

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV2012/0244

In the Matter of an Application for a Declaration of Interest in Property

REGISTRATION SECTION

BLOCK

PARCEL

CENTRAL

14-2088A

366

BETWEEN:

ARNOLD GORDON

Claimant

And

JESLINA JOSIAH

Defendant

Appearances:

Sherrie-Ann Bradshaw for the Claimant

Mr. Kendrickson Kentish and Ms. Amaya Athill for the Defendant

2014: December 19

JUDGMENT

- [1] **HENRY, J.:** The court in this matter is being asked to determine the financial consequences stemming from the break-up of an intimate relationship between the parties which produced two children. The claimant, Arnold Gordon asserts that he constructed the dwelling house where the defendant Jeslina Josiah and their two children have lived for the past 15 years by his sole effort. Jeslina asserts that she contributed both financially and other wise. Arnold Gordon denies any input by her. The two children are now grown. Ms. Josiah has continued to reside in the house. Mr. Gordon has brought the action seeking the following relief:

- (a) A declaration that the property, Registration Section: Central; Block No.: 14-2088A; Parcel: 366 situate at Sea View Farm, St. John's, Antigua is the property of the Claimant absolutely.
- (b) An order that the Defendant vacate the said property forthwith.
- (c) An injunction restraining the Defendant from remaining or re-entering into the said property and/or otherwise interfering with the Claimant in his possession thereof.
- (d) Damages for trespass.
- (e) A declaration that the Claimant has the right to absolute possession and use of the furniture and household effects.
- (f) An order that the Defendant deliver to the Claimant 7 windows bought from Lingies, Lights and Windows, a Dell computer and a computer chair and consequential damages.
- (g) Alternatively damages for conversion
- (h) Interest
- (i) Fees and costs
- (j) Any other such relief as the Court deems just

The Pleadings

- [2] Mr. Gordon's claim, filed on March 30th, 2012, alleges that he is the registered proprietor of the land in Sea View Farm. He and Ms Josiah had an intimate relationship which resulted in two children; Alex Gordon, born in 1989, aged 25 years and Alison Gordon, born in 1993, aged 21 years. The relationship ended in 2005.
- [3] He avers that in 1997 he built a concrete house on the land in Sea View Farm. He paid for the construction from money earned from his work as a truck driver in St. Thomas, his savings and money collected on an insurance claim. Without his knowledge, Mr. Ivan Floyd, the caretaker, allowed Ms. Josiah to move into the house. For the sake of the children, he allowed Ms. Josiah to remain in the house until the children reached the age of majority and stated so expressly to her.
- [4] At all material times he resided in St. Thomas and traveled to Antigua while the house was being constructed. He bought furnishings for the house, including a refrigerator, washer, dining set, a Dell computer and computer chair. In 2009 he purchased windows from Lingies, Lights and Windows for EC\$3,159.75 and stored them in the house.
- [5] In 2011, he discovered that 7 of the windows, the computer and the computer chair had been removed from the house. He purchased windows to replace the missing windows at a cost of EC\$2,310.75. The value of the computer is EC\$3,531.97 and the value of the chair is EC\$475.46.
- [6] On the 30th of January 2012 Ms. Josiah was issued with a notice to quit on the instruction of Mr. Gordon. The notice required Ms. Josiah to deliver up possession by the 29th of February, 2012. He asserts that on receipt of the notice Ms. Josiah threatened to burn down the house. He made a report at the All Saints Police station.
- [7] To date Ms. Josiah remains on the property and refuses to vacate and continues to trespass.

