

**IN THE SUPREME COURT OF BELIZE A.D. 2018
(CIVIL)**

CLAIM NO. 699 of 2018

BETWEEN:-

**YVONNE CASTILLO
LEONARD CASTILLO**

**1st CLAIMANT
2nd CLAIMANT**

AND

**CLEMENTINA CASTILLO JOHNSON
KAREEM JOHNSON**

**1st DEFENDANT
2nd DEFENDANT**

Dates of Hearing: [18th September, 2019]; [01 October, 2019 Oral Submissions]
Before: The Hon. Madame Justice Griffith
Appearances: Mr. Jaraad Ysaguirre, Barrow & Co for the Claimants; Ms. Audrey Matura for the Defendants.

Oral Judgment

Introduction

1. The Claimants Yvonne Castillo and Leonardo Castillo, are mother and son. The Defendants are spouses and the 1st Defendant is the biological niece and daughter by marriage, of the 1st Claimant. The Claimants have brought this action for possession of land on the strength of their ownership as registered proprietors of the subject property which is situate in Dangriga, Belize. The land falls within the compulsory registration system and is registered as Parcel 1052 Block 31 Dangriga North Registration Section and known to the parties as ‘the Lemon Street property’. The Claimants were registered as proprietors of the property in March, 2018 and have sought to recover possession of their property from the Defendants, whom they claim currently occupy same without their consent. The parties are family members however, and as often can be the case where family is involved, there is more to this situation than the relatively straightforward issue of property owners asserting their rights to possession of their property by recourse to the Court.

2. The Defendants contend, (specifically, the 1st Defendant contends), that the Claimants hold the Lemon St. property on trust for her, as said property had been given to her on a trust created in her favour by her late father. The 1st Defendant's late father, was the 1st Claimant's husband, who shall hereinafter simply be referred to as Mr. Castillo. Building on their defence, the Defendants have counterclaimed against the Claimants, for a declaration that the property is subject to the trust in favour of the 1st Defendant, and for an order rectifying the land register in favour of the 1st Defendant on the basis of fraud. The Claimants deny the existence of any such trust in favour of the 1st Defendant and these competing positions on the one hand of ownership and on the other, of equitable entitlement, frame the dispute before the Court.

Issues

3. The issues for determination are as follows:-
 - (a) Is there a trust in existence of the subject property in favour of the 1st Defendant whether by means of:
 - (i) express trust created by the 1st Defendant's deceased father; or
 - (ii) by operation of law against the 1st Claimant?
 - (b) If a trust was created by either of those means, is that trust enforceable against the Claimants as registered proprietors of the property?
 - (c) If a valid trust subsists in favour of the 1st Defendant, what remedy is she entitled to, in order to give effect to that trust?

Factual Background

4. The Claimants' and Defendants' familial relations arise from a not uncommon circumstance where upon the untimely passing of a parent of young children, an immediate family member assumes responsibility for raising those children. The 1st Defendant is one of several siblings, whose mother passed away when they were of tender years.

The Claimant as the children's maternal aunt, assumed responsibility for raising her nieces and nephews and eventually got married to the children's father – Mr. Castillo. The 1st Claimant had children of her own but none with the 1st Defendant's father; the 1st Defendant's parents both had children in addition to those with each other. These respective children were raised within, or otherwise closely connected within a family unit, so that in modern parlance (any questions of acceptance, harmony or discord aside), the family was a blended one of the siblings, along with the deceased Mr. Castillo as father and the 1st Claimant Ms. Yvonne Castillo, as mother/caregiver.

