[2012] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 113/2007

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**ERIC McCALLA**	**1ST APPELLANT**
AND	**JENICE McCALLA**	**2ND APPELLANT**
AND	**JEFFREY McCALLA**	**3RD APPELLANT**
AND	**GRACE McCALLA**	**RESPONDENT**

Miss Carol Davis for the appellants

Mrs Sharon Usim instructed by Robertson & Co for the respondent

18, 19, July 2011 and 29 June 2012

HARRIS JA

[1] I have read in draft the judgment of my sister McIntosh JA. I agree with her reasoning and conclusion and have nothing further to add.

DUKHARAN JA

[2] I too have read the draft judgment of McIntosh JA and agree with her reasoning and conclusion.

McINTOSH JA

[3] The appellants have appealed against a decision delivered in the Supreme Court on 3 August 2007 in which the learned judge granted a declaration that the 1st and 2nd appellants held property situated at Lot 245, 6 West, Greater Portmore, registered at Volume 1267 Folio 840 of the Register Book of Titles (the property) on trust for the respondent and the 3rd appellant, each of whom was entitled to a 50% share of the property. In addition, the learned judge ordered that the property should be valued by a reputable valuator agreed on by the parties or appointed by the court, should they fail to agree. The valuator was to determine the current market value of the property and, within a stipulated period after receipt of the valuation report, the parties were to decide on whether one would acquire the interest of the other or whether the property was to be sold on the open market. Should there be any reluctance on the part of one or other to take the necessary steps in the sale transaction then the Registrar of the Supreme Court would be called upon to do so, being empowered to sign all the necessary documents to facilitate the sale.

[4] As the surname suggests, these parties are kinsfolk save one where the bond was created by law instead of blood. In the real life drama which unfolded before the trial judge, the cast comprised a father, Eric McCalla (unhappily, now deceased), his daughter Jenice McCalla and his son Jeffrey McCalla on the one hand, with his daughter-in-law, Grace McCalla, Jeffrey McCalla's wife, on the

other. Some would say that in its unfolding the drama gave a clear demonstration of that very old maxim about the blood and water. Grace McCalla sought from the court a declaration of her interest in the property, based upon a promise which she alleged was made to her husband, Jeffrey McCalla and herself by Eric and Jenice McCalla, but, alas, she had no support in this bid and had to swim against the tide, fending for herself against the strength of the blood relations, although what she sought in the fixed date claim form she filed in the Supreme Court on 10 August 2005 was of potential benefit to her husband Jeffrey McCalla as well.

[5] By way of background, I turn to the circumstances and allegations which led to the request for the court's intervention. Some time prior to January 1993 Eric sought to obtain a house through the National Housing Trust (the NHT), in a housing scheme in Greater Portmore, St Catherine. To that end he submitted an application as did his daughter, Jenice. His application was successful and in January 1993 he was offered one of the houses, but before he could take up the offer, he was required to join forces with another contributor to the NHT who would still be of working age on his retirement, as he was nearing retirement age. Accordingly, he asked Jenice to join with him and when that joinder received the approval of the NHT they entered into a mortgage agreement to complete the transaction.

[6] Eric, Jenice and Jeffrey swore to a joint affidavit on 22 February 2006 in which Eric and Jenice deposed that the house was acquired, subject to a mortgage, with the intention that Eric would take possession of it but that intention was altered when Jeffrey came to the family and informed them that he was desperately seeking accommodation as he and his family had been given notice to quit the premises which they occupied at the time. Eric then agreed to defer his plans and they entered into a lease agreement with Jeffrey to occupy the house at a concession rental which was equivalent to the monthly mortgage installments. Jeffrey, his wife and children then took up occupation of the house and paid the agreed sum monthly until about May of 2004 when the marriage between Jeffrey and his wife broke down.

[7] Eric and Jenice further deposed that they had entered into no agreement with Jeffrey and his wife for them to pay the mortgage until its discharge, at which time the house would be turned over to them and, for his part, Jeffrey supported this. Their evidence is that Jenice is now to occupy the house and they wish to recover possession from Grace, who, although she had vacated the premises and Eric and Jenice had recovered possession, returned and continued to reside there, as a trespasser as she does not have their permission to be in occupation. Eric and Jenice also deposed that unknown to them and without their consent Grace and Jeffrey had made alterations and additions to the house. They only became aware of this sometime in 2004. Jeffrey admitted that he did not tell his wife about the lease and had given in to her nagging about the

alterations and additions to the house although he knew this to be in breach of the lease agreement he had signed. However, he had told her that it should not be done because ultimately they would have to leave it all behind.

