies Home Contractors Limited.

A Deposit of Sixty Thousand Dollars $60,000.00) was paid, this money came from our joint account at the Workers Bank. A copy of the receipt from West Indies Home Contractor is attached and marked exhibit BJ-L1 for identification.

My late son and I then transfer [sic] money from our saving account, into a fixed deposit account in order to gain an [sic] higher interest rate, to be able to pay the balance of the purchase money. We had to provide this proof to the Vendor. Attached is a copy letter from Workers Bank marked Exhibit BJ-L2 for identification.

On the 4th day of January 1995, my late son and I cashed in on our Fixed Deposit and paid the sum of Two Hundred and Sixty Six Thousand Three Hundred and Sixty Two Dollars and eighty cents ($266,362.80), by cheque to West Indies Home Contractors Limited. This represented final payment on the house. A copy of the receipt evidencing same is attached hereto marked exhibit BJ-L3 for identification.

We took possession of the property which was a one bedroom quad in January 1995.

Approximately six months after we took possession of the property, we started planning addition to the property and commence [sic] this work in early 1996.

My late son and I, from our joint account and earnings added 2 bedrooms, a living room, a wash room and a verandah to the property.

My son died on the 25th day of August 1997 and some of the expansion work was incomplete. After the funeral of my late son, I sought the assistance of my other children in having the work completed, so that the house would be more hospitable.

My late son and I purchase [sic] the house for it to be used as our dwelling until our death. The property, up to the time

of my son's death, was occupied by my son and still remains in my possession.

I humbly ask this Honourable Court for an order that my late son and I were Joint Tenants of the property and that I am entitled to fifty percent (50%) interest in the said property."

[7] The appellant exhibited to her affidavit copies of three documents, which were as follows:

(a) Receipt no. 10385 dated 12 July 1994 from West Indies Home Contractors Ltd, in the name of Neville Donald Lamie, in the sum of $60,000.00, stated to be "in payment of deposit/closing charges made SUBJECT TO CONTRACT on a/c GREATER PORTMORE Re Quad Sector No. 5E Lot No. 567".

(b) Letter dated 4 October 1994, from the Workers Bank, Tower Street branch, to West Indies Home Contractors Ltd, as follows:

"Dear Sir/Madam:

RE: CERTIFICATE OF DEPOSIT # 0055969 INO NEVILLE LAMIE &/ OR BETHUNE JOHNSON

We confirm that at the close of business on October 4, 1994, the subject customers had a balance of $250,000.00 in an ongoing Fixed Deposit which was opened on 23.09.94.

We trust the foregoing will suffice.

Yours truly,

WORKERS BANK."

(c) Receipt no. 12976 dated 4 January 1995 from West Indies Home Contractors Ltd, in the name of Neville Lamie, in the sum of $266,362.80, stated to be "in payment of deposit/closing charges made SUBJECT TO CONTRACT on a/c GREATER PORTMORE Re final payment Sector No. 5E Lot No. 567 CHQ WB Tower St # 36710 D/ 4. 1. 95 – 266,362.80".

[8] In response to this affidavit, there was some evidence from Ms Sterling on the question of the living arrangements at the property (in particular whether the appellant ever resided there after it was purchased) and as regards her own knowledge of the appellant's means. However, it is clear that she was hardly in a position to challenge the appellant's specific evidence as to the circumstances of the acquisition of the property, beyond expressing the view that "at no time did the deceased indicate that [the appellant] was assisting him with the purchase of the property" (see para. 9 of Ms Sterling's affidavit sworn to on 27 June 2007).

[9] In response to Ms Sterling's affidavit, the appellant filed a further affidavit (sworn to on 26 November 2007), in which she maintained her position that she had "pooled" resources with the deceased in order to purchase the property, and that she had "throw[n] partner at Workers Bank and with a lady in the community and gave both draws to Neville to bank and which was later used in the purchasing of the property" (para. 7). The appellant also asserted that the deceased and herself had begun expansion work on the property in late 1996 and that thereafter he would come to her "for us to go and buy material to begin expanding" (para. 9). Up to the time of the deceased's death, the appellant said further, the house was not completed so as to allow her to move into it, but that after her son had died, she "moved in and finished repairing, fixing and extending the house" (para. 22).

[10] At the outset of the hearing of this appeal, Mr Rudolph Francis on behalf of the appellant moved the court for an order that the appellant be given permission to adduce fresh evidence at the hearing. The so-called fresh evidence consisted entirely

of receipts evidencing expenditure by the appellant on the property after the death of the deceased. After hearing the application (which was opposed by counsel for the respondent), the court considered that that evidence, even if it had satisfied the other usual criteria for the making of such an order (which was doubtful – see ***Ladd v Marshall*** [1954] 3 All ER 743, 748), could not possibly have had any influence on the judge's decision. On that basis, the court therefore declined to grant the application.