- [8] Mr. Gordon states that there was never a common intention that Ms. Josiah would have a legal and/or beneficial interest in the said property.
- [9] In her defense filed on April 19th, 2012, Ms. Josiah admits that Mr. Gordon is the registered proprietor of the land and that she and Mr. Gordon had an intimate relationship. According to her pleadings however, that relationship ended in 2009 and not 2005.
- [10] She avers that the both contributed to the construction of the house; she contributed \$6000.00 of her savings and regularly gave the claimant varying amounts from her salary. It was agreed that their family should be housed in more wholesome accommodation. To this end, she moved out of her rented accommodation and into the dwelling house in or around 1998.
- [11] Ms Josiah denies that Mr. Floyd allowed her to enter the house without Mr. Gordon's permission. She and the children entered the house, she states, with Mr. Gordon's full knowledge and permission. She denies that she was told that she was being allowed to live in the house until the children reached the age of majority.
- [12] Ms. Josiah denies that Mr. Gordon bought all the furnishings for the house. She avers that she was employed and contributed to buying some of the furnishings; both of them paid for the chair set, she bought the mattresses for the bed and she paid for two of the three dressing tables. The computer was bought by Mr. Gordon for the use and benefit of the children. The computer was over 11 years old and no longer working. The chair was broken.
- [13] Ms. Josiah avers that she knows nothing about the windows alleged to have been left in the house.
- [14] Ms. Josiah admits to receiving the notice to quit but ignored it as she felt entitled to an interest in the house. She has maintained the property. Except for the monthly contribution of \$700.00 for maintenance of the children, she has maintained the property on her own. She vehemently denies that she threatened to burn down the house.
- [15] In his reply, Mr. Gordon reiterates that the defendant never made any contribution to the building of the house. He admits however, that she gave him \$6000.00 to assist with the payment of stamp duty to effect an instrument of transfer. The transfer was never done and Ms Josiah was given back the money after a demand was made in January 2009.
- [16] Since the filing of the claim form, Mr. Gordon has changed the locks on the house more than once and Ms Josiah has had a restraining order filed against him.

The Evidence

- [17] The claimant was the sole witness called in support of his case. He gave evidence consistent with his pleadings.
- [18] In cross-examination he admitted that he met Ms Josiah in 1978 and began a relationship with her. At the time she was living at Nut Grove. He describes the house in which she lived at the time as a two bedroom house with outside kitchen and outside toilet. Both children were born while she still

resided there. At that time Mr. Gordon's primary residence was in the Virgin Islands where he lived with his wife. It was put to him that he told Ms Josiah that he was not happy with their living conditions and wished to build a home so that Ms. Josiah and the children could be comfortable. This he denied. In fact his evidence is that he was quite happy with their living arrangements.

- [19] Mr. Gordon's evidence in regard to the construction of the house is basically that he constructed a concrete house from his earnings as a truck driver as well as insurance moneys received by him, in addition to his personal savings. A copy of the settlement agreement with the insurance company shows that he received US\$22,000.00 in settlement of his claim. He did not disclose how much he earned as a truck driver, however copies of receipts shows that he forwarded to Mr. Ivan Floyd, the person who supervised the construction in his absence, a total of US\$34,480.00 (EC\$91,617.00) during the construction of the house.
- [20] It was put to him that at the time the house was being constructed, Ms Josiah worked at the Royal Antiguan Hotel in the housekeeping department. He denied it. It was also put to him that during the construction of the house, each time Ms. Josiah got paid she gave him money – up to \$200.00 per week from her salary of \$400.00 per week. This he also denied. Lastly it was put to him that Ms Josiah gave him a lump sum of \$6000.00 to help with the construction of the house. This he also denied.
- [21] In his evidence, Mr. Gordon re-asserted that it is Mr. Floyd, who without his consent put Ms Josiah and the children in the house. The house, he says, was to have been rented on completion, to accumulate funds to send his children to college. Having learnt that Ms Josiah and his two children had moved into the house, he admits that they remained in occupation of the premises with his consent. His evidence is that he visited twice per year during the period 1997 to 2005 and on those occasions, he stayed at the house with them. His evidence is that he did not regard Ms Josiah as his family, only the two children. His evidence is that Ms Josiah is a trespasser, having been served with a Notice to Quit and having failed to leave the property. It was put to him that sometime in 2009, he had instructed an attorney to prepare documents giving a life interest in the property to Ms Josiah, and that it was when she broke off her relationship with him that he cancelled the instructions. This he strenuously denied.
- [22] Ms. Josiah gave evidence on her own behalf. Her evidence is that she has an interest in the house by virtue of her contribution to the construction. Her evidence is that in 1996 - 1997 she gave a lump sum of \$6000.00. From her earnings of \$1600.00 per/month she gave varying amounts for the purchase of materials and payment for labour.
- [23] With regard to her entrance into the house she gave further evidence that Mr. Gordon was in Antigua when the house was completed and that he gave her the key to move into the house.
- [24] Ivan Floyd gave evidence on behalf of Ms. Josiah. Primarily his evidence is that he supervised the construction of the house when Mr. Gordon was out of Antigua; also that Mr. Gordon had told him that he was building a house for Ms. Josiah and the children to live. However, in cross-examination