[8] Grace, in two affidavits filed, one on 10 August 2005, in support of her fixed date claim form and the other on 19 May 2006, in response to the joint affidavit mentioned in paragraph [6], deposed that at the time of the acquisition of the house, Eric was purchasing a motor car and Jenice was in school so that they faced challenges in meeting the financial obligations attendant upon the acquisition of the property. It was therefore decided at a meeting of the family that she and Jeffrey would acquire the property as their own. Since the offer was to Eric and Jenice, however and it was felt that there was no guarantee that a transfer to Jeffrey and herself would have been approved by the NHT, the parties agreed that Eric and Jenice would continue the transaction in their names. It was further agreed that Grace and Jeffrey would pay the closing and escalation costs as well as the monthly mortgage charges until it was completely satisfied at which point the property would be transferred into their names.

[9] According to Grace, it was based upon that agreement that she, her husband and daughter moved into the property at Lot 245, 6 West Greater Portmore and occupied the house thereon. They lived up to their end of the arrangement by paying the closing and escalation costs and servicing the mortgage up to its discharge some time in 2004. She stated that she sought, on

occasions, to spur her husband into taking steps to have the property transferred into their names but her husband would reassure her that all was well as his father was a christian and would keep his word. She and husband Jeffrey made substantial additions to the house and, as she was of the view that it was theirs to do with it as they pleased, she saw no need to seek the permission of Eric and Jenice before doing so. Both were aware of the alterations and extensions as they visited the property while these activities were in progress and as far as she was aware no objections were ever made by them.

[10] In her affidavit of 10 August 2005, however, Grace averred that Eric and Jenice (the 1st and 2nd Defendants in the court below) were now seeking to have her removed from the property in total disregard for her equitable interests in the said property. At paragraphs 29 - 31 of the said affidavit she averred that:

> "29. At no time until recently did the 1st and 2nd Defendants assert any proprietary interest in the said property. The 1st and 2nd Defendants made no contribution physically financially or otherwise towards the acquisition of the said property.
>
> 30. The relationship between my husband and I has irretrievably broken down …
>
> 31. I do verily believe that due to this breakdown in my marriage my husband has sided with the 1st and 2nd Defendants in a bid to deprive me of my entitlement to the said property."

As a consequence, she sought the following declarations and orders which were substantially granted by the learned trial judge:

"1. A Declaration that the Claimant is beneficially entitled along with the 3rd Defendant, Jeffrey Aston McCalla to share equally in property known as Lot 245 6 West, Greater Portmore, in the parish of St Catherine comprised in Certificate of Title registered at Volume 1267 Folio 840 of the Register Book of Titles ('the said property').

2. A Declaration that the Defendants hold the said property on trust for the Claimant and the 3rd Defendant in equal shares.

3. An injunction restraining the Defendants by themselves, their servants or agents or otherwise howsoever from causing or attempting to cause the Claimant to quit or otherwise be removed from the said property until the determination of the trial herein.

4. An injunction restraining the Defendants by themselves, their servants or agents or otherwise howsoever from disposing of the said property by sale, gift or otherwise in any respect to any person or company whatsoever, until the determination of the trial herein.

5. An order that there be partition of the said property by sale of same on the open market at current market value and that the Claimant be paid one-half (½) of the net proceeds of sale.

6. For the purpose of determining the current market value of the said property a reputable valuator shall be appointed by agreement of the parties hereto within thirty (30) days of the date hereof failing which C. D. Alexander Realty Co. shall be automatically commissioned to assess the market value of the said property.

7. Costs to be costs in the claim.

8. …"

Eric and Jenice had counterclaimed seeking declarations of their legal and beneficial interests in, as well as possession of, the said property but these applications were refused. They now ask this court to set aside the declarations and orders which the learned trial judge granted in Grace's favour.

The Grounds of Appeal

[11] The following are the grounds of appeal upon which they relied in their effort to show that this court ought to set aside the orders of the learned trial judge:

> "(i) The Learned Trial Judge wrongly concluded that the Respondent and the 3rd Appellant were each entitled to 50% share in the premises known as Lot 245 6 West, Greater Portmore in the parish of St. Catherine. (Hereinafter the said land).
>
> (ii) That the Learned Trial Judge's finding of an agreement between March 1993 and October 1993 that the Respondent and the 3rd Appellant would become owners of the house if they paid the mortgage and escalation costs was against the weight of the evidence and therefore wrong in law.
>
> (iii) That the finding of the Learned Trial Judge that the 3rd Appellant had an interest in the house was wrong in law, given that no such claim was made by the 3rd Appellant.
>
> (iv) That the finding of the Learned trial Judge that the lease Agreement was not a genuine document was against the weight of the evidence and therefore wrong in law.
>
> (v) That the finding of the Learned trial judge that the Lease Agreement was not a genuine document was in effect a finding of fraud, when fraud had not been alleged or pleading [sic] in the matter herein.
>
> (vi) That there was no proper basis to support the finding that the Respondent had paid the escalation costs with respect to the house.

