

1/11/04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
SUIT NO. E 428 OF 1999

BETWEEN VENIECE MILLER PLAINTIFF
AND MICHAEL HENDRICKS DEFENDANT

Mr. Gordon Steer and Ms. Charmaine Rhoden for the Plaintiff

Mr. Michael Hussey for the Defendant

Heard: January 26 & 27, 2004 and February 11, 2004

Straw, J. (Ag.)

Ms. Veniece Miller, the Plaintiff, a Cosmetologist and Mr. Michael Hendricks, the Defendant, a Special Constable, commenced a relationship in 1983. This relationship lasted until sometime in 1995/96. They have a son, Marlon Hendricks, who was born in 1992. Mr. Hendricks remained a Special Constable until 1996 when he was dismissed from the Force in relation to an offence committed against Ms. Miller.

During that time, they acquired three (3) properties and opened an account, # 1003938-02 at Issa Trust and Merchant Bank. Ms. Miller also operated a hair studio which was first registered as Amishi Hair Salon and since 1991, it has been operating under the name Clipso Hair Studio. The three properties, the bank account and hair studio are all the subject of this claim that is presently before the court.

The properties acquired include, firstly, 16 Bob Marley Circle, Cooreville Housing Scheme, St. Andrew with registered title in both names as joint tenants.

Secondly, Townhouse # 8, Cassandra Mews, 7 Cassandra Avenue, Kingston 10, St. Andrew. The title for this property is registered in the name Veniece Miller, as a result of previous court proceedings (Exhibit 37a).

Thirdly, property situated at Bridgewater, Bridgewater Gardens, Discovery Bay, St. Ann. Registered title is also in the name of Veniece Miller, also as a result of previous court proceedings (Exhibit 37b).

Both parties are claiming the entire beneficial interest in the Cassandra Mews property and all the proceeds of the Issa Trust account.

Ms. Miller is claiming 50% interest in the Cooreville property, while Mr. Hendricks is claiming the entire beneficial interest. In relation to the Discovery Bay property she claims the entire beneficial interest while the Defendant seeks a declaration as to his interest.

Finally, the Defendant seeks an order that the Plaintiff give an account to him of all profits earned by Amishi Hair Salon now trading as Clipso Hair Studio and payment of half of the profits.

The Property at Cooreville Gardens

This property was the first acquired jointly by both parties during the course of their relationship.

Both parties agreed that in 1984, the Defendant was selected by National Housing Trust to purchase the unit at Bob Marley Circle. The total cost was \$59,000.00 with 100% financing

provided by National Housing Trust. They agree that both names were put on the title. Ms. Miller claims that she became a co-applicant along with Mr. Hendricks as they decided to purchase the property together. Under cross-examination she states she was put on the title because of affordability.

Mr. Hendricks states that her name was put on the title as a beneficiary in case something happened to him and this had been explained to Ms. Miller. Both parties resided in this house together for several years.

Mr. Hendricks was solely responsible for the mortgage payments by way of salary deductions. The account went into arrears and Ms. Miller did pay arrears and states that she continues to do so up to the current period.

Exhibit 17 – a letter from N H T dated January 25, 2001 supports her contention that she is a co-applicant. As co-applicant she is required to pay the loan from National Housing Trust.

Exhibits 18 and 19 are letters from NHT in relation to the account. Exhibit 18 states that as of March 31, 1999, the arrears on

the loan was \$6,425.74 representing 4.4 months. Exhibit 19 dated May 13, 2002 states that as of May 13, 2002 the arrears were \$13,909.24 representing 7.74 months.

Exhibit 20 are some receipts supporting payment of arrears by Ms. Miller totalling about \$36,000.00 to that account in March 2000, October 2001, May 2002 and January 2003.

Mr. Hendricks conceded that the account had gone into arrears as a result of him losing his job and going to prison for assaulting the Plaintiff. He states that N H T had informed him that Ms. Miller paid about \$20,000.00 in arrears and concedes that the account is now in arrears.

