



[2012] JMSC Civ. 152

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV-02101

BETWEEN	WINSTON O'BRIAN SMITH	1ST CLAIMANT
AND	PLEASUREPHONICS LIMITED	2ND CLAIMANT
AND	CONSTANTINE SCOTT	1ST DEFENDANT
AND	CROSWELL SCOTT	2ND DEFENDANT
AND	VERONICA ROBINSON	3RD DEFENDANT
AND	JOYCE GIBSON	4TH DEFENDANT

Mr. Carlton Williams and Mr. Mark Williams instructed by Williams, McKoy and Palmer for the Claimants.

Ms. Judith Clarke instructed by Judith M. Clarke & Co. for the First, Second and Third Defendants.

IN OPEN COURT

Heard: 12, 13, 14, January, 11, 12, 13, 14, July, 10 November 2011, October 30 2012.

**PROPERTY DISPUTE – CLAIM TO EQUITABLE INTEREST – CLAIM TO ENTITLEMENT
TO APPLY FOR LETTERS OF ADMINISTRATION**

MANGATAL J:

[1] The First Claimant Winston O'Brian Smith ~~Mr. Smith~~ is the son of the late Imogene Black-Scott ~~Imogene~~, who died on the 29th of May 2006.

[2] The second Claimant Pleasurephonics Limited ~~Mr. Pleasurephonics~~ is a limited liability company duly incorporated under the Laws of Jamaica in 1982, with registered offices at 38 Segree Street, Savanna-la-Mar, in the Parish of Westmoreland. Mr. Smith and his late mother were at all material times, the sole shareholders and Directors of Pleasurephonics.

[3] The first Defendant Constantine Scott ~~Mr. Scott~~ was the husband of the late Imogene.

[4] The Second Defendant Croswell Scott ~~Mr. Croswell~~ is Mr. Scott's son.

[5] Mr. Smith claims that the 3rd Defendant Veronica Robinson ~~Ms. Robinson~~ is the girlfriend of Croswell.

[6] Mr. Smith claims that the 4th Defendant is the girlfriend of Mr. Scott. This was denied by Mr. Scott. Although during the course of the trial Mr. Carlton Williams, first advised that the 4th Defendant was not served, he subsequently stated that she had been. Ms. Clarke also advised that she had not been instructed that the 4th Defendant was served. However, there is an Affidavit of Service on the 4th Defendant, sworn to by Mr. Paul White, a police officer.

[7] The Particulars of Claim in this matter consist of many pages. However, I think that it will be convenient to simply set out here the essentials of what Mr. Scott and Pleasurephonics are claiming:

1. *A Declaration that the First Claimant is entitled to obtain a Grant of Letters of Administration in the estate of Imogene Black-Scott, late of 36 Segree Street, Savanna-la-Mar in the Parish of Westmoreland, Businesswoman, he being one of two persons entitled in priority on intestacy. His sister, Audrey Cooper, daughter of the deceased being the other.*
2. *A Declaration that the deceased held a 50% share of property situated at 38 Segree Street, Savanna-la-Mar in the Parish of Westmoreland and registered at Volume 1076 and Folio 423 in the deceased's name as sole*

proprietor, on trust on behalf of the First Claimant, he having contributed directly to the acquisition and maintenance of same.

3. *A Declaration that the First Claimant is the sole Director and Shareholder of the Second Claimant.*
4. *A Declaration that the First Claimant and the deceased are joint proprietors of two parcels of unregistered land in Lilliput in the Parish of Saint James; these lots having been acquired from income generated by the deceased and the First Claimant.*
5. *An Order that the Defendants give an account for all rent collected at 36 and 38 Segree Street and every transaction which took place at the said Second Claimant Company from the 29th of May, 2006 until the date of this Order.*
6. *Mesne profits for wrongful occupation by the Defendants of 38 Segree Street, Savanna-la-Mar in the Parish of Westmoreland from the 13th of October, 2006 until the date of this Order.*
7. *Damages for detinue and wrongful conversion of the assets of the deceased and the Second Claimant.*
8. *Damages for losses suffered due to the Defendants' interference in the said estate of the deceased without the requisite authority to do so.*
9. *A Declaration that the estate of Imogene Black-Scott is the sole owner of 1996 Toyota Corolla Station Wagon motorcar Chassis Number EE1000043477, Engine Number 4E181477 which formerly bore registration number 4169 DF and now bears registration number 7657 FG wrongfully transferred to the First Defendant on the 18th June, 2008 and that the First Defendant transfers the said vehicle to the estate of the deceased.*
10. *An Order that in the event that the First Defendant fails to or refuses to transfer the said title to the motor car to the estate of the deceased that the Registrar of the Supreme Court be appointed Transferor of the said motor car with power to sign and execute all relevant documents for the transfer of the said motor car to the estate of the deceased.....*

[8] As Ms. Clarke summarizes admirably in her closing submissions on behalf of the 1st, 2nd and 3rd Defendants, the Claimants case can be separated and dealt with in two segments:

- A. The claims against the 1st Defendant directly touching the estate and property of and/or in the name of the late Imogene Scott and
- B. The claims against the 2nd and 3rd Defendants having to do with their conduct towards the Claimants and with respect to the subject properties.