(vii) That the finding of the Learned Trial Judge that the 1st and 2nd Appellants held the said land on trust for the Respondent and the 3rd Appellant was wrong in law and against the weight of the evidence.

(viii) That the learned Trial Judge erred in that he made findings that were contrary to the evidence and the interest of the 2nd Appellant, in circumstances where the 2nd Appellant was never cross examined and her evidence therefore never put in issue."

The Contending Arguments

Grounds (i), (ii) and (vii)

[12] These three grounds were argued together. Miss Davis, on behalf of Eric, Jenice and Jeffrey, argued that, based on the authorities, the learned trial judge's finding that the beneficial interest in the disputed property was to be shared equally between Grace and Jeffrey on a constructive trust with the registered proprietors holding the property as trustees for them was wrong in law as such a finding would require evidence of a common intention for them to have the beneficial interest in the property and evidence that they acted in reliance on that common intention to their detriment, but, there was no such evidence in this case.

[13] It was counsel's contention that the learned trial judge seemed not to have found it necessary for a common intention to be established. Relying on ***Muschinski v Dodds*** [1984 – 1985] 160 CLR 583, she expressed the view that a constructive trust can properly be described as a remedy, imposed by equity

regardless of actual or presumed agreement or intention, to preclude the retention or assertion of beneficial ownership of property, if that was contrary to equitable principles. Counsel further argued that there was no evidence of detriment as the reliance on the evidence of mortgage payments and additions done to the house was misconceived since the sums paid were for rent which was at an under value and therefore in the nature of a concession. It was counsel's contention that the additions were made for the convenience of Grace and her family and therefore could not be regarded as detrimental.

[14] Miss Davis submitted that the learned judge's conclusion that a constructive trust had been created in favour of Grace and her husband was based on his erroneous finding that there was an agreement between the parties for the transfer of the property to them on their payment of the escalation costs and the mortgage installments. Such a finding was against the weight of the evidence, counsel argued, making particular reference to Grace's contradictory evidence including her affidavit evidence that the agreement was in writing, though she produced no documentary proof of this, then later, in oral evidence, testifying that there was nothing in writing. Further, Miss Davis submitted, the learned trial judge having found that the date she gave for the meeting which led to the agreement, was not supported by the accepted time line for the offer made to Eric and Jenice, he ought to have found that there was no agreement instead of substituting another date. On the totality of the evidence, counsel argued, there was no basis for a finding of a constructive trust in Grace's favour.

[15] If there was no agreement then any evidence of conduct would be to no avail, Miss Davis continued, as it could not show any common intention for Grace and Jeffrey to have a beneficial interest in the property. The learned judge accepted that Jenice had a definite share in the property as she was a tenant in common with her father and there was nothing from which an inference could be drawn that she intended to give her brother and his wife her share of the property. There was no evidence of how these registered proprietors were to be compensated for paying the deposit and other initial payments until Grace and Jeffrey took up possession of the property.

[16] On the other hand, Mrs Usim argued that a constructive trust has been created in favour of Grace. She further argued that the authorities show that in the absence of direct evidence, a common intention may be inferred from the actions of the parties, both prior to and after the acquisition of the property. It was her submission that the learned trial judge, as the sole arbiter of the facts, took advantage of the opportunity he had to observe the witnesses and to arrive at his conclusions on the totality of the evidence as well as his assessment of the credibility of the witnesses. In so doing, he arrived at his conclusion that Grace was to be believed, Mrs Usim submitted, based not only on her evidence but also on the conduct of all the parties surrounding the acquisition of the property and the circumstances leading to Grace and Jeffrey moving into and later making additions to the house.

[17] The learned trial judge accepted as a fact that there was a meeting, Mrs Usim submitted, though not on the date given by Grace, and there was evidence from which he could have determined the more probable date, for instance, the dates in 1993 when the deposit was paid, when the mortgage was granted and when Grace and her husband moved into the house. Further, counsel continued, it was open to the judge to accept such parts of Grace's evidence which he accepted as true and to reject those parts which he found to be inaccurate or untrue.

[18] Mrs Usim argued that there is nothing unusual in the judge's finding that based on the agreement which he accepted as having been made at that meeting, Eric and Jenice had become trustees for Grace and Jeffrey, even if they were unaware of it, because trusts, such as implied and constructive trusts, are often created in like manner and the courts are left to determine the intentions of the parties from their conduct. The learned judge, she argued, accepted that Jenice was a part of the discussions and had agreed that Grace would make NHT benefits available to her when she was ready to acquire a home and on that basis she would have joined with her father as trustees on a constructive trust for Grace.