5. Without any reference at this stage to entitlement, it suffices to say that the 1st Claimant, Ms. Yvonne and Mr. Castillo, deceased, acquired an interest in the Lemon Street property sometime in 2014, by taking over a loan of the then registered proprietor, Mrs. Patricia Sabal. Both Ms. Yvonne and her deceased husband assumed the legal liability of the mortgage. There was no transfer of the title to the property to Ms. Yvonne and Mr. Castillo, as no such dealing appears on the register. However, it is accepted all around, that the 1st Defendant and Mr. Castillo assumed the mortgage (legal charge) which was being administered by the Social Security Board. Without any reference to how this circumstance came about, it also suffices to say that the 1st Defendant Ms. Clementina, with the consent of her father and Ms. Yvonne, was let into occupation of the Lemon Street house. There is great variance as to the actual circumstances which gave rise to Ms. Clementina's occupation of the premises, and such variance is at the heart of the dispute before the Court.
6. Mr. Castillo passed away in December, 2016, and according to Ms. Yvonne, she thereafter discovered that there were arrears owing on the mortgage of the property. She was unable to clear those arrears in a sufficient time, and the property was put up for sale by auction by Social Security. The Claimants as mother and son, purchased the property at the auction and became the registered proprietors in March, 2018.

In April, 2018 the Claimants issued the Defendants with notice to vacate, and upon their failure to comply, the Claimants instituted this claim for possession of the property in November, 2018. The claim also sought mesne profits, damages and a permanent injunction against the Defendants. The Claims for damages and mesne profits appear to have been abandoned as there was no evidence filed in support of these claims.

Discussion and Analysis

Issue (i) - was there (a) an express trust or (b) a trust by operation of law created in favour of the 1st Defendant?

(a) Express trust

7. The determination of this first issue against the Defendants, (meaning that no trust is found in favour of the 1st Defendant, Ms. Clementina), will be dispositive of the Claim. In answer to the claim for possession based on the Claimants' registered title, Ms. Clementina's position was that sometime in 2014, her late father Mr. Castillo purchased the property for her and told her of this fact. In addition to Ms. Clementina's assertion of her father having told her so, the assertion was supported by two of her brothers, as witnesses. Ms. Clementina was also supported by the justice of the peace, whom it was said assisted with the purchase (the assumption of the legal charge) of the property. Unfortunately, Ms. Clementina's and her supporting witnesses' assertions that Mr. Castillo had purchased or intended to and thereafter did purchase the Lemon St. property for her were all based on inadmissible hearsay evidence. There was therefore no oral evidence before the Court from the Defendants, which was available to prove that Mr. Castillo had made any statement regarding any intention he had for Ms. Clementina to have ownership of the property.
8. Aside from the attempted oral evidence, the 1st Defendant also relied upon the fact of her occupation of the property in the first place, and after her father died, her continued occupation of the property without objection on the part of the Claimants.

According to Ms. Clementina, this evidence establishes that the Claimants (Ms. Yvonne particularly), knew of the trust of the property created by Mr. Castillo in her favour. As further evidence of the creation of the trust, Ms. Clementina asserts the fact that she carried out repairs to the property at her expense, with the knowledge of her father and Ms. Yvonne. On the other hand, the Claimants asserted that shortly before his death, Mr. Castillo, in the presence of assembled family members, (including the parties and several other siblings), made certain pronouncements as to the ownership of the Lemon Street property being intended for the Claimants. Particularly, that the house on the property was to belong to the 1st Claimant and the unfinished structure to the rear, to the 2nd Claimant. This assertion was made respectively by each Claimant, as well as by their witness, another son of Ms. Yvonne. Unlike the assertions of the 1st Defendant and witnesses, this evidence as to the utterings of the deceased, was admissible on account of them having alleged to have made been made in the presence of the Defendants. Whether or not the Court accepted this evidence as fact proven is another matter.

9. Under cross examination, Ms. Yvonne denied that there was ever any indication given to her by her deceased husband that the property they purchased together was intended for anyone but her and her son, the 2nd Claimant, Leonardo Castillo. Ms. Yvonne's explanation of how Ms. Clementina came to occupy the property was that she, Ms. Yvonne, suggested it to Mr. Castillo and they both agreed for Ms. Clementina to occupy the property as she was having a difficult time paying her rent. The property required some repairs to be habitable, including to the roof which was leaking, and it was on that basis – in order to take advantage of occupying the property rent free - that Ms. Clementina came to carry out repairs and thereafter occupy the property. Ms. Clementina accepted under cross examination that there was never any conversation at which both she and Ms. Yvonne was present, when her late father made any statement regarding her (Ms. Clementina's) ownership of or entitlement to the property.

