

IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO: 639 of 2013

BETWEEN

MICHELE YOUNG

CLAIMANT

AND

JULIUS ZABANEH

DEFENDANT

Keywords: Agreement to transfer Property; Section 40 Registered Land Act.
Trusts; Constructive Trust.

Before the Honourable Mr. Justice Courtney A Abel

Hearing Dates: 22nd July 2014;
23rd July 2014;
29th July 2014;
23rd September 2014;
10th October 2014;
14th October 2014.

Appearances:

Ms. Liesje Chung for the Claimant

Mr. Hubert Elrington SC for the Defendant

JUDGMENT

Delivered on the 14th day of October 2014

Introduction

- [1] The Claimant and the Defendant not only had the relationship of employee and employer but were friends.
- [2] The Claimant in January 2002 borrowed from a bank \$135,000.00 to fund, in part, the purchase of two parcels of land on which stood a single-story three bedroom dwelling house.
- [3] The Claimant worked hard to improve the house to an eight bedroom two story dwelling house for herself and her three children to live in and for their benefit.
- [4] After over 5 years of paying the mortgage to the bank the Claimant ran into financial difficulties and the properties were transferred to the Defendant who took over responsibility for the mortgage while the Claimant and her children continued to live in the dwelling house.
- [5] The Claimant claims that the Defendant decided to help her out of her difficult financial situation and that, as security, it was agreed that the properties would be transferred to him until the Claimant repaid the Defendant.
- [6] The Defendant denies that there was any such arrangement and claims that it was a sale and sought to evict the Claimant and her children from the house and from the parcels of land.
- [7] The present claim concerns the nature of the arrangement which was entered into between the Claimant and Defendant in relation to the properties and involves a determination by the court of the question of what, if any agreement, existed between the parties concerning the transfer of the lands and dwelling house. Was there a genuine sale or was it otherwise; and also the question whether the Defendant is holding the properties on trust for the Claimant and if so on what terms.

Detailed Background

- [8] The Claimant is a young woman with three children. The two younger children are now young persons and an adult. They are at present aged 16 and 20 and still studying. The eldest child is 21 and is currently employed. All of them still live with the Claimant.
- [9] The Defendant is a businessman and is one of the shareholders and Directors of Pharmacy Express Limited (“the Company”) which leases 4 stores in the /Fort Street Tourism Village and, as his business, supplies all four stores with pharmaceutical goods.
- [10] The Claimant was employed by the Defendant as Manager of the 4 stores during the period 2005 to 2011 and they “became friends”.
- [11] On the 24th January, 2002 the Claimant was registered as proprietor of Parcels 443 and 445, Block 16 in the Caribbean Shores/Belize Registration Section (“the properties”) with title absolute, subject to a charge in favour of Atlantic Bank Limited (“the Bank”).
- [12] The Court accepts that the charge with the Bank was initially for a loan in the sum of one hundred thirty-five thousand dollars (\$135,000.00) which the Claimant obtained from the Bank to partially fund the payment of the purchase price of the properties.
- [13] It is common ground that the Claimant, since she became proprietor of the properties, has been continuously in occupation of them and has improved the structure on them from being a three bedroom single-story dwelling to being an eight bedroom two-story dwelling in which she has remained, with her children, in actual occupation as their home.
- [14] The Court accepts that the Claimant for several years paid approximately \$1,600.00 per month toward the loan with the Bank until sometime in the year 2008 when she started falling upon hard times financially and eventually into arrears and thereby became exposed to the threat of foreclosure by the Bank.
- [15] To assist the Claimant in dealing with the arrears with the Bank the Defendant kindly gave the Claimant some \$20,000.00. He did this as he considered her a valued and committed employee and, no doubt, as a friend.