Ground (iii)

[19] In this ground Miss Davis complained that the learned trial judge's finding that Jeffrey had an interest in the property was wrong in law, given that no such

claim was made by him. Counsel contended that the order of the learned trial judge effectively made Jeffrey a claimant without his consent, which was contrary to the provision of rule 19.3(4) of the Civil Procedure Rules 2002, which reads:

> "No person may be added or substituted as a claimant unless that person's written consent is filed with the registry."

It was Jeffrey's evidence, counsel argued, that he had entered into no agreement as contended for by his wife and did not wish or consent to be a claimant. She further argued that his evidence was as to being a tenant under a lease agreement and, although he had not imparted that information to his wife, he had told her on occasions, especially when she wanted to undertake the additions to the house, that they would have to walk away from it as the house did not belong to them.

[20] Mrs Usim's submission, however, was that the stance taken by Jeffrey was merely a ruse to prevent his wife from succeeding in her claim but that this could not displace her interest. She contended that the learned judge did not substitute Jeffrey as a claimant as the interest he received in the property was not as a claimant but simply the result of the judge's finding in favour of Grace. Counsel referred the court to the case of ***Vandervell v Inland Revenue Commissioners*** [1967] 2 AC 291 relied on by the learned trial judge for his finding that one does not divest oneself of an interest in property simply by

saying "I don't want it", so that Jeffrey's interest in the property is not determined because he declines to take it up.

Grounds (iv) and (v)

[21] These grounds were also argued together. Miss Davis contended that the learned trial judge's finding that the lease was not a genuine document in existence at the time of the move to the disputed property was wholly wrong and against the weight of the evidence. The position taken by Grace was that there was no tenancy arrangement and not that the lease document was not genuine, she contended. To challenge its genuineness in the cross examination of Eric, suggesting that it was a recent invention, counsel said, was tantamount to imputing fraud and Eric, Jenice and Jeffrey had no opportunity to rebut that allegation.

[22] It was Mrs Usim's contention, however, that the learned trial judge's finding did not imply fraud. That this lease was never brought to the attention of Grace is unchallenged as also the point at which it made its appearance in the matter, counsel submitted and it was only in the response to her affidavit that Grace became aware of its existence. As far as Grace was concerned, she was paying mortgage and not rent under any lease agreement and the learned trial judge accepted that this was so, she further submitted. Mrs Usim also argued that it was open to the learned trial judge to find that the lease, whenever it was created, was created as a ruse to undermine Grace's case. It was counsel's

further submission that the document "may very well be 'genuine' in the sense that it was created by Eric, Jenice and Jeffrey and was not a forgery but it was irrelevant in terms of its effect on the respondent's [that is, Grace's] claim".

Ground (vi)

[23] In her submissions on ground (vi) Miss Davis argued that the evidence was insufficient to support the learned trial judge's conclusion that Grace had paid the closing and escalation costs pertaining to the acquisition of the property. He had disbelieved Grace's evidence that she had obtained a loan to meet the down payment on the house and had made the payment and he had found that it was Eric who made the down payment. However, he accepted her evidence that she had paid escalation costs although no mention was made of any such costs by Eric, Jenice and Jeffrey and Grace had provided no proof of such payments. Miss Davis submitted that there was no evidence that escalation costs were even required by the NHT and, if so, what the quantum was and when it was paid. All that the learned trial judge had for consideration was the bare assertion of Grace and that did not suffice to ground a finding that she had made any such payment.

[24] Mrs Usim relied on evidence elicited from Grace in cross examination, however, that she was unable to get the keys for the house until the escalation costs were paid. It was her evidence that it was Eric who called upon her husband and herself to pay the escalation costs before they could get the keys

from NHT. That, Mrs Usim contended, was sufficient evidence taken together with the unchallenged evidence that Grace and her husband were the first occupants of the house, to support the judge's finding, on a balance of probabilities, that Grace paid the escalation costs as she alleged.

Ground (viii)

[25] Finally, in relation to ground (viii), it was Miss Davis' contention that Jenice's evidence that there was no meeting and no agreement ought to have been accepted by the learned trial judge as that evidence was not challenged in cross examination. For this submission she referred us to the case of ***Chin v Chin*** Privy Council Appeal No 61 of 1999 delivered 12 February 2001. It was wrong, counsel contended, to conclude, as it seems that the learned trial judge did, that because he did not believe Eric and Jeffrey in material respects he would also disbelieve Jenice, so that her cross examination would not affect his findings. Counsel submitted that it is well established law that a trial judge is not in a position to assess the credibility of the witnesses where there is no cross-examination (see ***Chin v Chin***). The learned trial judge ought not to have rejected her evidence where she had presented herself for cross-examination but none was undertaken. In that event a finding adverse to her interest ought not to have been made, so that although she had a beneficial interest in the property at the time of its acquisition, in the end she was left with nothing, she argued.