THE CLAIMS AGAINST THE 2ND AND 3RD DEFENDANTS

[9] The relief that the Claimants seek in relation to these Defendants are seemingly covered in the reliefs numbered 5-8 above (inclusive).

[10] I agree with Ms. Clarke that the Claimants have produced no evidence upon which a Court could properly find that Coswell and the 3rd Defendant are liable to account to them or either of them for any rent collected at the properties referred to. There is indeed also no evidence to prove that the 2nd and 3rd Defendants were in wrongful occupation of 38 Segree Street at any material time. The same is also true in relation to the 4th Defendant. In fact, there really is no evidence upon which I could on a balance of probabilities say that Mr. Smith has made out a claim for mesne profits from any of the Defendants whatsoever.

[11] As regards the claim for detinue and wrongful conversion, in so far as it is directed at the 2nd, 3rd and 4th Defendants, this has not been dealt with in the evidence, nor indeed, in either the written or oral submissions on behalf of the Claimants.

[12] Equally, there would be no basis for a finding of any wrongful interference in the estate by the 2nd and 3rd Defendants. Nor indeed has any proper basis been provided in relation to the 4th Defendant. There would also be no evidence on the basis of which damages for any losses occasioned by this alleged interference could be assessed.

[13] The assertions of wrongful, unlawful, and malicious activity have not been substantiated and I find as a fact that the 3rd Defendant has never lived on the property.

THE CLAIMS AGAINST THE 1ST DEFENDANT MR. SCOTT

[14] The 1st Defendant had applied for a grant of letters of administration in the estate of Imogene Scott. However the 1st Claimant has lodged a caution in those proceedings. The 1st Claimant is seeking a declaration that he is entitled to the grant. Pursuant to section 4 (1)(d) of the **Intestates, Estates, and Property Charges Act**, upon the death of an intestate, her spouse the 1st Defendant, and her two children, the 1st Claimant and Audrey Cooper would be the beneficiaries of her estate. As Mrs. Scott's widower, Mr. Scott would be entitled to one half of the property forming the deceased's real estate, all of the personalty, ten percent of the net value of the estate as well as an annuity. I entirely agree with Ms. Clarke's submission that until a grant of administration has been made and the estate distributed, the beneficiaries have no such claims as would entitle them to stake claims as owners of the estate's assets. A beneficiary under a will or on an intestacy has no legal or equitable proprietary interest in the unadministered assets of the deceased's estate. The decision of **Commissioner of Stamp Duties (Queensland) v. Livingston** [1965] A.C. 694, cited by Miss Clarke, is authority for the proposition that the entire ownership of unadministered assets is in the deceased's personal representative. Further, that the true status of a beneficiary under a will or on intestacy is that he has a chose in action to have the deceased's estate properly administered.

[15] As regards 36 Segree Street, Mr. Scott has an indisputable legal interest as himself and Imogene were registered on the Title as tenants-in-common. In relation to 38 Segree Street, it was Mr. Smith's evidence that he contributed to the purchase of 38 Segree Street. He stated in his Witness Statement that he and the deceased purchased the property jointly in or around 1961 from Imogene's then neighbour. 1961 is also the date stated in the Particulars of Claim. It is to be noted that in the Defence filed on behalf of the 1st Defendant it was stated that the 1st Claimant could not have purchased the property in 1961 as he was then a child, he having been born in 1949. It is only when giving evidence at the trial that Mr. Smith sought to correct the date 1961, claiming that it should have been 1971 and that 1961+ was a typographical error. Mr. Smith claimed that the title to the property was however registered in the sole name of

the deceased as she was the one who dealt with and negotiated with the vendor. According to Mr. Smith, it was however always his understanding that having contributed jointly to the purchase price, that they both held an interest in the property. The property remained in the possession and control of the deceased and Mr. Smith, Mr. Smith's evidence continues, until the death of the deceased and to the exclusion of all others. Mr. Smith claims that he and the deceased both exercised all acts incidental to ownership, including leasing and collecting the rental therefrom.