- [16] In 2008, in preparation for enforcing its security, the Bank had the properties appraised and the properties were then valued at approximately four hundred and fifty-five thousand dollars (\$455,000.00).
- [17] Eventually things got so bad that the Claimant took a decision to try to sell the properties herself so that she would be able to pay-off the Bank and with the surplus would try to buy another home.
- [18] The Claimant received interest from a prospective purchaser, namely one Mrs. Helen Allen, who was at that time purchasing other properties in Belize, and eventually was willing to purchase the properties from the Claimant for her asking price of four hundred and forty thousand (\$440,000.00).
- [19] It was then that the Defendant came into the picture in a manner that gives rise to the main controversy in the present claim resulting in the Claimant rejecting Mrs. Allen's offer.
- [20] It is at this point that things, and the evidence, becomes somewhat contentious and unclear.
- [21] The Claimant testified that it was orally agreed between the Defendant and herself in or about December 2010 that the Defendant would take over the loan payments to the Bank and that he would continue to do so until the Claimant was in a better financial position to resume responsibility for paying for the properties at which point she would repay the Defendant.
- [22] The Claimant accepts that she indeed signed the documents transferring the properties to the Defendant. But her evidence is confused as to what her intention was when she did so. This is the main weakness with the Claimant's case. The Claimant testified under cross-examination that when she signed the transfer documents she did not know what she was signing (she assumed that she was signing the transfer of the mortgage) but this was somewhat inconsistent with her pleaded case that it was agreed that the properties would be transferred to the Defendant as a security for the loan which he was providing.
- [23] I am nevertheless prepared to consider the case on the basis that the Claimant signed the transfer documents being careless as to what she was signing or even

knowing that she signed the transfer document as such an interpretation provides the best fit to a confused set of facts on both sides.

[24] It is the Claimant's case that she was unable to meet her loan obligations to the Bank and because of the relationship of the parties (professional and personal) and in a gesture of kindness, the Defendant offered to take over the loan for her until she was able to get her finances in order.

[25] The Claimant has claimed that there was an oral agreement (hereinafter "oral agreement") in the following terms:

(a) The Defendant would assume making the loan payments to the Bank and would continue to do so until the Claimant was in a better financial position.

(b) The Claimant would continue in possession and actual occupation of the properties.

(c) As security to the Defendant for the repayment to the Defendant of the monies he would be paying on account of the loan, the Claimant would transfer the properties to the Defendant. This would enable the Defendant to make payments to the Bank in his own name and enable the Bank to charge the properties as security for the remaining balance of the loan as a debt now due from the Defendant.

(d) That when the Claimant's financial position improved she would repay the Defendant and he would retransfer the properties to the Claimant.

[26] The Claimant maintains that it was never her intention that the Defendant should keep the properties for his own use and benefit, but that she should at all times retain beneficial ownership and possession of the properties and that she at all times has had every intention to eventually repay the Defendant all sums which he paid to the Bank.

[27] The Defendant on the other denies that there existed any such agreement and/or trust and insists that the Claimant sold him the properties, and the improved dwelling, for \$65,000.00.

[28] Legal transfer of the properties from the Claimant to the Defendant took place and was duly entered on the land register; along with the existing charge which was

then transferred to the Defendant. The Defendant relies on these transfers to ground his claim to the properties.

[29] As at the 9th September 2012 it was thus entered on the land register that the properties were transferred by the Claimant to the Defendant and were charged by the Defendant to the Bank.

[30] At or about the time of the transfer the balance on the loan stood at approximately \$102,000.00, and the consideration noted on the transfer forms for each of the properties was \$65,000.00. The evidence is far from clear whether the Claimant received this sum and this court will have to make a determination on this question as it may assist in deciding the case.

[31] At the time of the transfer the court is prepared to accept that the approximate value of the properties was \$440,000.00.

[32] Clearly if there was such an oral agreement not only would it be a breach of the agreement for the Defendant to go back on the bargain; it but would be unconscionable either for him to do so and a trust would be thereby established in law to prevent him from renegeing on it.

[33] On or about 30th January 2013, however, the Defendant served a notice on the Claimant for her to quit and deliver up possession of the properties to him.

[34] The Claimant emailed the Defendant on 27th February 2013 and 5th March 2013 requesting that the Defendant state the amount owed to him. The Defendant did not respond.

[35] By summons dated 14th May 2013 the Defendant commenced proceedings against the Claimant at the Magistrates Court for the Claimant to vacate the properties.

[36] The Claimant on the 25th September 2013 again requested the Defendant to provide her with a statement of account as to the amount paid by the Defendant to the Bank and that she stated that she intended to repay the Defendant and to pay off the balance owed to the Bank; to which the Defendant had yet again not responded.

[37] The Claimant's financial position has apparently now somewhat improved as she is doing consultancy work with investors and earning about \$5,000.00 per month;

and she claims she is in a financial position to take over the loan and in due course repay the Defendant.