he also admitted that Mr. Gordon had also stated that he was building the house for rental purposes. He denied that it was he who gave the keys to the defendant. His evidence is that he never saw the keys to the house.

The Law

- [25] The law to be applied in the resolution of property disputes of this nature has been developed from a line of cases such as **Pettitt v Pettitt**¹, **Gissing v Gissing**² in the 1970's to more recently by the House of Lords in **Loyd's Bank plc v Rosset**³. Both parties have referred the court to the oft cited passage from Rosset:

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement to share in this sense can only I think be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding of this effect is made it will only be necessary for the partner to ascertain a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she acted to his or her detriment or significantly altered his position in reliance on the agreement in order to give rise to a constructive trust of proprietary estoppel.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage installment, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

- [26] However, as noted by Lord Walker in **Stack v Dowden**⁴, the law has moved on. "The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

Establishing the Beneficial Interest

¹ [1970] AC 777

² [1971] AC 886

³ [1991] 1 AC 107

⁴ [2007] UKHL 17

- [27] Ms. Josiah bases her entitlement to a beneficial interest in the property to direct financial contributions of a lump sum of \$6000.00 plus additional contributions from her salary over a period of time which she says was used to purchase material and labour. This additional sum was not quantified. In addition, on her days off she contributed her labour by working at the house scraping paint from the windows and other chores. There was also evidence that he had told her that he was building the premises so that she and the children could be better housed and that she left her rented accommodation and moved into the house with Mr. Gordon's knowledge and consent and with the expectation that she had an interest.
- [28] Counsel for Mr. Gordon sought to show by cross-examination, that Ms Josiah did not have the means to accumulate \$6000.00. Her salary she admitted was only \$400.00 per week. However, she stated that she threw a "box" and was able to save. It is not unusual that she has no bank records to prove the transaction which took place in 1987. Mr. Gordon admitted receiving \$6000.00 from Ms Josiah, but asserts that this took place in 2009 and that the sum was to be used for stamp duty. This in the court's view proves she is capable of accumulating sums of money and is not adverse to giving assistance. She was forthright in her evidence and the court accepts her evidence that she did give the lump sum of \$6000.00 at the start of the construction in addition to additional sums from her salary. The court also accepts her evidence that on her days off she contributed her own labour.
- [29] The court finds that there were no express discussions either before Ms. Josiah moved in or during the time she resided in the house, giving rise to an agreement as to whether the property is to be shared beneficially. However, based on the conduct of the parties, including the financial and other contributions by Ms. Josiah, the inference can be made of a common intention that the property be shared beneficially.

Quantifying the Beneficial Interest

- [30] The second question to be answered in this case is "what is the extent of the parties' respective beneficial interests in the property?" The learning as to what evidence ought to be considered by the court is to be gleaned from the decision of Lord Justice Chadwick in **Oxley v Hiscock**⁵. He stated:

"Again, in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this Court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, "the whole course of dealing between them in relation to the property" includes the arrangements which they make from time to time in order to meet the

⁵ Oxley v Hiscock [2004] EWCA 546 paragraph 69

outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.”