Both agree that since 1992, the property had been leased. Mr. Hendricks states that rent had been used to defray the mortgage after he left the Security Force.

Improvements were done to the property. Ms. Miller states that she is solely responsible for improvements amounting to \$120,000.00. She has no documents in support.

On the other hand, Mr. Hendricks stated that he alone bore the cost of the improvements. However, under cross-examination, he said he does not remember if she assisted him with the improvements.

The court has no clear picture of the cost of the improvement except what was stated by Ms. Miller.

The court accepts that Ms. Miller was a co-applicant along with Mr. Hendricks because of affordability. The documentation supports her.

In Young vs Young, 1984 FLR, 375, it was held that the fact that a house could not be bought as a family home without the Defendant incurring liability, or potential liability, was some grounds for inferring that he was acquiring a beneficial interest in the house.

However, I cannot stop my consideration there. Mr. Hendricks was solely responsible for the payment of the mortgage between 1984 up to at least 1999. Ms. Miller paid arrears between 2000 and 2003. This does not induce me to find that there was a

common intention for them to have 50% interest each in the property at the time of acquisition.

What would be fair and just in this situation is for the court to look at the contribution of the parties in relation to the acquisition and improvement to the property.

There was no contribution by Ms. Miller at the time of acquisition. She has alleged that she spent about \$120,000.00 on improvements. It is accepted also that she paid some arrears on the mortgage payments. The fact that she paid some of the arrears at a later date, however, would not by itself mean that she is entitled to an interest. It would depend on the proportion of the total paid. The court is hard pressed to assess this proportion as there is no evidence showing the total paid so far by the Defendant or total amount on mortgage that is outstanding. The fact that the purchase price was \$59,000.00 is not helpful as mortgage payments include the interest and is spread over the life of the mortgage.

The issue left for the court to consider is whether she made improvements and how much and whether this is evidence that she acted to her detriment believing that she had an interest.

I do believe the Plaintiff that she bore costs in relation to the improvements to the property to the amount of \$120,000.00. The Defendant has not impressed me as a very credible witness for reasons that will be divulged herein after. Taking into consideration all the above-mentioned circumstances, I assess her share as (25%) $\frac{1}{4}$ share interest and the resulting $\frac{3}{4}$ share to the Defendant.

Issa Trust Account

The Plaintiff is contending that in 1994, she opened a joint deposit account at Issa Trust and Merchant Bank in the name of herself, the Defendant and their son Marlon Hendricks.

Sums were lodged to this account and over a period of time the amount was in excess of \$1,900.000. She states that the Defendant made no contribution to the account but his name was

put on the account that, in the event of her death, he would hold the same in trust for their son.

The Defendant is making the same claim to the said account. He alleges in his witness statement that he opened the account in 1985. Under cross-examination, however, he states it is 1993, and it was a mistake if he stated it was in 1985.

Mr. Hendricks states that, while he was a Special Constable, he also operated a taxi service from 1989. Money earned from this business went into a saving account at National Commercial Bank, Half Way Tree. He also invested money in stocks and shares. He later sold the taxis and operated three (3) buses. This was in 1991 until 1996. He alleges that he made good money from the bus service.

In his witness statement, he states that the source of the funds for the Issa account came from profits derived from his transportation business and also from investments made from stocks and shares.

Under cross examination, he states that he opened the account with \$300,000.00 which was part proceeds that he received from an Insurance company in relation to one of his buses that had been involved in an accident. He received money also from Ms. Miller as a result of their partnership in the Hair Studio and that some of this money also went into the Issa account. This was about \$200,000.00. Also, that he sold one of his Encava buses for \$300,000.00 and invested the proceeds in the Issa account. He has provided no documentation in support.