[16] I must say that I found the 1st Defendant to be somewhat of a confusing witness. I have to weigh the evidence of Mr. Scott as contained in his Witness Statement, whilst at the same time examining his oral evidence. Indeed, at one point, Mr. Scott seemed to be distancing and disassociating himself from even his signature on the Witness Statement, and other parts of the evidence. At the same time, I have taken into account the witness's level of intelligence and his seeming state of infirmity. In fact, on one occasion during the trial the matter had to be adjourned because Mr. Scott fell ill during the proceedings and had to be rushed from court to the hospital.

[17] Mr. Smith asserts that Mr. Scott did not have any general right to be at 38 Segree Street, and that Mr. Scott had only been assigned by Imogene a room at the property. According to Mr. Smith, Imogene and Mr. Scott had separated from in or around 1991. Mr. Scott, on the other hand, in his Witness Statement states that he and his wife Imogene acquired the property together. It was their matrimonial home and they set up business there jointly. I also take into account the fact that Audrey Cooper and Veronica Robinson, the 3rd Defendant, gave evidence. Both witnesses called on behalf of the Defence supported Mr. Scott's written assertions that he lived with the deceased up to the time of her death. There was quite a bit of documentary evidence that the deceased's place of residence prior to her death was 38 Segree Street. Indeed, the death certificate certifying the death of Imogene indicates that Imogene Scott died here in Jamaica, with her usual residence being stated to be 38 Segree Street. Whilst Mr. Smith claimed that Imogene lived in the United States, the evidence elicited on the part of the Defence is that both the deceased and Mr. Scott had lived partially in the United

States, but that they had both been living together at 38 Segree Street at the time of the deceased's death.

[18] Having weighed the evidence, I find as a fact that Imogene and Mr. Scott were living together at 38 Segree Street at the date of her death. I find that Mr. Scott was entitled to apply for letters of administration in Imogene's estate and as Miss Clarke puts it, as ~~an~~ ^{an} attending administrator, having been in possession jointly with the deceased in respect of both properties prior to her death, Mr. Scott's actions prior to the grant do not seem impermissible in law.

[19] At this time, I now turn to deal with the claims made by the 2nd Claimant Pleasurephonics Limited. Pleasurephonics Limited was incorporated in 1982. By letter dated March 25 2010 the Companies Office of Jamaica indicated that upon its incorporation the company had filed only its memorandum and articles of association. The letter states additionally:

- *...No other documents were filed.*
- *The Companies Office initiated the removal process for this company in 2007.*
- *On September 22, 2008 a letter was received from Winston Smith (director) requesting that the company not be removed.*
- *The first Annual Return (Annual Return 1983) for the company was then filed on 2 January of 2009.*
- *As such in March of 2009 the last Annual Return filed was 1985 which was submitted on the 26 February 2009.*
- *The assessment letter dated March 9, 2009 would rightly indicate that the Annual Returns outstanding were 1986 to 2009.*

[20] I agree with the Defendants that the evidence suggests that the 2nd Defendant was not actively engaged in pursuing any business. Mr. Smith's letter to the Registrar of Companies is indeed dated almost two years after the death of Imogene and does appear to have been issued around the same time as the disputes and other

contentions that led to the filing of this law suit. Mr. Smith also admits that he established a website for Pleasurephonics only after his mother Imogene's death. I frankly do not see what relief the Claimants would really be entitled to and the Declarations being sought certainly seem unnecessary. If indeed the manner of holding of entitlements is set out in the articles of association, so for example, the documentation states that Imogene held 50 % of the shares in Pleasurephonics Limited, then it follows that, she having died, her interest and entitlement in the company would fall to her estate. I accept the evidence of Audrey Cooper that the company Pleasurephonics had no capital or assets. I find that the claim that the 2nd Claimant Pleasurephonics Limited was engaged in the acquisition, maintenance and operation of the properties at 36 and 38 Segree Street is unsustainable. Further, I accept that there was a guesthouse known as Pleasurephonics at 38 Segree Street, which did not necessarily have to do with a company by that name. The Claimants have not established a basis for a ruling or finding that Pleasurephonics is entitled to manage the guesthouse operated at 38 Segree Street.

[21] As regards the motor vehicle, I find that there is no basis for the declaration sought.

[22] I am of the view that the main focus of Mr. Smith's claim is to an entitlement to an interest in the property at 38 Segree Street, based upon his alleged contribution. In fact, the closing submissions made upon his behalf are almost exclusively focused on this issue, and so too, this aspect of the claim constituted the main thrust of the evidence presented and cross-examination directed, on behalf of Mr. Smith.

[23] I must indicate that I was not impressed with Mr. Smith as being a witness of truth. Mr. Smith appears to have kept an extraordinary amount of documentation, and numerous documents were admitted into evidence upon his Attorney's application. However, at the end of the day, none of them provide any direct or substantial link to show that Mr. Smith contributed to the purchase of the property jointly with Imogene Scott. I thought that Mr. Smith's demeanour was that of someone who was not being

genuine and who had contrived to make a claim based upon his say-so, in a manner that could not readily be contradicted, given that the other person with whom he claims to have this understanding, his mother Imogene, is deceased. However, the evidence has to be weighed by the Court as a whole, in order for the Court to find what facts are proved and as to what reasonable inferences, if any, can be drawn.