[11] In contending that the learned judge had come to the wrong conclusion on the evidence, Mr Francis relied on the equitable doctrine of proprietary estoppel (notwithstanding the fact that the complaint in ground three of the grounds of appeal had been that the judge had "failed to consider the equitable doctrine of resulting trust"). Mr Francis characterised proprietary estoppel as "one of the qualifications to the general rule that a person who spends money on improving the property of another has no claim to reimbursement or to any proprietary interest in the property". In this case, he submitted, the appellant had amply satisfied the conditions that were required to be satisfied for the equity to arise in her favour, viz., detriment (by the expenditure of such part of the funds held jointly with the deceased that belonged to her), expectation or belief, and encouragement. The extent of the appellant's equity, Mr Francis concluded, "is to have made good so far as may fairly be done between the parties, the expectations of the person sought to be dispossessed..." Hence the order sought by the appellant, which is "that her interest in the property be declared to be 50% of its current market value, or any other percentage that will give effect to her interest". In support of these submissions, Mr Francis referred us to the well known

cases of ***Dillwyn v Llewellyn*** (1862) 4 De G F & J 517, ***Inwards v Baker*** [1965] 2 QB 29, ***Jones (A. E.) v Jones (F. W.)*** [1977] 1 WLR 438 and ***Greasley v Cooke*** [1980] 1 WLR 1306. In addition, he also made reference to the discussion on proprietary estoppel in Snell's Equity (29th edn, pages 573 – 579).

[12] Miss Cassandra Anderson for the respondent submitted that a claim to a beneficial interest in land by a party who is not the registered owner must be based on the law of trusts, as a result of which the party claiming a beneficial interest in the property must show (a) a common intention that she should have a beneficial interest, and (b) that she acted to her detriment. As regards the evidence produced by the appellant to establish her interest, Miss Anderson submitted that the evidence was insufficient to establish any common intention or that the appellant had acted to her detriment by expending any funds belonging to her. Miss Anderson, for her part, relied on the equally well known decisions of the House of Lords in ***Gissing v Gissing*** [1970] 3 WLR 255, and of this court in ***Azan v Azan*** (1988) 25 JLR 301.

[13] The principle of proprietary estoppel contended for by Mr Francis in this case is well established and, as the editors of Snell's Equity (29th edn) observe (at page 573), it is "older than promissory estoppel...[i]t is permanent in its effect, and it is also capable of operating positively so as to confer a right of action". ***Inwards v Baker***, to which Mr Francis also referred us, is on its facts the paradigm example of the principle in action. In that case, a son wished to build a bungalow as his home and for that purpose sought to acquire a piece of land, which turned out to be beyond his means, from a stranger. His father, who owned some six acres of land in the district,

suggested to him that he build on his (the father's) land, which offer the son accepted and in due course built his bungalow, largely by his own labour, with some financial assistance from his father. The son went into occupation of the bungalow and lived there continuously for over 30 years, in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished. The father, who would from time to time visit the son at the bungalow, then died without ever having formalised the arrangement with his son, leaving a will (made some time before the father had himself acquired the land), under which the property vested in the names of trustees for the benefit of persons other than the son. In a subsequent action by the trustees to recover possession of the bungalow from the son, it was held that where a person expended money on the land of another in the expectation, induced or encouraged by the owner of the land, that he would be allowed to remain in occupation, an equity was created, such that the court would protect his occupation of the land and the court had power to determine in what way the equity so arising could be satisfied. In the instant case, the court determined that the way to satisfy the equity that had undoubtedly been created in the son's favour was to allow him to remain in occupation of the bungalow for as long as he desired.

[14] But despite Mr Francis' enthusiasm for proprietary estoppel as the appropriate vehicle for the vindication of the beneficial interest in the property claimed by the appellant, it seems to me that the facts of ***Inwards v Baker*** have only to be stated for it to become clear that they are distinctly removed from the facts of the instant case, in which the appellant's claim is to a beneficial interest in the property registered in the

name of the deceased. In such a case, the claimant of a beneficial interest has to establish, as Sir Nicholas Browne-Wilkinson V.C. put it in ***Grant v Edwards*** [1986] 2 All ER 426, 437, "a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership" (see also per Lord Diplock in ***Gissing v Gissing***, at page 789). The distinction between the two types of equitable remedies was recently stated with great clarity by Lord Walker of Gestingthorpe in ***Stack v Dowden*** [2007] 2 All ER 929, at para. [37], as follows:

> "Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice (see ***Crabb v Arun District Council*** [1975] 3 All ER 865 at 880, [1976] Ch 179 at 198), which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