On the other hand, Ms. Miller is contending that the source of the funds was accumulated by consistent and diligent savings and earnings from her Beauty Salon and investments over a period of time. She also provided the court with documentation. These include bank statements from Bank of Nova Scotia for Clipso Hair Studio between 1992 to 1996 (Exhibits 1 and 2). Exhibits 4a, 4b, 6, 7, 14, 15 and 31 all relate to various bank accounts operated by Ms. Miller at National Commercial Bank, Eagle Commercial Bank, Bank of Nova Scotia and Mutual Security Bank.

Ms. Miller impressed the court as a diligent and industrious woman who is prudent in the exercise of her financial activities. In particular Exhibits 27 to 30 include five (5) Managers' cheques that Ms. Miller contends she used to start up the Issa account. These are as follows:

Exhibit 27 – two Managers' cheques made out to Venice Miller dated January 12, 1994 and March 1, 1994 for the amounts of \$450,000.00 and \$100,000.00 respectively. There are also two (2) ECB withdrawal slips which shows withdrawal from ECB savings account # 205005887 for the respective amounts.

Exhibit 28 – a Mutual Security Bank Manager's cheque dated December 18, 1995 for \$100,000.00 and a withdrawal slip for the same amount from a MSB savings account # 71400311.

Exhibit 29 - NCB Manager's cheque dated January 16, 1995 in name of Venice Miller for \$200,000.00.

Exhibit 30 - MSB Manager's cheque dated August 8, 1995 for \$200,000.00 in favour of Venice Miller.

Exhibit 31 is a MSB passbook for account # 71400311

showing the withdrawal of \$200,000.00 on August 2, 1995. This passbook is in the name of Venice Miller.

All these cheques total \$1,050,000.00, drawn between January 1994 to December 1995. Ms. Miller is asking the court to accept these as support for her allegations that she solely funded the Issa account and in particular that the cheques were the source of funds with which the Issa account was opened.

Apparently, the money from the Issa account was transferred by Mr. Hendricks to Buck Securities then to Mayberry Investments in 1996 and then returned to Issa Trust in 1997 where the account was reopened in the names of Veniece Miller and Marlon Hendricks. Thereafter, Money Management Certificates were issued in these joint names up to 1998 until the account was frozen (Exhibit 36).

The court did not find Mr. Hendricks to be a credible witness for the following reasons:

There is a previous inconsistency between his witness statement where he stated that he got no money from Ms. Miller from the

business and what he said under cross examination. He has explained that what is in the witness statement is a mistake.

Secondly, he stated that in 1998 he went to Issa Trust and Merchant Bank to ascertain the status of the account and found that the Plaintiff had transferred the said account into her name and the name of their son.

It is quite clear, however, that when the funds from the Issa account had been transferred to Mayberry Investments by the Defendant, it was transferred to re-open the account at Issa. The cheque from Mayberry was made out in the names of the Plaintiff, Defendant and their son.

When the account was re-opened, it was done only in the name of the Plaintiff and the son. Ms. Miller states this was done because the Defendant knew that the money was not his. Under cross-examination, Mr. Hendricks stated that the manager told him that he had signed a document putting the account in the names of Ms. Miller and their son and he accepted that, i.e. what the manager explained to him. Mr. Hendricks cannot therefore

convince the court that he did not know his name had been removed from the account. It must have been clear to him when the account was being re-opened at Issa, that he was no longer on the account. The question for the court to consider is why would Mr. Hendricks have allowed his name to be removed. In all the circumstances, I accept that Ms. Miller was the one who provided the funding for the Issa account, as both documentation provided by her and the reason given for Mr. Hendricks' name being removed from the account is cogent and compelling.

The court therefore, gives judgment to the Plaintiff on the claim and counter claim in relation to the Issa Trust account # 1003938-02.

Amishi Hair Salon/Clipso Hair Studio

The Defendant has asked the court for a declaration that he is entitled to 50% of the profits of the above business.

