

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV2002/0431

BETWEEN:

OREL JAMES BENJAMIN

Claimant

and

IRISDENE BENJAMIN Nee BOWERS

Defendant

Appearances:

Samantha Marshall for the Claimant

Kelvin John for the Defendant

2003: June 30, July 28, August 19

JUDGMENT

[1] **MITCHELL, J:** In the year 1982, when she was 16 years old and just out of school, Iridene Bowers began an intimate relationship with Orel Benjamin. She later bore him two children. They married, and acquired properties. The titles to the properties were taken in his name alone. The marriage broke down. They were divorced on an uncontested petition brought by him. She still lives in the matrimonial home from which he has been excluded by a court order. He claims possession of the house. The question for the court is whether he is entitled to the order he seeks.

[2] At the time when the relationship began, as now, there existed a peculiarly Antiguan institution whereby Ministers of government and other favoured parliamentary representatives might authorise the hand-out of plots of Crown land to deserving constituents and others. Since the time of the collapse of the sugar industry in the second half of the twentieth century, and the subsequent acquisition of its assets by the Crown,

the government of Antigua has been possessed of large tracts of previous sugar lands in all parts of the island. It is this land that is the fount and origin of this beneficence. It is generally arranged through a process whereby the constituent approaches his or her parliamentary representative, preferably a member of whichever political party is in power. The representative, if duly impressed with the merits of the application, writes a letter to the appropriate government department recommending that a lot of land in the desired locality be sold to the person or persons in question. The recommendation is usually acted on. It is all done quite informally, with no lawyer or other professional being involved, far less any regulation or institutional structure in place designed to ensure fairness and impartiality, or, more to the point, that proper records are maintained. Eventually, after a price has been paid to the appropriate government ministry, the land is transferred into the name of the recommended individual.

- [3] Miss Bowers had been born in 1966. She became pregnant with the first child of the couple in 1987, and their daughter Oris was born in November. Their second daughter Odene was born in March 1989. During the early part of the relationship, Miss Bowers lived with her older sister, as her mother had died when she was a child. Mr Benjamin was a hard-working fisherman and plumber. He toiled for long hours to build up his two chosen occupations. Miss Bowers worked just as long and hard. Her work at the restaurant was seasonal, and she was able for long periods of time to assist Mr Benjamin, as he admits, in both the plumbing and fishing businesses. She helped by scaling the fish that Mr Benjamin caught, and delivering them to hotels, supermarkets and offices. She would catch the ferry daily, and deliver fish to Jumbee Bay Hotel on Long Island. She prepared the invoices and had the task of collecting payments and running down bad debtors. Using the family vehicle, she delivered plumbing materials from the storeroom to various construction sites all over Antigua. She would transport the assistant plumbers as well. She bought and sold various items such as curtains, clothes, bags, and pot sets to raise further income, all of which went to the family needs. She worked as he did, from early in the morning until late in the evening.

[4] After the birth of their first child, Oris, Mr Benjamin and Ms Bowers began living together. She moved from her sister's home at Golden Grove and went to live with him at Parham. They discussed their future life together. They went, in the now familiar tradition, to see their parliamentary representative about acquiring a plot of land on which to build their family home. They took their baby with them to help to impress the parliamentarian with their need. Their efforts were successful, and the appropriate letter was forthcoming. There is no independent evidence as to what exactly happened, as is to be expected from circumstances such as these. Mr Benjamin swears that it was he and he alone who was being favoured by the parliamentary representative, and who paid the Ministry for the title to the land. Mrs Benjamin swears that it was her presence and that of the baby that swung the deal, and that the proceeds for the purchase were produced by the sweat of both their brows. The very amount of purchase price that was actually paid is now unknown to either of them. Suffice it to say for the moment that in the year 1987 Registration Section Gilberts, Block 22 2490 A, Parcel 114 was registered in the name of Mr Benjamin alone. Within two years the matrimonial home had been built, and the couple moved in to it in 1989. It is a comfortable one-storey, three bedroom, two bathroom dwelling on one and a half acres of land, all presently valued at \$660,240.00. The couple then married in July 1992.