[26] In response, Mrs Usim submitted that the learned trial judge had made his findings based on the joint affidavit filed by Eric, Jenice and Jeffrey and had considered her input in the affidavit. Her evidence, insofar as she was fixed with knowledge of relevant events, accorded with the evidence of Eric and Jeffrey, Mrs Usim argued and that evidence was tested in the cross examination of Jeffrey and Eric. Counsel contended that the learned trial judge, having given full consideration to that evidence found, inter alia, that Jenice's "assertion that Grace and Jeffrey went ahead with the additions without her knowledge was against all the probabilities". In other words, she argued, the learned trial judge found that her credibility was also tainted.

Analysis

[27] It is settled law, approved and applied in this jurisdiction in cases such as **Azan v Azan** (1985) 25 JLR 301, that where the legal estate in property is vested in the name of one person (the legal owner) and a beneficial interest in that property is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties.

[28] In the instant case, counsel for the parties accepted authorities such as ***Lloyd's Bank v Rosset*** [1990] 1 AER 1111, followed in ***Peter Haddad v Arlene Haddad*** SCCA No 36/2003, a decision of this court delivered on 20 April 2007; ***Gissing v Gissing*** [1970] 2 All ER 780; and ***Grant v Edwards*** [1986] 2 All ER 427 as clearly demonstrating the law in relation to the establishment of constructive trusts and though, in most cases, the issue involved the matrimonial home and parties in a broken relationship, it is accepted that the principles are equally applicable where the property in question is not the matrimonial home and the issue to be determined is not as between parties to a marriage. In ***Haddad v Haddad*** this court reviewed a long line of authorities, including the aforementioned cases and applied the principles to be distilled from them, upholding the learned trial judge's finding that there was a common intention by the parties to own the property in question and that the claimant acted to her detriment in reliance on that common intention, thus resulting in a constructive trust and, ultimately, a share in the beneficial interest. Indeed, it is to be noted that in all the aforementioned cases, where a beneficial interest was found to be held by the person in whom the legal estate was not vested, the court found both a common intention as well as the corresponding detrimental action.

[29] The learned trial judge found that a constructive trust was established in favour of Grace and Jeffrey based on Grace's evidence that there was an agreement between the parties that she and Jeffrey were to be the owners of the property. Therefore, a proper assessment of the credibility of Grace was

critical. The learned trial judge rejected parts of Grace's evidence as "inaccurate" or unreliable and although, as Mrs Usim quite correctly submitted, it was open to him to reject such parts of her evidence found to be "inaccurate" and act upon the parts which he accepted as true, it is necessary, in my view, to look at the impact which the rejected evidence had on the evidence which was accepted, in order to determine whether the latter could sufficiently support his conclusions, as it is well established that the court of review has jurisdiction to assess the sufficiency of the evidence adduced in the trial.

[30] A careful review of her evidence reveals the following inaccuracies/ untruths, as found by the learned trial judge:

(i) Grace's evidence that it was in or about 1992 that Eric and Jenice offered to sell the house to Jeffrey and herself as it was in February 1993 that the offer of the house was made to the appellants. This, he said, made it unlikely that any conversation embodying an offer to sell took place in 1992. He made allowance for fading memories and concluded that <u>if Grace is really saying that the conversation took place in 1992 she is inaccurate.</u> So, the important matter of the date of the discussion from which the agreement emanated was made the subject of an inference. He said at paragraph 15 of the judgment, "There is no clear evidence when the family meeting was held, but, <u>if it was held</u>, it would be more

probable that it was held after the house was allotted to Eric" That would have been in 1993.

(ii) Grace's evidence that it was she who paid the deposit for the purchase of the house. She raised the money by means of a loan from a friend, Mr Cox, from whom Eric was purchasing a motor car for approximately $60,000.00. The arrangement was that that sum would be paid to Grace and Jeffrey by Eric to make the deposit and they would repay Mr Cox over time. This was because no financial institution was prepared to lend them $60,000.00 only, instead of the whole purchase price. This, the learned trial judge found to be "unlikely to be true" and was, rightly, in my view, rejected by him. (The unlikelihood of a financial institution even contemplating any such facility with a stranger to the sale transaction could hardly have escaped his consideration.) He said when Eric was told about the need for the deposit there was no reliable evidence that Grace and her husband were in Eric and Jenice's contemplation and he concluded that the deposit of $62,122.00 was paid by Eric and not Grace: "Thus I do not accept Grace's evidence that she borrowed any money from Mr Cox."