The Plaintiff has stated that Clipso Hair Studio came into existence on April 5, 1991. Prior to this, she had a business in the

name of Amishi Hair Salon. At the time she was already in a relationship for four (4) years with the Defendant.

Mr. Hendricks contends that he made substantial contributions to the start up of Amishi Hair Salon and that they were in partnership. He said he put vast amounts of merchandise in the business for sale. Under cross-examination, he stated that this amounted to three (3) boxes of stockings, colognes, ladies hand bags and five (5) boxes of cutex. Apart from this, Mr. Hendricks gives no others details of his contribution to the business. Ms. Miller has denied all of this.

In order to come to a determination whether a true partnership existed, the court considered the following:

Mr. Hendricks stated that the money from the business should have gone into a joint account at NCB with both their names. It was never done. He agreed that Ms. Miller saved the money from the Hair Studio at ECB. This account is solely in her name. Clipso's account was maintained at BNS and Ms. Miller was the sole operator (Exhibits 1 and 2).

He has no documents to support the fact that he bought merchandise for the business for any period of time.

While the court is of the view that Ms. Miller may not be truthful as to whether accessories were sold, any such input would appear to be minimal.

Mr. Hendricks himself has admitted that Ms. Miller worked very hard and came home at 11:00 p.m.

If such a partnership existed, one would not have expected Mr. Hendricks to be satisfied with his not having any control over the account. It would seem he would have had no idea how much the business was earning. On a balance of probabilities, I accept that there was no such partnership agreement. At the most, there might have been some informal understanding in relation to the sale of a limited supply of accessories.

In the circumstances, the court therefore gives judgment to the plaintiff on the counterclaim in relation to Amishi Hair Salon now trading as Clipso Hair Studio.

Property at Bridgewaters, Discovery Bay

Mr. Hendricks has stated that he has no interest in the building on the property at Discovery Bay as he was not responsible for its construction. Therefore, the court will not give any consideration as to whether he is entitled to any interest.

In relation to the land, Ms. Miller contends that she bought it from National Housing Corporation for \$370,000.00. She said she paid for it solely and was advised to put the Defendant's name on the title in order to protect her son. She admitted that he accompanied her to National Housing Corporation when she was making the down payment.

This property was located after the Cooreville purchase. This would have been about 1995. There is no clear evidence of the intention of the parties in relation to this property so the court will apply the principle of a resulting trust.

In Dyer vs Dyer 1775-1802 AER pg 205 the principle is clearly enunciated:

“The clear result of all cases, without a single exception, is that the trust of a legal estate, whether freehold, copy hold or leasehold, whether taken in the names of the purchasers and others jointly or in the name of others without that of the purchasers, whether in one name or several, and whether jointly or successively, results to the man who advances the purchase money ----. It is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence.”

The issue for the court to determine is whose money purchased the property.

Mr. Hendricks states that he asked Ms. Miller for \$300,000.00 from Clipso's account to purchase the land as he had never taken any money from the business. Ms. Miller has denied this. In support of her contention, she has put in evidence an ECB Manager's cheque dated August 25, 1994 payable to NHC for \$100,000.00 as well as an ECB savings withdrawal slip in the same amount showing that the said amount was withdrawn from her account # 205005887 (Exhibits 5a and 5b).

The court prefers the evidence of Ms. Miller as to the purchase of the land. As mentioned previously, the court has

serious difficulties with the credibility of Mr. Hendricks in relation to other issues. She has accounted for approximately 1/3 of the purchase price.

He is not alleging that he provided this money from any business venture or from resources independent from Ms. Miller. The court therefore, gives judgment for the plaintiff and declares that she is entitled to the entire beneficial interest of the said property and building.

Cassandra Mews Property

There is no clear evidence in relation to the intention of the parties when this property was acquired. Mr. Hendricks states that Ms. Miller's name was placed on the title to secure the interest for his son.