Ms. Clementina also accepted that she was not present at the time when the mortgage arrangements were made with her late father and Ms. Yvonne. It was undisputed that there was no evidence in writing made by Mr. Castillo in relation to the property at all. On the basis of the above evidence, the Court is asked to find that an express trust was created by the deceased Robert Castillo, that the Lemon St. Property was held by himself and Ms. Yvonne, for the benefit of Ms. Clementina.

10. As a matter of law, it is accepted that a trust of property may be created with little formality and may be created orally or in writing¹. Specifically however, section 5(4) of the Trusts Act, provides as follows in relation to trusts for land:-

“A trust (other than a trust by operation of law) respecting land situated in Belize shall be unenforceable unless evidenced in writing.”

This position in Belize is consistent with the law as initially received from England, which as submitted by Counsel for the Claimants, was to be found in section 53(1)(b) of the Law of Property Act of England, which was originally reproduced verbatim in the Law of Property Act of Belize² and thereafter subsisted in the following terms, but to the same effect:-

43.–(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol, no interest in land shall be created or disposed of except by writing signed by the person creating or conveying it, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law.

(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

Counsel for the Claimant also cites section 124 of the Registered Lands Act, Cap. 194 (Cap. 190 no longer applies to registered land) as indication of the legal position regarding trusts of land and writing. In particular, Counsel cites section 124(2) which provides for the instrument declaring a trust of land to be deposited with the Registrar.

¹ Section 5(3) of the Trusts Act, Cap. 202 of Belize; Kodilinye & Carmichael, Commonwealth Caribbean Law of Trusts, 3rd Ed. Ch. 2.

² Law of Property Act, Cap. 190, section 43(1)(b), as amended by No. 5 of 1992; see **Viviene Thompson et al v Alfred George v Mervyn Hulse, Supreme Court Action No. 14 of 1978** per Moe J @ para 17.

The Court is not of the view that this section 124 of Cap. 194 establishes the requirement for a trust of land to be evidenced in writing, but the legal position is found clear based on section 5(4) of the Trusts Act.

11. In the instant case, it is accepted that there was no writing establishing or evidencing Mr. Castillo as having created any trust of the Lemon Street property in favour of the 1st Defendant. In the circumstances, there is no question of enforcement of any express trust of the property in favour of the 1st Defendant. However, as the terms of section 5(4) speak to 'enforcement', it is clear that an oral trust for land still can be created, but it cannot be enforced unless evidenced by some writing. In Belizean case **Thompson v George & Hulse**, Moe J confirmed that the absence of writing in relation to an express trust as required by the then s.43(1)(b) of the LPA, did not render the trust created void or ineffective.³ This conclusion was made with reference to an established equitable principle which is that equity would not allow a statute to be used as a vehicle of fraud⁴. This principle may be illustrated by the case of **Simpson v Simpson et anor**⁵, which was provided by Counsel for the Claimant in support of his submission that a trust in relation to land was required to be evidenced in writing. This case concerns a similar situation of a dispute of family members asserting on the one side, the creation of an express oral trust against the registered proprietors on the other side. It was found that there was writing evidencing the oral trust in this case, but had this not been so found, Moss QC (sitting as deputy judge) was clear that the express oral trust found would have been upheld on the basis that to do otherwise would allow the Defendant company (the registered proprietor) to use the statutory requirement for writing as a vehicle of fraud.
12. With respect therefore to whether an express trust was in fact created at all, the Court examines the evidence available in this regard.

³ Belize Supreme Court No. 14 of 1978 per Moe J @ para 17.