The Court Proceedings

- [38] On the 22nd November 2013 the Claimant filed a fixed date claim form claiming inter alia, a declaration that the properties, which are currently registered in the name of the Defendant, are held by the Defendant on trust for the benefit of the Claimant absolutely.
- [39] On the 3rd December, 2013 the Claimant filed an Affidavit of Service of the Fixed Date Claim Form and Notice of first hearing for the 10th February, 2014 along with a Statement of Claim.
- [40] The progress of the claim then took many twists and turns.
- [41] A judgment was at one stage entered against the Defendant as he did not file a Defence. But the Court decided to set the judgment aside on the application of the Defendant upon certain terms, including that the Defendant file a Defence and pay certain sums. This has been the subject of an application for leave to appeal which will be separately considered.
- [42] On the 23rd July 2014 an Amended Defence was received by the Claimant and the trial commenced. The court took the evidence of the Claimant and on the 29th July 2014 the trial continued and the Court ordered that certain portions of the Defendant's Witness Statements be struck out. The Court then took the evidence of the Defendant, Rudolph Ramirez, Wendy Dawson and the case was adjourned to the 23rd September to take the evidence of Mrs. Helen Allen who has failed to attend.

The Issues

- [43] There are a number of factual and legal issues in the present claim for this court to determine.
- [44] A number of such factual issues have been summarily determined above as this court does not consider that they are seriously in dispute or otherwise considers that they may be summarily resolved. But if any of such facts are doubted then they may be considered findings of fact by this court.

- [45] The mixed question of law and fact for this court to decide is whether there was the oral agreement between the parties in or about December 2010, as alleged by the Claimant, such that a trust can arise in the circumstances of the present case.
- [46] The main issue is whether the Defendant, in an act of friendship, offered to assist the Claimant by taking over and making the loan payments so that she would not lose the properties, until the Claimant was in a better financial position to do so, and then to repay him; or whether there was a genuine purchase and sale of the properties
- [47] The questions at the heart of the present claim is who to believe, the Claimant or the Defendant; which will in turn determine whether the Defendant holds title to the properties on trust for the benefit of the Claimant absolutely or whether there was a genuine sale.

The factual and legal contentions of the parties in relation to the central issue

- [48] The Claimant generally contends that by reason of the agreement alleged, and the facts and circumstances of the present case, the Defendant holds the properties on constructive trust for the benefit of the Claimant absolutely.
- [49] Specifically the Claimant contends:
- (a) It is not credible that the Claimant would have abandoned the sale of the properties to Mrs. Helen Allen to take up an offer which the Defendant is alleging (to purchase the properties for \$65,000.00 plus the unquantified arrears of interest and the repayment of the outstanding mortgage of \$102,000.00).
 - (b) The evidence of the payment of the consideration for the properties (for each of them or both for a total of \$65,000.000) is not supported by any evidence (apart from the transfer documents around which there is much confusion) is also therefore not credible.
- [50] The Claimant contends that the Claimant has proved her case and that her case is more credible than that of the Defendant's and this Court should believe the Claimant.
- [51] The Defendant emphatically denies the existence of the oral agreement and contends that the Claimant sold the properties to Defendant and transferred them

to him absolutely for his use and benefit for the price stated on the transfer documents (each for \$65,000.00 plus the unquantified arrears of interest and the repayment of the outstanding mortgage of \$102,000.00), and that this contention is indeed credible.

The Evidence Relating to the Facts in Dispute

Abandonment

[52] In relation to the abandonment the Claimant's testimony was clear and uncontested: that Mrs. Allen at first made an offer for the properties for \$340,000.00 but the Claimant refused the offer as she wanted to sell for \$440,000.00.

[53] But that after the Defendant offered to assist her "with my loan payments so that I would not lose nor have to sell the properties", the Claimant accepted the Defendant's offer to take over and make the loan payments to the Bank etc.

[54] That Mrs. Allen then contacted her and indicated that her offer was accepted.

[55] The Claimant testified that she spoke to her (Mrs. Allen) and indicated that she was getting assistance and she:"would be keeping the properties".

[56] The Defendant was not able to contradict this evidence of abandonment.

The Evidence of the Payment to the Claimant of the Purchase Price

[57] The Defendant testified that when the Claimant could not make the loan payment to the Bank she informed him of this fact and that she did not want the Bank to take her home and that she would prefer that he purchased it. That thereafter he consulted with the Bank to inquire about the amount she owed to the Bank; as well as, to make the necessary arrangements for him to purchase the properties from the Bank.

[58] The Defendant testified that he then purchased the properties from the Bank then somewhat inconsistently suggested not that he purchased the properties from the Bank but that the Claimant sold him her properties.

[59] It is clear, however, from the documents submitted by the Defendant that the purchase was not from the Bank but from the Claimant for the sum of \$65,000.00 for each property (including the dwelling on them).