In relation to the above property, Ms. Miller stated that she paid down the sum of \$311,500.00 on Townhouse 8. The purchase price was \$880,000.00. There was an escalation cost of \$360,000.00. The total would therefore be in the amount of \$1,240,000.00.

She borrowed \$100,000.00 from the Defendant as a result of which he requested that his name be placed on the title. She received a further \$480,000.00 as mortgage from Victoria Mutual Building Society.

The court, therefore, considers the financial contribution of both parties in order to determine their respective interest.

She said that she paid solely the mortgage payments monthly from her account at BNS, Premier Plaza.

Both herself and the Defendant moved into the house and their son was born in 1992. The improvements were done by her solely. In support of her contention, she exhibited four (4) cheques (Exhibit 24) payable to C.O. Jacks in relation to Cassandra Mews.

These are as follows:-

- | | | | |
|----|------------------------|------------|-------------------------------|
| 1 | Manager's cheque dated | 16.09.1991 | - \$ 160,000.00 |
| 2. | “ “ “ | 23.09.1991 | - 51,500.00 |
| 3. | “ “ “ | 24.09.199? | - 100,000.00 (year not clear) |
| 4. | “ “ “ | 19 12 1991 | - <u>89,000.00</u> |
| | Sub total | | - \$400,500.00 |

The VMBS mortgage would have supplied - \$480,000.00

Total - \$880,500.00

In relation to escalation cost she borrowed \$100,000.00 from the Defendant and gave him a further \$60,000.00. The rest of the funds has not been accounted for - under \$200,000.00. She also said she repaid the Defendant his \$100,000.00.

On the other hand, in his witness statement, the Defendant stated he solely provided the deposit and thereafter paid the mortgage installment out of the earnings of his transportation business. The Defendant would give the Plaintiff cash which she lodged into her chequing account from which the mortgage would be paid as the defendant did not have such an account at the time.

However, this is a previous inconsistent statement as under cross-examination he said the rent from the Cooreville property was given to Ms. Miller and she would then write a cheque and pay the mortgage in relation to the Cassandra Mews property.

This statement is also inconsistent with what he stated in his witness statement that the rent from the Cooreville property was used to pay that mortgage to National Housing Trust.

In support he exhibited two (2) receipts, (Exhibit 42), one dated July 16, 1992 for \$160,000.00 and one (1) dated June 16, 1992 for \$200,000.00. Both were paid on behalf of the Cassandra Mews property.

The receipt for \$200,000.00 is a dubious one as there is no signature attached and nothing to indicate which organization it is from and in its present state, I do not accept it as genuine. I cannot rely on it.

In relation to the receipt for \$160,000.00, Ms. Miller has given the court a credible answer i.e., she borrowed \$100,000.00 from him and gave him a further \$60,000.00 to pay the escalation cost. I cannot place any reliance on the evidence of Mr. Hendricks in relation to the purchase of the property . He is obviously not speaking the truth in relation to the mortgage payment. On a

balance of probabilities, I accept the Plaintiff's version in relation to the \$160,000.00.

The mortgage to VMBS was paid off by a cheque from Mayberry Investments of \$500,000.00 (Exhibit 26) and a further deposit of \$10,239.00 paid by Mr. Hendricks (Exhibit 42).

I have already found that the money at Issa Trust belonged to Ms. Miller. This money was the source of the investment at Mayberry.

In effect then, Ms. Miller would have paid at least \$900,500.00 plus \$160,000.00, of which \$100,000 was a loan repaid to Mr. Hendricks. At most, I could only find that Mr. Hendricks paid \$10,237.00 as a mortgage payment, which is too minimal an amount to award him an interest.

In the circumstances, judgment is given for the Plaintiff on claim and counterclaim. The court makes the declaration that she is entitled to the entire beneficial interest in Townhouse 8, Cassandra Mews, 7 Cassandra Avenue, Kingston 10, St. Andrew.