⁴ *Rochevoucauld v. Boustead* [1897] 1 Ch. 196

⁵ [2005] All ER (D) 132

- All of the conversations between the deceased, Mr. Castillo and the siblings who gave evidence on behalf of the 1st Defendant were carried on outside the presence and hearing of the Claimants. In the circumstances, there is no evidence before the court of any utterings made by Mr. Castillo in relation to the 1st defendant and the property. The actions upon which the 1st Defendant relies as providing support for such a trust (her occupation and repairs with the knowledge and consent of Ms. Yvonne and her late father; Ms. Yvonne's failure to remove her from the property after her father's death, as well as the allegations that Ms. Yvonne had no monies of her own from which to have been a partner in paying for the mortgage) – none of these assertions take the matter much further for the 1st Defendant in terms of the creation of an oral trust. The conduct of Ms. Yvonne is just as consistent with a maternal figure either actively (as Ms. Yvonne claimed), looking out for her daughter's interest in suggesting to the deceased that Ms. Clementina occupy the property; or simply agreeing with or not objecting to her husband's daughter being afforded the facility of living rent free in their premises.
13. The facts before the Court are that Mr. Castillo and Ms. Yvonne became the legal holders of the mortgage of the property. There is no evidence of any conversation involving Ms. Yvonne as joint legal owner, by which knowledge of any intention to create a trust by Mr. Castillo in favour of Ms. Clementina, can be imputed to her. There is no admissible evidence of what the deceased ever said in relation to a trust being created. Even if the evidence of the deceased having said the property 'is for' Ms. Clementina, there is nothing to indicate that a trust was intended as opposed to an outright gift, which then failed. Taken at its highest, the allegations made by the 1st Defendant as supported by her witnesses imply that her deceased father intended to gift her with the property. The allegations were made that Ms. Yvonne was only placed on the mortgage of the property because the Social Security Board required that to be done as she was the deceased's wife. Mr. Ramos the Justice of the Peace who went with the couple when the mortgage was being signed into their name attempted to give this evidence.

Mr. Ramos was not able to give that evidence as it was established upon an attempt to amplify his witness statement that whilst he had accompanied the couple, he was not physically present with them when they carried out the transaction with the mortgage official.

14. The Court would contrast the above evidence with the case of **Hodgson v Marks et al**⁶. In this case, an elderly registered proprietor Mrs. H, transferred her property to her lodger in circumstances the Court found amounted to an express oral trust, so that she retained her beneficial ownership in the property. The evidence was that Mrs. H was prevailed upon by the lodger to transfer the property to him, to avoid being taken advantage of by her nephew. Mrs. H transferred the property to the lodger for no consideration who as registered proprietor then transferred the property to a third party (with vacant possession). The third party then executed a registered charge in favour of a financial institution, the lodger disappeared and the third party asserted his claim to possession of the property. Mrs. H sued the third party and the financial institution for the return of her property, on the basis that she had an overriding interest in the property. The overriding interest claimed was her right as beneficial owner under a trust of the property, having been in actual occupation of the land.
15. The court accepted the evidence of Mrs. H. of her intention to retain the beneficial ownership of the land, as supported by the lack of consideration and the conduct and representations made by the lodger in handling other aspects of Mrs. H's finances and affairs. The court also had the evidence of the solicitors who prepared the transfer documents and had spoken with both Mrs. H and the lodger, in relation to the sale. With that evidence available, that court was able to find that the transfer had not been intended as a gift, but that there was an express oral agreement that the lodger was to hold the property in name only, for the benefit of Mrs. H for the remainder of her life.

⁶ [1971] Ch. 892

In comparing the circumstances in the case at bar, the Court considers the fact that there was an actual transfer of property in **Hodgson**; there was evidence of the intention of Mrs. H in relation to the transfer as supported by evidence as to that intention from the solicitors who facilitated the transaction and had dealing with both parties to the transfer. There is no evidence of similar ilk in this case as there is no evidence (properly admissible) of any stated intention of Mr. Castillo and evidence of his conduct is equally consistent with explanations other than an intention to create a trust of the property. The Court on the evidence available is therefore unable to find that there was an express trust created by Mr. Castillo in favour of the 1st Defendant Ms. Clementina Castillo.