- [31] The court therefore must supply the common intention by reference to that which all the material circumstances have shown to be fair.
- [32] In addition to the initial contribution at the time of acquisition, the court in **Oxley**, in looking at the whole course of dealings between the parties, considered the arrangements made for such items such as mortgage contributions, taxes, utilities, repairs, insurance and housekeeping in coming to a decision on the nature of each party's contribution.
- [33] In the circumstances of this case however, these factors do not throw much light on this issue.
- [34] Mortgage: There is no evidence that a mortgage was obtained in regard to this property. The evidence points to the house being constructed over the space of about 2 years as cash became available.
- [35] Taxes: No evidence was adduced as to the payment of taxes in relation to this property.
- [36] Utilities: Ms Josiah's evidence is that the utilities were placed in her name from the outset and that she has paid all the utilities in respect of the house during the approximate 15 years that she has resided there. The submission on her behalf is that this is evidence that should be taken into account in determining not only whether she has a beneficial interest in the house, but also in determining the nature of that interest.
- [37] A substantial part of the rationale for taking items such as utilities, repairs etc into account is that the court undertakes a survey of the whole course of dealings between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages in order to determine what proportions the parties must be assumed to have intended for their beneficial interest. The court treats what has taken place while the parties have been living together in the property as evidence of what they intended at the time of acquisition.⁶
- [38] Here the couple had more of a visiting relationship. Mr. Gordon resided in the Virgin Island with his wife. He visited Antigua about once or twice per year. When he visited Antigua, he stayed with Ms Josiah and his two daughters in the house. Over the past 15 years he would have visited at best 30 times. But it cannot be said that they “lived together” in the property for any appreciable length of time. Ms Josiah met the cost of the utilities consumed on the premises by herself and the two children. Mr. Gordon remitted to Ms Josiah the monthly sum of EC\$700.00 for maintenance for the two children, so that the payment of utilities by Ms. Josiah does not give rise to the same inferences as in the **Oxley** case

⁶ *Oxley v Hiscock*, supra, quoting Lord Justice Waite in *Midland Bank v Cooke* [1995] 2FLR 915, at 926F-H

- [39] Repairs: Mr. Gordon did no repairs to the premises during the time Ms Josiah lived in the house. Ms Josiah's evidence is that she met the costs of maintaining the premises alone. Unfortunately, she adduced no evidence of the nature or quantum of the maintenance done to the premises. The court accepts however, that over a period of 15 years, even a modest amount of maintenance would have been done.
- [40] Insurance: there is no evidence before the court as to what arrangement, if any, was made for the payment of insurance on the premises.
- [41] Housekeeping: Again this would be of minor impact on the question in light of the nature of the relationship between the parties.
- [42] Having considered the whole course of dealings of the parties in regard to the property, the court has found no pooling of resources over the years in dealing with the property. The court is of the view that Ms Josiah's interest in the house can be quantified based on the following:
1. Her lump sum payment of \$6000.00.
 2. Payments from her salary during the construction phase.
 3. Upkeep of the house during the 15 years.
- [43] Although evidence was not adduced as to the exact cost of the construction of the house, the claimant submitted receipts for sums remitted to Mr. Floyd during the construction of the house. The total amounts to EC\$91,617.00. In addition, when he visited Antigua he brought with him additional sums. Even though the court does not have exact figures, it is apparent that Mr. Gordon contributed the lion's share. I would therefore hold that a fair division of the house (excluding land) would be 75% to Mr. Gordon and 25% to Ms Josiah.

The Furnishings

- [44] Mr. Gordon also seeks a declaration that he has the right to the absolute possession and use of the furniture and household effects, namely, the refrigerator, washer, dining room set, 3 piece living room set, center table and dressing tables.
- [45] In his statement of claim, he alleges that in addition to the above items he also purchased a Dell computer and a computer chair and furnished the house with same. According to the pleadings in or around 2011 on a trip to Antigua, he discovered that Ms Josiah had wrongfully removed the computer and the computer chair and has wrongfully deprived him of them. Despite demand, Ms Josiah continues to detain same. The value of the Dell computer he says is EC\$3,531.97 and the chair EC\$475.46.
- [46] Ms Josiah denied the allegations. She pleads that both parties contributed money to buy the chair set; that she purchased the glass table; the defendant bought the mattresses for the beds but the claimant bought the frames; that she purchased 2 out of the 3 dressing tables. In regard to the computer, she avers that claimant, who is not computer literate, purchased the computer primarily for the use and benefit of the then infant children. The computer, she asserts is over 11 years old

and no longer in working condition. The computer chair had been broken for some time. After the children left home, she disposed of the computer and chair.