[15] The instant case is therefore a 'common intention' constructive trust case, as appears clearly from the affidavit of the appellant already referred to (at para. [6] above) in which she states (at para. 16) that "My late son and I purchased the house for it to be used as our dwelling until our death". As is now clear from the landmark decision of the House of Lords in ***Stack v Dowden***, where, as here, the sole legal ownership of the property is vested in one party, the onus is on the party who wishes to show that she has any beneficial interest at all, and if so, what that interest is (see per Lord Hope, at para. [4], Lord Walker, at para. [33], and Baroness Hale, at para. [68]). In order to satisfy this onus, it is therefore necessary for the appellant to establish that there was a common intention that her son and herself should have a

beneficial interest in the property and that she has acted to her detriment on the basis of that common intention (see ***Azan v Azan***, especially per Forte JA, as he then was, at page 303). In the absence, as in the instant case, of any direct evidence of the common intention of the parties, such an intention may be inferred from their words or conduct, such as the making of substantial contributions to the acquisition of the property, which is what the appellant in fact relies upon in this case.

[16] The single question that therefore remains is whether on the evidence that she placed before Gayle J (Ag) the appellant did enough to satisfy the onus. In this regard, she stands or falls on the strength of the three items of documentary evidence upon which she relies (set out in full at para. [7] above). These are, firstly, the receipt dated 12 July 1994 from West Indies Home Contractors Ltd, in the name of Neville Donald Lamie, in the sum of $60,000.00, stated to be "in payment of deposit/closing charges made SUBJECT TO CONTRACT on a/c GREATER PORTMORE Re Quad Sector No. 5E Lot No. 567"; secondly, the letter dated 4 October 1994, from the Workers Bank, Tower Street branch, to West Indies Home Contractors Ltd, confirming a balance of $250,000.00 held under a certificate of deposit in the joint names of the appellant and the deceased; and, thirdly, the receipt dated 4 January 1995 from West Indies Home Contractors Ltd, in the name of Neville Lamie, in the sum of $266,362.80, stated to be "in payment of deposit/closing charges made SUBJECT TO CONTRACT on a/c GREATER PORTMORE Re final payment Sector No. 5E Lot No. 567 CHQ WB Tower St # 36710 D/D 4. 1. 95 – 266,362.80".

[17] Neither of the receipts from West Indies Home Contractors Ltd is, it seems to me, particularly helpful to the appellant's case. As Miss Anderson pointed out, they are both in the name of the deceased alone and, being the only evidence emanating from the contractors/vendors of the property, they in fact tend to support the respondent's case that the appellant had no involvement of any kind in the purchase transaction. Mr Francis naturally places great reliance on the letter from the Workers Bank confirming that the appellant and the deceased were joint holders of a fixed deposit account in the sum of $250,000.00. However, there is nothing in that letter to link that deposit in any way to the purchase of the property, save, perhaps, for a notation towards the end of the second receipt (dated 4 January 1995, in the sum of $266,362.80), from which it might be possible to infer that the cheque for the amount paid was drawn on a Workers Bank Tower Street account ("CHQ WB Tower St # 36710 D/D 4. 1. 95 – 266,362.80"). While I do not consider Miss Anderson's point that the amount in the joint account and that for which the receipt was given do not correspond ($250,000.00 v $266,362.80), to be a compelling factor, given that the figures are not wholly disparate, I am nevertheless quite unable to say from this evidence that there is any connection between the two documents.

[18] In her magisterial judgment in ***Stack v Dowden***, Baroness Hale made the telling point (at para. [69]) that -

> "In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions."

[19] That was, of course, on its facts, a very different case from the instant case, in that, the court was there concerned to discern the common intention of an unmarried couple, who had lived together for nearly 20 years and had had four children born to them over that period, in relation to property which had been acquired in their joint names, in circumstances in which, upon the breakdown of their relationship, one party was claiming an unequal share of the property. But I would nevertheless consider Baroness Hale's point to be of more general application, mandating in the domestic context, an enquiry in every case into the circumstances of the transactions in question, that may go beyond purely financial considerations.

[20] It seems to me that in the instant case, even taking into account and making allowances for the special context created by the relationship of mother and son, the appellant has simply failed to come up to proof in her attempt to displace the presumption created by the registration of the title to the property in the deceased's sole name. I would therefore dismiss the appeal. However, I would in these circumstances make no order as to the costs of the appeal.

PHILLIPS JA

[21] I have read in draft the judgment of my brother Morrison JA and agree with his reasoning and conclusion. There is nothing I wish to add.

McINTOSH JA

[22] I too agree with the reasoning and conclusion of Morrison JA and have nothing to add.

MORRISON JA

ORDER

Appeal dismissed. No order as to costs.