[60] The evidence about the payment of the consideration of \$65,000.00 for each of the properties is far from clear. The Claimant gave no evidence of receiving any monies for the properties from the Defendant.

[61] The Defendant under cross-examination testified that both of the properties were for \$65,000.00 and then that he paid \$65,000.00 to the Bank by cheque. But the Claimant produced nothing to the court to substantiate that he indeed paid any such \$65,000.00.

The Law

[62] The applicable law in relation to oral agreements is well established and need not be rehashed here.

[63] Generally oral agreements are enforceable as contracts.

[64] The properties, being registered land, are governed by the Registered Land Act.

[65] As a matter of law, under the Registered Land Act, however, oral agreements are not normally capable of disposing of land, as Section 40(2) provides:

”no action may be brought upon any contract for the disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some other person lawfully authorized by him.”

[66] By law a constructive trust can arise and be attached to specific property held by a person in circumstances where it would be inequitable to allow that person to assert full beneficial ownership of the property.

[67] A constructive trust is automatically imposed in circumstances where it is held by a person where it would be inequitable to allow him/her to assert full beneficial ownership of the property. As a general principle it may be said that property subject to a constructive trust must have come into the hands of the alleged trustee as a result of unconscionable dealing or in breach of a fiduciary obligation¹.

¹ Volume 48 Halsbury’s laws of England, Fourth Edition, 2007 Reissue, Paragraph 687.

[68] The facts and decision of the case of **Bannister v Bannister**² is useful as a precedent in relation to the present case and supports the following legal propositions:

- (a) That it is a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance (or transfer) to himself for the purpose of defeating a beneficial interest which according to the true bargain, was to belong to another, is not confined to cases in which the conveyance itself was fraudulently obtained.
- (b) That the fraud which brings the principle of a constructive trust into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest; and that is the fraud to cover which the provision requiring that conveyance of land be evidenced in writing, cannot be called in aid, in cases in which no written evidence of the real bargain is available.
- (c) Also that it is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.

Findings of fact relating to the Agreement

[69] Generally, to assist in determining the disputed matters I did not find the evidence of Rudolph Ramirez and Wendy Dawson helpful. I considered that both of them, as employees of the Defendant, were not impartial witnesses and there was a serious risk that they had their own interest to serve and their own jobs to protect.

[70] Specifically, I agree with the Counsel for the Claimant that it is not credible that the Claimant would have abandoned the un-contradicted possible sale of the properties to Mrs. Helen Allen to take up an offer which the Defendant is alleging (to purchase the properties for \$65,000.00 plus the unquantified arrears of interest and the repayment of the outstanding mortgage of \$102,000.00). Frankly, I do not believe that could have been a proper alternative to that of a sale to Mrs. Allen which was presented to the Claimant for her reasonable consideration. Nor do I

² [1948] 2 All EWR 133 page 4 -4.

believe that the Claimant did accept this offer, or even a reasonable person in the position of the Claimant, would have taken it even if the offer was made by a friend.

- [71] Secondly, I do not believe that on the facts and circumstances of the present case the Claimant, faced with the value of the properties would have accepted either \$65,000.00 (as alleged by the Defendant under cross-examination), or even \$140,000.00 (as contained in the transfer documents) plus the unquantified arrears of interest and the repayment of the outstanding mortgage of \$102,000.00. This suggestion is, in my view, not credible.
- [72] Finally, I come to what I consider may be the most crucial evidence in the case namely, the evidence of the payment of the consideration for the properties (each for \$65,000.000) which was suggested by Counsel for the Defendant, as the amount which the court should accept as the consideration paid by the Defendant to the Claimant.
- [73] For the purposes of determining the case in relation to the disputed matters I considered the evidence in relation to the \$65,000.00 is important.
- [74] What happened in relation to this \$65,000.00? This is far from clear and gives the best indication, in my view, about the nature of the transaction in question.
- [75] Clearly if there was a genuine sale and purchase then the Claimant would, at the very least, have been given the \$65,000.00 for the properties (including the dwelling).
- [76] If, in my view, the Defendant had given the Claimant any monies for the properties there would have been clear evidence of this from either both parties or certainly from the Defendant (as a businessman who had taken other steps to protect himself legally).
- [77] The evidence of the payment of \$65,000.00 was contained only in the transfer documents (around the signing of which there was much confusion) and the evidence of the Defendant is otherwise contradictory (the Defendant stated in cross-examination that he in fact paid the Bank this sum by cheque) but he produced no other receipt or other evidence of payment (i.e. a cancelled cheque) in the face of clear denial of such by the Claimant.