- [47] Ms Josiah has lived in the house for some 15 years. Some of the furniture she says she brought with her from her rented premises. The court accepts that evidence. The court also accepts that she purchased some of the new furnishings for the house. She admits that Mr. Gordon purchased the refrigerator and the washer. At best the "new" furniture is at least 15 years old. With wear and tear over the years, their value would be much diminished. In any event no evidence of their value was submitted. I accept the evidence of Ms Josiah that having repaired the computer several times, when it last fell into disrepair, it was disposed of. The value of an 11 year old computer is almost nil in any event. I would therefore award the refrigerator and washer to Mr. Gordon. The order sought by Mr. Gordon in respect of the other items is refused. The order sought in regard to the computer and chair is also refused

The Windows

- [48] Mr. Gordon also seeks an order that Ms. Josiah do deliver up to him 7 windows bought from Lingies, Lights and Windows in 2009, with the alternative of paying damages and consequential damages.
- [49] Mr. Gordon avers that on or about 2009, he purchased windows for the sum of EC\$3,159.75 and stored them in a vacant bedroom of the house. A copy of the receipt was tendered. In 2011 on a trip to Antigua he discovered that Ms Josiah had wrongfully removed 7 of the windows stored. Thereafter he purchased 7 new windows. Alternatively, that she wrongfully detained and still detains 7 of the windows. The value of the 7 windows he states to be EC\$2,310.75
- [50] Ms Josiah denies the allegations and states that she knows nothing about the windows. Her evidence is that one day she came home and saw the windows in the second bedroom. Mr. Gordon was renovating one of his houses on Union Road. She admits that he did go back to the Virgin Islands and left some windows there. Some time later he told her he was missing some windows. She told him she knows nothing about the windows, and asked him if he was sure he got the right number of windows from the store.
- [51] Mr. Gordon bases his claim in detinue and conversion. There is no direct evidence of conversion on the part of Ms Josiah. Mr. Gordon has presented no evidence of the number of windows purchased, or of the number of windows stored at the house. He has alleged a certain number of windows were left at the house. But without some documentary evidence to show that at least the number of windows purchased, he has failed to maintain his burden of proof that any of the windows have gone missing. The orders sought by Mr. Gordon in this regard are refused.

Trespass

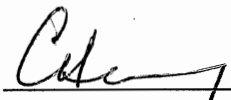
[52] Mr. Gordon also seeks damages for trespass. Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies⁷. Under the heading who may sue for trespass, the learned authors state:

"Trespass is an injury to a possessory right and therefore the proper claimant in a claim for trespass to the land is the person who was or is deemed to have been in possession at the time of the trespass. The owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass, since a mere right of property without possession is not sufficient to support the claim."

[53] In light of the court's findings that Ms Josiah has a beneficial interest in the house, under the circumstances, Mr. Gordon's claim for trespass must fail. They are both co-owners of the house. The service upon Ms Josiah of the Notice to Quit in these circumstances was not appropriate or effective to terminate her interest in the house.

[54] Accordingly, the court makes the following orders and declarations:

1. A declaration that the parties own the property described at the Land Registry as Registration Section: Central; Block No: 14-2088A; Parcel: 366 situate at Sea View Farm 25% of the value of the house to the defendant Jeslina Josiah and 75% of the house, together with the land to the claimant Arnold Gordon.
2. That a valuation be carried out of the property by a valuator to be chosen by the parties. The cost of the said valuation to be borne 75% by the claimant and 25% by the defendant.
3. That the claimant, Arnold Gordon, do pay to the defendant, Jeslina Josiah, 25% of the value of the house as determined by the valuator, within 3 months of the completion of the valuation.
4. Within 60 days of receipt of the payment ordered in paragraph 3 above, that the defendant, Jeslina Josiah do vacate the said premises.
5. That the defendant, Jeslina Josiah, is entitled to take with her the furnishings of the house except for the refrigerator and washing machine.
6. The orders sought for injunctive relief are denied.
7. Each party to bear their own cost.
8. Liberty to apply in order to carry out the items 2, 3 and 4 above.


CLARE HENRY
High Court Judge
Antigua & Barbuda

⁷ Halsbury's Laws of England 4th Edition, Vol 45, paragraph 1384