(iii) Grace's evidence that Jenice's name was only added to the title for mere convenience. In assessing this evidence the learned trial judge found that it was unlikely to be true and was an attempt to suggest that Jenice, at the time of the acquisition of the house, had no beneficial interest in the property. The learned trial judge expressed the opinion that the title being conveyed to both as tenants in common, strongly suggests that each had an undivided share in the property. The extent of Grace's evidence in this regard is worthy of note. She maintained that Eric and Jenice could not take up the offer to acquire the house because they lacked the funds to do so and would have lost the house had she and her husband not stepped in and purchased it. In her second affidavit, at paragraph 36 she said:

> "…there was no offer of sale of the property to me by the 1st and 2nd Defendants because they had not acquired the property. The 1st Defendant was merely the successful applicant… The 1st and 2nd Defendants had no deposit and neither was the mortgage paid by them in any respect. Their names are on the title and remained on the application out of mere convenience and trust that they will transfer the property as planned to the 3rd Defendant and I."

(iv) Grace's assertion that Eric and Jenice were not in a position to service the mortgage. The learned judge found that this was

> unlikely to be so since by all accounts they qualified for the mortgage, indicating that the mortgagee was satisfied that they could carry the mortgage.

[31] The aforementioned are matters of substance and must be viewed with other evidence which clearly affected the strength of Grace's claim. Initially, her evidence was that the agreement was in writing though she later admitted that there was no written record of it, so that when she spoke of her husband removing a briefcase from the house with documents for their business and for the house, that would not have included anything to do with the agreement. However, the learned trial judge was not impressed with Jeffrey's assertion that though he took the briefcase it did not contain anything of assistance to his wife in her claim and instead, he "accepted Grace's assertion that the documents do relate to the business and the home". Further, the learned judge said, "I also find that Jeffrey took the documents. If my finding is correct this goes a far way in explaining the relative lack of documentation put forward by her". However, she had given no evidence of any specific documents which she was unable to produce because the briefcase was taken. She made no mention, for instance, of having received a receipt for the payment of the escalation costs or anything else relating to the acquisition of the property and her claim to a beneficial interest.

[32] The essence of the agreement and certainly the express finding of the learned trial judge was that the transaction had to be completed by Eric and

Jenice as there was no guarantee that the property would be transferred to Grace and her husband. They would pay the mortgage until completion then the property would be transferred to them. It was Grace's evidence, however, that she was seeking to have this transfer effected before the mortgage was discharged. In her oral evidence she said that she was uncomfortable that there was no document signed or even a piece of paper about the agreement and she would speak to her husband expecting him to "speak to his family or have a meeting…" But it went further than not having any documentary proof of the agreement as, at paragraph 54 of her second affidavit, Grace averred that she had nagged her husband, not in regard to the extensions being done to the house but to get the property signed over to her husband and herself, "to protect our interest before we embarked on the significant expenditure that we in fact embarked on". On occasions, she said, her husband would assure her that his father would duly sign over the property to them as his father could be trusted. (This was clearly to ignore the interest of Jenice whose name she maintained was added for mere convenience.) Sometimes she said she would speak to third parties about the matter and her husband would assure her that he would deal with it and have the property signed over to them. Surely, this was not in keeping with the agreement.

[33] Jeffrey's denial that she pressured him to have the property transferred into their joint names did not really cast doubt on her assertions as he admitted in cross examination that she did say that if anything should happen to him she

would be in problems, continuing to explain that "[b]ecause of rift between she and my father in case anything should happen to me if I get my name on the title which she know I could not do because we are only here for a certain time". This shows that she was seeking to have him take action in that regard.

[34] In addition, although the learned trial judge seemed to have accepted Grace's evidence that the agreement included her undertaking to put herself in a position to be able to transfer NHT benefits to Jenice when she was ready to acquire her home, she admitted in cross examination that she was making no contribution to the NHT and would therefore have had no benefits to transfer. She said she and her husband had never made any application to the NHT for any benefit and agreed that neither had the required points to make an application.

[35] At paragraph 20 of her second affidavit, she averred that she and her husband actually got applications on two separate occasions for New Era Homes and that these applications were brought to the attention of Jenice "so that we could honour our bargain to return the favour for her to own her own home". It is difficult to reconcile this, however, with her oral evidence that they were not making any NHT contributions at any time. It is to be noted that her husband's evidence was to the contrary as, according to him they were contributors to the NHT from 1992 to 1995. The burden of establishing her NHT status was hers, on a balance of probabilities, however and her evidence did not even raise a

probability that she was ever in a position to earn any benefits let alone transfer benefits to her sister-in-law. There is no indication that the learned trial judge weighed these considerations into his assessment of her evidence.