(b) Trust by operation of law

16. Counsel for the Defendants had also submitted that the Claimants held the property on a constructive trust for the 1st Defendant. Before considering the basis upon which this trust is alleged, it must very clearly be stated, that any constructive trust would have to be one established against the Claimants, independently of Mr. Castillo. The factual matrix does not allow any question of a constructive trust to be asserted by way of any actions associated with or capable of being imputed to the deceased, Mr. Castillo. In relation to the evidence, Ms. Clementina again relies upon the assertions of Ms. Yvonne's conduct towards her in allowing her to carry out repairs to the property and to remain in occupation of the property after the death of Mr. Castillo. It was also alleged that Ms. Yvonne was aware of Mr. Castillo's wishes that the property belong to Ms. Clementina. The allegation also was made that Ms. Yvonne was placed on the mortgage solely because it was required for her to do so as Mr. Castillo's wife as opposed to her having any substantive interest in the property. The Defendants made much of the failure of Ms. Yvonne to notify the US Veteran's authorities upon Mr. Castillo's death in addition to her adjudged failure to inform other family members of the arrears on the mortgage which resulted in the property being put up for sale.

Also 1st Claimant's behavior in failing to look after the mortgage and allowing it to be sold so she could buy it was alleged.

17. With respect to these factual allegations, the Court makes the following findings on a balance of probabilities:-
- Ms. Clementina is unable to prove that her late father Mr. Castillo ever made Ms. Yvonne aware of any intention he had for her (Ms. Clementina) to have ownership of the property;
 - Ms. Clementina was allowed by Ms. Yvonne and Mr. Castillo to occupy the premises rent free and her repairs to the property were done with their knowledge in order to render the premises habitable for her;
 - The Court finds it unremarkable that after Mr. Castillo died Ms. Yvonne made no attempt to remove Ms. Clementina from the property, as Ms. Yvonne was residing at what was her matrimonial home for many years;
 - Ms. Yvonne provided an acceptable explanation for her inaction in relation to communicating Mr. Castillo's death to the US authorities, in that she had been assured by the 2nd Claimant, that he would attend to it.
18. With respect to the circumstances of acquisition of the mortgage, the Court finds the Ms. Yvonne to have been a credible witness. Particularly, contrary to the assertion that she never worked and as such did not have the wherewithal to pay the mortgage alongside Mr. Castillo, it was accepted by Ms. Clementina that Ms. Yvonne had been operating a shop for many years, thus the Court accepts that she did have income available to her. The Court observed also that Ms. Yvonne was knowledgeable from recall, of the details of the mortgage including the specific amounts of the payments. Against this factual position, the Court considers the legal requirements for the creation of a constructive trust. The constructive trust is one created by operation of law, imposed against the interest of a person holding the legal estate in land. There are several established situations in which a constructive trust is imposed, for example, in particular fiduciary relationships (which is not the case at bar);

or where trust property is knowingly received by a person thereafter dealing with the property in a manner inconsistent with their knowledge of the property and circumstances, as trustee⁷. Kodilinye as well Lewin on Trusts⁸ also speak to the constructive trust as it arises in the context of family or matrimonial property. Namely, the 'common intention' trust, which is generally found on the basis of an agreement properly imputed to parties, evidenced by their conduct, representations made, coupled with reliance based on such conduct or representations to the determinant of the party asserting a beneficial interest under the constructive trust⁹.