[24] I did not find Mr. Smith's explanation about a typographical error at all convincing. Firstly, it was at the trial, some two years after he had executed the Particulars of Claim and over a year after executing his Witness Statement that Mr. Smith was now attributing the 1961 date to a typographical error. Yet he has not explained why the Particulars of Claim, (signed a year earlier), suffer from the same typographical error. Whilst Imogene Scott did become registered as owner in 1971, I do not think that assists with Mr. Smith's credibility. When cross-examined he stated that he cannot say he is certain that the property was bought in 1971. He stated that the property could not have been bought in the 1960's my records do not reflect that. When asked at what point he determined that there was a typographical error, his response was reviewed the documents and saw that chronologically it could not have been correct. He stated that this was the basis upon which he determined that it was a typographical error.

[25] Many of the copious documents relied upon by Mr. Smith either do not show a connection to 38 Segree Street, or are referable only to representations being made by Mr. Smith on the instructions of Mrs. Imogene Scott (see for example, exhibit 18, letter dated May 28, 1976, written to Bank of Nova Scotia by Mr. Smith). Other documents tendered by the Claimants also could not guide a finding by me that Mr. Smith had any ownership or equity in the property at Number 38.

[26] Importantly, Mr. Smith claims that he and his mother borrowed money from Myrtle Hall to carry out construction at 38 Segree Street. A property owned jointly by him and Imogene was used to secure this loan. Exhibit 17 is a letter which is relied upon by Mr. Smith. However, it states that Myrtle Hall agreed to lend Imogene Scott (not

Imogene Scott and Winston Smith), a sum of money on the security of premises comprised in certificate of Chantilly title. Nothing in this document corroborates or advances Mr. Smith's claim of his own contribution or involvement. Nothing in it refers to 38 Segree Street. I noted that in cross-examination Mr. Smith stated that he and his mother jointly owned property at Chantilly, Westmoreland, and which he says that his mother gifted to him. Exhibit 33 shows a transfer to Mr. Smith and Imogene as joint tenants from Imogene by way of gift in 1986. In his evidence, Mr. Smith testified that he has built a guest house on that property. Mr. Smith also admits that he borrowed money from Jamaica National Building Society to carry out construction at Chantilly. If Mrs. Imogene Scott went to the trouble of transferring an interest in the Chantilly property to Mr. Smith, from as far back as 1986, it is difficult to see why, or to accept as credible, Mr. Smith's assertion that Imogene intended to transfer an interest in 38 Segree Street to him. It is difficult to accept that such an intention existed, and was left hanging for so long, i.e. from 1971 and was never consummated (whilst the gift of an interest in the Chantilly property was), right up to her death in May 2006, over thirty . five years after 38 Segree Street became registered in Imogene's sole name.

[27] All told, I have had to grapple with concerns in relation to the state of the evidence of Mr. Scott. However, in any event within the 1st Defendant Mr. Scott's case, I find those concerns or difficulties have been largely counterbalanced by the evidence of Ms. Cooper and Ms. Robinson. Despite the many documents tendered on behalf of Mr. Smith, and given my assessment of him as not being a witness of truth, I find that the 1st Claimant Mr. Smith, whose duty it is to satisfy me of his claim on a balance of probabilities, has failed to attain the requisite standard to prove or show that he made any contributions, direct or indirect towards the acquisition, maintenance and construction of 38 Segree Street, in order to ground his claim to be entitled to a half interest in that property.

[28] Whilst the Attorneys-at-Law for the Claimants in their written submissions relied upon the doctrine of proprietary estoppel and the very interesting English case of **Thorner v. Major and others** [2009] 1 W.L.R. 776, this almost seems to be an

afterthought. There has been no pleading of the vital ingredients to ground proprietary estoppel as a cause of action in the Claimants' Statements of Case. There is in any event no evidential basis for a finding of proprietary estoppel. The Claimants have both by way of their pleadings and the evidence failed to show the three essential ingredients for proprietary estoppel being (a) A representation or assurance made to the claimant of a proprietary interest; (b) Reliance on it by the claimant; and (c) Detriment to the claimant in consequence of his (reasonable) reliance.

[29] The Claimants have therefore failed to make out their claims herein. There will therefore be judgment for the 1st, 2nd, and 3rd Defendants against the Claimants, with costs to be borne by the 1st Claimant, such costs to be taxed if not agreed.

[30] The claimant's claim against the 4th Defendant is dismissed.