[36] The argument advanced by Miss Davis in relation to ground (iii) seems to me to be sound. The learned trial judge's order granting a 50% interest in the disputed property is tantamount to adding Jeffrey as a claimant without his consent and this was in the face of his clear indication that he has no claim to the property. Further, I do not accept that ***Vandervell*** is applicable to the facts of this case. ***Vandervell*** was concerned with tax liability on the ownership of shares in the appellant's company and the application of certain statutory provisions. There was no dispute that the shares had been owned by the appellant. He sought to divest himself of both the legal and beneficial interest in them through a trust company but, by a majority, the House of Lords held that the effort had failed so that he retained ownership and was liable to pay the relevant tax on dividends they attracted. In his dissenting opinion, Lord Upjohn agreed with Plowman J who, in the court below, had said:

> "As I see it, a man does not cease to own property simply by saying 'I don't want it'."

Reliance was placed on these words by the learned trial judge, but, in my view, that reliance was misplaced. They must be seen in the context of the particular circumstances of that case which related to an owner seeking to give away

property that he owned and as Lord Upjohn continued, "If he tries to give it away the question must always be has he succeeded in doing so or not."

[37] In my humble opinion, ***Vandervell*** is of no assistance in the instant case, on the issue of whether Jeffrey had any interest in the property. He denied having any such interest and it was the learned trial judge, who, rejecting his assertion that he had no claim on the property, declared him to have an interest. He was not saying "It is mine but I do not want it" or "I no longer own it". He was saying it was never his, unlike the appellant in ***Vandervell*** who owned the shares and was seeking to dispose of them.

[38] Faced with the level of conflict evident in the instant case, the learned trial judge had a duty, in assessing the evidence, to weigh the probabilities with care. Having found that Grace's evidence was untruthful in several material respects, the eventual outcome ought not to have been based on whether the opposing witnesses were found to lack credibility in certain areas of their evidence but on whether her account was credible, on an assessment of the totality of the evidence.

[39] There is merit, it seems to me, in Miss Davis' submission that the learned trial judge would have needed to hear evidence from Jenice before arriving at findings adverse to her interest. Cross examination of Eric and Jeffrey could not suffice to address Jenice's peculiar position where it was alleged that there was

consideration for her participation in the agreement which she denied ever existed. Grace's evidence of acting upon the agreement by bringing to her sister-in-law's attention possible homes she could acquire arose in cross-examination and could not have been addressed by Jenice's affidavit evidence, so that her denial of the agreement remained intact at the end of the day. Eric was never cross examined about the agreement at all and Jeffrey was not questioned on the point.

[40] I note also that the learned trial judge had regarded the credibility of Jeffrey as tarnished because he had given a reason in his affidavit evidence for leaving Eltham View but made no reference to it in his evidence in cross-examination. However, the record of the proceedings shows that he did not resile from his position that he had been given notice to quit Eltham View, as in answer to a question from the judge himself Jeffrey maintained that he and Grace did receive notice to vacate the premises after his wife cursed the landlord. It would seem therefore that his oral evidence merely expanded on what he had said about the notice in his affidavit.

[41] The extensive additions to the house also weighed heavily in the judge's assessment of Grace's evidence as he was of the view that work of that kind would not be undertaken unless acting on the agreement that the house being extended would be theirs. At paragraph 41 of his judgment he said:

> "I find it difficult to accept that a tenant albeit the son of the landlord, as a reasonable and rational person would make these extensive additions to a house with no expectation of any reimbursement or any expectation of a proprietary interest. Jeffrey has eschewed any semblance of reasonableness. If Jeffrey is accepted he was 'gifting' his father and sister with the construction with funds from his primary and quite likely his sole source of income, based on the evidence without any hope of an interest or hope of a benefit of some kind. His conduct, not his words, is more consistent with his wife's version of events than that of a husband who wished to appease his wife."

He found that Jeffrey's retention of bills for the additions "in case of anything" was inconsistent with his assertion that he knew that he had no interest in the property and more consistent with a person expending money on the property on the understanding that he would have an interest and "in case of anything" he would have the bills to prove his claim. The evidence of Grace's conduct at this point, however, must be brought to bear on this finding in that her nagging to have her name put on the title was inconsistent with the agreement which she said had been made. There was no evidence that she ever asked that Eric and Jenice be reminded of the agreement, yet she was speaking even to third parties and going to a lawyer to take steps for the transfer, before the mortgage had been discharged.