- [78] This central aspect of the Defendant's case is troubling and in my view is a clear indication of what really happened and ultimately determinative of the case.
- [79] I simply do not believe the Defendant when he said that he gave the Claimant \$65,000.00. I do not believe that the Defendant, as an experienced businessman, would have paid this sum as a commercial transaction without getting a proper receipt or producing proof of payment. I also do not believe that the Defendant would have allowed the Claimant to stay in the home after he had terminated her employment, unless there was an understanding that she was entitled to stay there.
- [80] The above evidence of a sale and purchase indicates, in my view, that the paper transaction was a sham and that the Defendant's case is not credible.
- [81] On the other hand, on balance, having seen and heard the Claimant in the witness box I generally preferred the Claimant's case in relation to the oral agreement; and also generally considered that she has indeed discharged the burden on her of proving her case on the balance of probabilities.
- [82] I therefore find the following facts on the balance of probabilities:
- (a) After the Claimant fell into arrears with her loan payments, the Claimant sought the assistance of the Defendant.
 - (b) The Defendant, in an act of friendship, did indeed offer to assist the Claimant with her loan payments so that she would not lose the properties.
 - (c) The Defendant agreed to take over and make the loan payment to the Bank until the Claimant was in a better financial position.
 - (d) The Claimant and the Defendant had an understanding generally on the terms of the oral agreement. Generally I do not believe the Defendant's evidence that the Claimant sold him the properties for approximately \$232, 0000.00 which he allegedly paid for the properties and that the reason for selling the properties to the Defendant was that she could not make the loan payment to the Bank and she did not want the Bank to take her home and that she would prefer that he purchased it from the Bank.
- [83] Also I found that the Defendant's case on balance was fatally flawed in that it is not credible that on the facts of the case that it was at all likely that the Claimant, even as an act of desperation, would have entered into the arrangement which the

Defendant was advancing. My finding of lack of credibility arises from the values of the properties involved, the emotional and financial connection and investment which would have been involved with the properties (as evidenced from the Claimant's conduct and evidence of the obvious attachment which the Claimant and her children would more likely than not have had with the properties as their home), and also the amounts owed to the Bank in relation to the mortgage etc.

[84] Specifically, I found difficulties with the case for both parties but having seen and heard the witnesses in the case in relation to the matters in dispute I found the Claimant's case more consistent with the uncontested facts and found the Claimant more credible as a witness and the evidence for the Defendant and the Defendant himself not credible as a witness.

[85] I might add that the fact that the Defendant did not respond to the emails of the Claimants when she was offering repayment of the monies that he had advanced to the Bank even though he acknowledged that he had in fact received those emails, indicative of the conclusion I have reached.

[86] The Defendant will not be permitted to use the absolute character of the transfer to the Defendant of the properties, as he has attempted to do, for the purpose of defeating the beneficial interest which the Claimant has in the properties. In my view, it would be inequitable and even a fraud by the Defendant, which would not be permitted by this court, or any court of equity, for the Defendant to use the provision requiring that transfers of land be evidenced in writing, to defeat the Claimant's case; and this court will not allow the Defendant to call in aid the fact that no written evidence of the real bargain is available.

Disposition

[87] The Claimant is therefore entitled to her declaration that the properties, which are currently registered in the name of the Defendant, are held by the Defendant on trust for the benefit of the Claimant absolutely.

[88] The Claimant is also entitled to an order that the Defendant shall transfer the properties to the Claimant upon terms which are fair and just.

[89] A fair and just order would, in my view include the following, which I make:

- (a) That the Claimant immediately commences payment of the installments on the loan to the Bank.
- (b) That the Defendant state and prove what monies were paid to the Bank by him pursuant to the oral agreement.
- (c) That upon payment by the Claimant of all sums duly proved or agreed to have been paid by the Defendant the properties shall be transferred to the Claimant absolutely.

[90] An injunction is granted restraining the Defendant, whether by himself or by his servants or agent or howsoever from taking or seeking to take possession, selling, negotiating for the sale of, disposing, leasing or otherwise dealing with any interest or right in or over the properties.

[91] Liberty is granted to either side to apply to give effect to the above orders.

Costs

[92] In the circumstances of my findings on the case I find that the Defendant shall pay the Claimant's cost at the prescribed scale with the claim being valued at \$338,000.00, the net value of the properties.

The Hon. Mr. Justice Courtney A. Abel