

11/01/05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL M 037/2002

BETWEEN RUBY MATTHEWS CLAIMANT
AND DORIS MATTHEWS DEFENDANT

Mr. Leroy Equiano and Miss Simone Jarrett instructed by Kingston Legal Aid Clinic for Plaintiff.

Mr. Leslie Campbell and Mrs. Suzette Campbell instructed by Campbell and Campbell for Defendant.

Heard: 2nd, 3rd, 20th February, 23rd March & 23rd April 2004

Sinclair-Haynes, J. (Ag)

Facts

The Claimant, Ruby Matthews, is the sister of the Defendant, Doris Matthews. On the 1st December 1971 they, with their sister Vinnette Berry acquired premises situated at 20 North Drive, Hampton Green, Spanish Town as tenants in common. At the time of the acquisition they all resided in the United States of America (U.S.A.) The property was purchased by way of mortgage from Bank of Nova Scotia (B.N.S.) which was discharged by 1975.

Whilst the sisters resided in the U.S.A. the property was managed by Austin Williamson, then paramour of Ruby. His daughter, Myra succeeded him as agent when he became ill.

In 1982 Ruby became critically ill. On the 4th September 1989, whilst Ruby resided in the U.S.A and appeared to have little hope of surviving her illness, her (Ruby's) interest was transferred to Doris. Myra, who was a close friend of the family and former agent of the premises attended a Justice of the Peace on the instructions and in the presence of Doris, signed the name Ruby Matthews on a document of transfer pursuant to the Registration of Titles Act. The Justice of the Peace was never informed that she was in fact not Ruby Matthews. Ruby returned to Jamaica in 1991. The premises at 20 North Drive was tenanted. She resided at various locations until 1995 when she entered into occupation of North Drive. In 2001 Doris asked her to remove to a smaller section of the house. Upon her refusal, Doris informed her she was the sole owner of the house.

Miss Ruby Matthews now sues Doris for recession and or rectification and alleges:

- (1) that the transfer was fraudulent;
- (2) that Doris knew that she did not instruct anyone to sign on her behalf.

Doris' version of the facts

In answer to this, Doris has many versions.

Doris in her defence contends:

- (a) the transfer was effected with the knowledge of Ruby;
- (b) valuable consideration was given;

- (c) the deposit on the premises was paid solely by her;
- (d) Ruby and Vinnette's names were added to the title merely to assist her in qualifying for the mortgage;
- (e) The mortgage payments were made solely from her own resources and from rent collected.

In her ancillary claim she reiterates that the deposit was paid entirely by her and asserts as follows:

- (1) that they agreed among themselves that they would contribute to paying the mortgage. However, Ruby and Vinnette breached the agreement by failing to contribute to the mortgage. As a result it was she who paid the mortgage from her earnings and from rent collected from the premises. Ruby and Vinnette made no contribution on the acquisition of the premises;
- (2) Ruby was ill and impecunious. Consequently, with the assistance of their brother Desmond, she financed the building of a house for Ruby in St. Mary. The consideration for the said building was that Ruby agreed to remove her name from the certificate of title;
- (3) She permitted Ruby to occupy a part of the premises to facilitate her visits to the doctor. However, Ruby and another relative began occupying the property without her permission.

Her story changed under Cross-examination. She testified that the property was acquired by their joint funds. They, however, agreed among themselves that upon the acquisition of other property by Ruby and Doris they would transfer their interests in North Drive to her. Vinnette acquired the right to occupy and collect rental from their parents' house. She, Doris, constructed a house for Ruby in St.

Mary. In furtherance of the agreement Ruby instructed her to instruct Myra to execute the transfer on her behalf.

Ruby's version of the facts

Ruby denies Doris' contentions and asserts that all three sisters contributed to the acquisition of the premises and they were all responsible for paying the mortgage from their pooled resources. In order to facilitate payment of the mortgage, a joint account was opened at the Spanish Town branch of Bank of Nova Scotia. To that account, their pooled funds were sent.