19. With reference to the case at bar, it is clear that this is not a situation in which any question of a fiduciary relationship arises. Further, the Court has already found that there is no evidence of any express trust created by Mr. Castillo in favour of the 1st Defendant, much less any evidence imputing knowledge of such a trust to Ms. Yvonne. The second kind of constructive trust identified above which arises from a trustee improperly dealing with trust property is also not supported on the evidence. With the factual findings described in paragraphs 17-18 above, there is also no basis upon which a common intention between the Claimants and Ms. Clementina can be inferred, in order to give rise to any beneficial ownership or interest under a constructive trust in favour of Ms. Clementina. As far as Ms. Yvonne's position is concerned, the mortgage was acquired without reference to Ms. Clementina; and the purchase of the property (on auction by the Social Security), was also effected without any circumstance referable to a beneficial interest in the property in favour of Ms. Clementina. Counsel for the Defendant's primary approach in her submission of the trust created in favour of the 1st Defendant, appeared to advance the concept of the 'remedial constructive trust', which has been developed in Australia, Canada and the United States.

⁷ Kodilinye & Carmichael on Trusts, 3rd Ed. Ch. 7 @ pg98-99.

⁸ Lewin on Trusts 19th Ed. Ch. 7 @ 7-005

⁹ This 'common intention' trust is best known from the cases of Pettitt v Pettitt and Gissing v Gissing.

- This 'remedial constructive trust', sees the courts in effect impose the *remedy* of the constructive trust, in situations where it would be unconscionable or in general, inequitable, to allow a person to retain a proprietary interest in property.
20. The remedy to impose the constructive trust in such situations is entirely discretionary, so that where injustice would be caused to third parties, the court is free not to do so. Lewin on Trusts addresses the 'remedial constructive trust'¹⁰ – but it is therein stated that whilst it has found a place in Australia and Canada, the remedial constructive trust does not occupy a place in the English Law. The decision of **Westdeutsche Landesbank Girozentrale v Islington LBC**¹¹ is cited by Lewin as presenting some basis for the advancement of the principle in English law as it is said to have been left open for discussion. However in **FHR European Ventures LLP v Cedar Capital Partners LLC**,¹² in considering the appropriate remedy in relation to secret profits received by a trustee or fiduciary, the English Supreme Court definitively stated that it did not recognize the 'remedial constructive trust'¹³. In the circumstances, the Court finds that the evidence before the court does not support the finding of a constructive trust against either Claimant in favour of the Defendants, in any of the known instances in which the trust is said to arise.
21. The Court does note that the 1st Defendant and her siblings who testified on her behalf were entirely resolute in their belief as to her entitlement to the Lemon Street property. It does also appear that the 1st Defendant will be significantly displaced by having to surrender possession of the property. However, as a matter of law, the Defendants have failed to prove their counterclaim of a trust having been created in favour of the first Defendant.

¹⁰ Lewin supra, par 7-025 et seq.

¹¹ [1996] AC 669

¹² [2014] 3 WLR 535

¹³ Ibid @ para 47

Additionally, the Defendants have failed to establish any basis of any fraud by the Claimants in their acquisition of the property, which was purchased at a public auction for \$95,000. At most the Court is prepared to observe that given the fact that the 1st Defendant had been residing in the property with initial consent, had effected repairs thereto and whether rightly or wrongly was settled in living there - and also given the family relationship - it perhaps was not the most constructive approach employed by the Claimants, to have acquired the property without notice to Ms. Clementina and other siblings. However, acquiring legal ownership by avoidance of what most probably would have been acrimony and contention as to entitlement of the property does not amount to fraud, thus no issue of rectification of the register by the Court arises. The counterclaim is dismissed, the Claimants' claim for possession of the Lemon St. property is successful and the Claimants are entitled to their costs. In the circumstances, issues (ii) and (iii) as identified at paragraph 3 above, do not arise for consideration.

Disposition

22. The Claim and Counterclaim are disposed of by the following orders:-
- (i) The Claimants, as registered proprietors, are entitled to possession of the property registered as Parcel 1052 Block 31 of the Dangriga North Registration Section;
 - (ii) The Defendants Clementina Castillo Johnson and Kareem Johnson are to vacate the property on or before the **31st January, 2020**;
 - (iii) Costs are awarded to the Claimants in the agreed sum of **\$4,000.00**.

Dated the 29th day of October, 2019.

Shona O. Griffith
Supreme Court Judge, Belize.