[42] When one clears away all the inaccuracies and untruths as well as the areas where Grace's conduct was inconsistent with her account of an agreement, was there a preponderance of evidence remaining upon which the learned trial judge could have reasonably accepted that there was an agreement? As I see it,

all that remained was the failure of Eric and Jenice to object to the additions about which the learned judge found that they were aware and the payment of the monthly mortgage installment until its discharge which, he said, was consistent with there being an agreement. The learned trial judge found that Eric and Jenice were not truthful about their knowledge of the extension and clearly rejected Eric's evidence that he had voiced his objections to his son. The judge concluded that this lack of action by them coupled with the payment of the mortgage was consistent with there being the agreement as Grace contended. Could it be said that he was plainly wrong in coming to those conclusions?

[43] The additions to the house were clearly of benefit to the registered owners. The judge himself alluded to that when he posed the question as to whether Jeffrey would be "gifting" his father and sister by expending large sums of money on their house without any expectation to benefit. It seems to me that the absence of any objection on their part did not move the probabilities in favour of Grace's account of an agreement, as it is just as probable that the registered owners saw no reason to object to what would clearly enhance the value of their property. Additionally, if Grace and Jeffrey were occupying a house that did not belong to them, they surely would be expected to pay for that privilege whether by way of a lease agreement or not. The fact that the sum they paid was the mortgage installments did not lead inexorably to the conclusion that it meant that the house would be theirs when the payments were completed. Much was said about how Jenice was to be compensated for giving

up her benefits but what about Eric? There was no evidence that he was "gifting" his son with the deposit and the initial sums paid by him before Grace and her husband took up possession of the house. Additionally, he had produced documentary proof that he was the one who paid the property taxes.

[44] Finally, in relation to the lease agreement, it seems to me that the learned trial judge was entitled to look askance at the production of this document at the point that it was in fact introduced. It was clearly intended to bolster the counterclaim, but in my view, that provided no support for Grace's claim. In all the circumstances, I am of the view that the learned trial judge's conclusions were unreasonable and against the weight of the evidence.

Conclusion

[45] I have come to the conclusion that the finding of the learned trial judge that there was an agreement as contended for by Grace and consequently a constructive trust in favour of her husband and herself was plainly wrong and that grounds (i), (ii) and (vii) must therefore succeed.

[46] It is also my opinion that the learned trial judge lacked the jurisdiction to make the orders that he made with respect to Jeffrey including the order giving him time to acquire Grace's interest (and vice versa). If he was correct in finding that Grace was beneficially entitled to a 50% interest, then the remaining 50% would have to revert to the registered proprietors (see the judgment of Lord

Reid in **Vandervell** at page 307(G) to 308(A)). For my part, ground (iii) also succeeds.

[47] In relation to grounds (iv) and (v), I am unable to agree with Miss Davis that a declaration that the lease produced by Eric, Jenice and Jeffrey was not a genuine document in existence at the time of the acquisition of the property, was necessarily an imputation of fraud on their part. Even if there was no lease agreement, that did not mean that there was therefore an agreement for the transfer of ownership of the property to Grace and her husband. Grace had the burden of proving that there was an agreement as contended for by her on a preponderance of the evidence and, in my view, the learned trial judge was plainly wrong when he concluded that the probabilities weighed in her favour, in all the circumstances of the case.

[48] It seems to me that the party seeking to establish an entitlement to a beneficial interest ought to present to the court more than bare assertions, so that, having been found to be untruthful with regard to the payment of the deposit and the elaborate arrangement with Mr Cox to secure funding for that payment, Grace ought to have done more, for instance, than to simply state that she paid escalation costs. She purported to give a figure for the deposit though it was inaccurate but did not provide one with respect to the escalation costs. I find myself in agreement with Miss Davis' submission that there was not a

sufficiency of evidence as could support this finding so that, for my part, ground (vi) succeeds.

[49] Additionally, the learned trial judge erred in my view when he concluded that because she agreed with her brother about the reason for the move from Eltham View and with her father on other aspects of their joint affidavit, cross examination of Jenice would not materially affect his findings. He would have needed to hear from her especially in circumstances where Grace's evidence was fraught with contradictions. If the other side declined to cross examine Jenice, thereby not making available to the trial judge material upon which he could properly base his findings in the face of such conflicting evidence, then the learned trial judge ought not to have rejected her evidence. Ground (viii) should therefore also succeed.

[50] In the final analysis, I would allow this appeal and set aside the orders of the learned trial judge with costs to be taxed if not sooner agreed.

HARRIS JA

ORDER

Appeal allowed. Orders of the learned trial judge set aside. Costs to the appellant to be taxed if not agreed.