It was she who financed the construction of a more modern house on lands owned by their parents in St. Mary. This property was left to nine (9) siblings by their parents. Her brother (Desmond) was responsible for the actual construction. In consideration she purchased in the U.S.A., a van for the sum of US\$9,500.00 which she sent to her brother, along with other monies towards the said construction. The house remains unfinished. She insists she funded the construction from her savings and bonuses. Upon her return to Jamaica the premises at North Drive was tenanted. As a result she lived in St. Catherine and in St. Mary until the tenants vacated the premises

Submissions by Mr. Leroy Equiano

Mr. Leroy Equiano challenges the validity of the transfer and submits that

the transfer was fraudulent and therefore the void for following reasons:

- (1) The claimant did not authorize Myra or anyone to sign on her behalf. Assuming she did instruct Myra, verbal instructions to act as agent where land is to be transferred is not sufficient;
- (2) Myra had no authority by way of deed to act on behalf of Doris. A power of attorney must be duly proved and recorded in the Records Office in accordance with Section 51 of the Conveyancing Act, which states as follows:

“An instrument creating a power of attorney must be duly proved and recorded in the Record Office. The recording of such instrument shall be necessary for its completion and no person whose rights depend upon an exercise of the power shall be required to recognize the existence of such power until the same is duly recorded.”

Where this section has not been complied with the persons permitted to refuse to recognize it are those whose rights arise out of the exercise of that power. In this case, that person is Ruby, not Doris. He relied on **Chrysler v Robinson** 15 JLR 105 at 109 in which Rowe J A (as he then was) enunciated the following:

“the world at large is not empowered by S51 to decline to recognize a non-recorded power of attorney. Only a special class of persons is so privileged and this class is limited to persons whose rights depend upon an exercise of the power...I am of the view that persons who are permitted to refuse to recognize a non-recorded power of attorney are those whose rights flow from or arise out of the exercise of their power.”

- (3) Doris should not retain the benefit from her fraudulent conduct;
- (4) Myra was an innocent instrument who was deceived by Doris into believing it was Ruby who desired her to sign on her behalf.

Submissions by Mrs. Suzette Campbell

Mrs. Campbell asserts that:

The actions of Ruby support the fact that she parted with her interest. She argues in support of that contention, that upon her return from the USA, Ruby wandered nomadically for five years from St. Mary to St. Catherine. Indicative of this fact is her sojourn with Myra, to whom she made a contribution; her failure to give the tenant of North Drive notice and her failure to request an account as to the rent. This, she submits must be viewed against the background that once in occupation of the North Drive premises she locked out the surveyor.

Ruby's assertion that she gave her brother US\$9,500.00 is incredible, because Ruby was gravely ill, unable to work and was supported by social security. So impecunious was Ruby that her airfare to Jamaica was paid by her sister-in-law. It is therefore more probable that it was Doris who provided the money for the construction of the house in St. Mary in consideration for Ruby's share in the North Drive premises.

Vinnette Berry ought not to be believed when she told the Court she did not know of the agreement to transfer their interests to Doris. It is unreasonable to accept that she would have gone to the JP, signed away her interest and later collected \$13,000 without seeking to find out the reason. Vinnette transferred her

share in consideration of the ability to occupy their parents' house and to collect the rent from her parents' house.

Mrs. Suzette Campbell argues that Ruby has recognized the existence of the transfer and in circumstances where she authorized Myra to sign her behalf, the lack of writing and recording does not render the transfer void.

She argues that the claimant has failed to establish that fraud was used to procure the transfer of Ruby's $\frac{1}{3}$ interest to Doris because she has failed to prove that Doris misrepresented any fact to her which she Doris knew was not true or did not believe to be true or was reckless or careless as to whether the representation was true or false. She relied on the case of **Derry and Peek** (1889) 14 AC 337

Assessment of the evidence

The evidence of Ruby and Doris are wholly disparate. Careful scrutiny is therefore required to determine the truth.

I will first scrutinize Doris' evidence. Her veracity was called in question by Mr. Leroy Equiano soon after the commencement of her cross examination. Doris told the Court that she never gave Myra instructions to sign for Ruby. Swiftly she repudiated that and told the Court that she gave Myra instructions to sign for Ruby. She resiled from her defence and ancillary claim when she told the Court that all three of them pooled and sent money to an account at BNS to pay the mortgage. She was unable to say whether the account was in Ruby's sole name

or their both names. The rental from the property, she told the Court, went to that account. She admitted that they never discussed the fact that their names were only being put on the title in order that she could qualify for the mortgage. She testified that what was discussed was that upon Ruby and Vinnette acquiring properties of their own, they would transfer their share in the premises to her. She categorically stated that it was not true that they joined with her to get the mortgage and that she solely paid the mortgage. She renounced paragraph 6 of her ancillary claim and told the Court she did not pay the mortgage from her earnings. She admitted that the house belonged to all three of them before the transfer to her. Her viva voce evidence was therefore at variance with the assertions contained in her defence and ancillary claim. In fact, the assertions made by her in her defence and ancillary claim that Doris' and Ruby's names were only placed on the deed as a mere trustee and that Ruby never contributed to the purchase price were suggested strenuously by Mr. Campbell to Ruby. These suggestions were relinquished by Doris under cross-examination. Having renounced the assertions contained in her defence and ancillary claim that Ruby and Vinnette never contributed to the acquisition of the property, and their names were placed on the title so that she could obtain a loan, she swiftly changed her explanation as to why the transfer to her was effected. Her changed story was that there was an agreement among them that upon Ruby and Vinnette acquiring properties of their

own, they would transfer their interests to Doris. In furtherance of that agreement, Ruby instructed her (Doris) to instruct Myra to sign for her. Myra impersonated Ruby obviating the appointment of a power of attorney.

Was there such an agreement? Did Ruby issue these instructions?

Vinnette's testimony is that there was no special agreement. They purchased the property whilst they were in the USA and, "it was to be left until we decided what to do from what."

Ruby's testimony is that it was bought as a family unit. There was no special agreement. The agreement was to return to Jamaica.

The first version of Doris' evidence was that their names were only placed on the title to assist her in obtaining a mortgage. Her changed version is that Ruby's and Vinnette's interests in North Drive were to be transferred to her upon Ruby and Vinnette acquiring their own properties. Ruby, she told the Court, once said, "one person can't own two properties."

Mrs. Suzette Campbell submitted that Doris was more informed about the property. Her superior knowledge is consistent with her belief and evidence that full ownership would revert to her.

Has she really demonstrated that she knows more?

The evidence is that Ruby was the person who initially was in charge. All three sisters agree that the mortgage payments were sent to Ruby's account. Doris'

evidence is that the account might have been in both their names or Ruby's sole name. Vinnette's evidence is that they gave Ruby the money, which was sent to the account. The rental collected went to that account. Ruby's name appeared first on most of the documents. Doris' explanation of that fact was that it might have been because Ruby was the eldest. It was Ruby's boyfriend, Austin Williamson, who was the first agent for the property. He collected the rent, etc. When he became ill, the responsibility devolved to his daughter who is Ruby's good friend. During the period Austin collected the rent, Doris' testimony is that she might have seen a statement once.

Those circumstances make it quite manifest that prior to her illness, Ruby was in charge. The submission that Doris was more *au fait* than her sisters about matters concerning the premises is unfounded. Doris' information about certain important details is merely smattering. She was unable to say with certainty when the mortgage was paid off. She told the Court it was paid off in 1989. She then agreed with Mr. Equiano that it was in 1982. Later she told the Court it was in 1975.

Ruby testified that the property was bought for \$10,000.00. She was unable to say what the deposit was. So too was Doris. She could not recall what the mortgage was. She told the Court it might have been \$8,000.00.

Mrs. Suzette Campbell submits that it is unchallenged that it was Doris who found the property. However this is not correct as Ruby testified it was Austin. Vinnette, in her witness statement averred it was Austin who told them about the house. Doris could not recall if Austin collected the rent in 1991. She recalled he collected rental in 1993. She could not say when Myra began collecting the rent.

Ruby is more elderly and she suffered a stroke. The fact that she cannot recall certain details is understandable in the circumstances. However, Doris is much younger and there is no evidence that she suffers from any disease. If in fact she paid the deposit, it is more likely that she would be able to recall the sum. Is it that it was Mr. Austin who paid it why, like the other sisters, she has no recollection what it was?

Ruby's testimony is that she purchased the van for \$9,500.00 and she sent other monies from her savings of \$5,800.00, which she said multiplied and from her bonuses which she received at the end of the year. She was, she testified, in receipt of her salary for more than one year after her illness. Thereafter, she was put on disability. Her insurance paid her medical expenses.

Vinnette supported Ruby in her contention that she financed the construction of the house in St. Mary. She told the Court that Ruby gave Desmond money and sent a van to Desmond.

Doris' testimony is that Desmond provided the money for the purchase of the van and she provided the money for the construction of the house.

Mrs. Suzette Campbell submits that the fact that she admits she could not afford to pay her medical bills is evidence of her impecuniosity and therefore, could not afford to finance the construction of the house. That, together with the fact that Ruby could not afford to pay her fare to Jamaica is evidence that she could not have contributed to the construction of the house.

On a balance of probabilities it is reasonable to infer that she could have depleted her savings on the construction of the house, hence, her inability to fund her fare to Jamaica and hence the house remains unfinished. It is difficult to accept that Doris financed the construction of the house in St. Mary yet she is unable to recall the cost of the construction.

The fact that Ruby lived several places for a number of years before occupying the premises is not indicative that she knew she did not own it. I accept Ruby's evidence that the reason she did not occupy the premises was that it tenanted and she had to wait for the tenants to vacate the premises. Doris testified that she instructed her brother to give the tenant notice so that Ruby could occupy the premises. Ruby was ill at the time and so she might not have been up to such a task.

On a balance of probabilities, I find that it was Doris who recognized Ruby's interest why she (Doris) gave the tenant notice to allow Ruby to occupy the premises. Ruby's actions of locking the surveyor out once she took occupation is understandable in light of her testimony that she discovered her 1/3 interest in the property was transferred to Doris. The matter was then with her lawyers. At that stage it is understandable that she would be wary.

The submission that Ruby was not given money for her share in North Drive property because she received a house in St. Mary is peculiar in light of the fact that Vinnette also received their parents' house and the right to collect rent from that house, yet she Vinnette also received \$13,000.00 for her share in North Drive. received a half finished house and no money. On a balance of probabilities I reject Doris' evidence that she financed the construction.

Having heard Ms. Vinnette Berry and having had the opportunity to observe her demeanour. I conclude that she is an honest witness. I accept her testimony that she signed the transfer for her 1/3 interest in North Drive and accepted the \$13,000.00 because she felt that both Ruby and Doris had come to an arrangement.

Upon the evidence adduced, I find on a balance of probabilities that Doris is not a witness of truth. I accept Ruby's evidence that there was no agreement to transfer her interest to Doris. I accept Ruby's evidence that she financed the construction of the house in St. Mary. I reject Doris' evidence that she, Doris

provided the funds for the construction of the house in St, Mary, which was in consideration of Ruby removing her name from the title for North Drive.

I accept Ruby's evidence that she did not instruct Doris or anyone, to instruct Myra to sign her name. I find that Doris fraudulently caused Myra to impersonate Ruby in order to avoid compliance with of the Registration of Titles Act and of the Conveyancing Act. She resorted to such actions because she knew she was committing a fraud on Ruby and therefore was unable to obtain the requisite power of attorney from Ruby. I find that Doris committed a fraud on the JP by deceiving the JP that Myra was Ruby.

I also find that Doris deceived her attorneys at Nunes Scholesfield DeLeon and Company that Ruby had in fact signed the document. I find that Doris' actions were fraudulent. I hereby find that Doris' fraudulently caused to be transferred to herself Ruby's interest in all that parcel of land, part of Hampton Green in the parish of St. Catherine and registered at Vol. 1077 Folio 640 of Register Book of Titles. Fraud vitiates such transactions.

Lord Denning made it quite clear in **Lazarus Estate Limited vs Beasley**, 1965 ALL ER 340 at page 345, that:

“no court in this land will allow a person to take an advantage which he has obtained by fraud... Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgements, contracts, and all transactions whatsoever...”

With regards to Doris' ancillary claim I find Clifford Welsh not to be a reliable witness. I find that the renovations to the property were effected by means of rental collected from premises jointly held by the parties.

Consequently, I dismiss the ancillary claim.

I hereby order rectification of said title.