[5] The marriage did not last long. The relationship deteriorated. Mr Benjamin was not faithful, and he was not averse to using violence against his wife. They were divorced in 1999 on a petition brought by him. Mrs Benjamin, as she now was, did not defend the divorce petition. She was not legally represented in the divorce proceedings. They continued to live together through those proceedings. Mrs Benjamin swears that they were intimate throughout, and that she had had hopes the relationship would survive. Mr Benjamin swears that though they lived in the same house they did not share the same bedroom and were not intimate. After the divorce, Mrs Benjamin was forced to seek the protection of the Magistrate's Court by way of a Protection Order from alleged violence on the part of Mr Benjamin. A question of the use of a gun, among other things, was involved. He was ordered to leave the home and not to interfere with her in the future. He contributes monthly to the maintenance of his two teenage daughters. From the date of

the Protection Order, Mrs Benjamin has paid the utility and other bills relating to the use and upkeep of the house from her own earnings. She maintains herself and the children by working as a beach vendor on Long Bay.

[6] Mr Benjamin was not without a roof over his head as a result of the Protection Order. Using the title he held over Parcel 114 as security for a loan, he had before the divorce acquired another property at Crabbs, closer to where his fishing boats are located. He does not have registered title to this second property as yet, but he holds a letter giving him permission to build, and indicating that the appropriate government department is preparing his title document. There is no independent evidence to show how he acquired this property. Mrs Benjamin swears that he got it in part through her earnings and savings and by the use of her interest in Parcel 114 as security for a loan. Mr Benjamin swears that he got it entirely by his own efforts. He lives in this property now. It is a two-storey, four bedroom house. From this location he carries on his plumbing and fishing businesses.

[7] Mr Benjamin was understandably irritated after the Protection Order was served on him and he was prevented from returning to the home where his ex-wife and children lived. He sought legal advice. There is in Antigua and Barbuda no statute governing matrimonial property other than the old **Married Womens Property Act**. To claim relief under this Act, an action must be brought by either the husband or the wife before the divorce is granted. Ex-husbands and wives must rely on the common law and the equitable remedies of the law of trusts. He brought the present action after the divorce had been granted. He brought it by way of a Fixed Date Claim Form filed on 2 September 2002. It is not signed by his legal practitioner as required by the rules. It is a claim for an order for possession only, and as such is a claim that may properly be brought by a Fixed Date Claim Form. There is no statement of claim with it, only Mr Benjamin's affidavit in support. Mrs Benjamin has filed no defence or ancillary claim. What she did, instead, was on 23 September 2002 to file an acknowledgment of service indicating her intention to defend the claim.

- [8] On 11 October 2002, the date fixed for the first hearing, the matter came up in Chambers for directions to be given. The little matter of the Fixed Date Claim Form not having been signed by either Mr Benjamin or his attorney was overlooked. Both counsel assured the court that, save for the filing by Mrs Benjamin of her affidavit in reply, the matter was ready to be heard. Accordingly, leave was given to Mrs Benjamin to file any affidavit in reply by 25 October, and a trial date of 11 December was fixed by the court.
- [9] Mrs Benjamin did not file any affidavit in her defence within the time given. Instead, on 31 October 2002, she filed a Form 6 application form seeking an order that Parcel 114 be transferred into the joint names of them both, and that she be permitted to live in the property with her children during her lifetime unless she consented to an earlier sale. She swore and filed an affidavit of the same date in support of this application. This application was never heard or dealt with in Chambers.
- [10] On 27 November 2002, Mr Benjamin filed a second affidavit. This one was in reply to that of Mrs Benjamin filed with her application on 31 October. In it, he reiterated his assertion that the property was acquired by him alone, and that Mrs Benjamin has absolutely no right to remain in possession. He made no objection to the filing of the application, nor to the failure of Mrs Benjamin to file an affidavit in reply to his within the time stipulated, as had been directed on 11 October.
- [11] When the matter was called up in open court for hearing on the morning of 11 December, neither Mr Benjamin nor his counsel were present, nor was there any explanation for their absence. Mrs Benjamin and her counsel were both present. On Mr John's application, the court dismissed Mr Benjamin's claim, and gave judgment for Mrs Benjamin in terms of her application of 31 October, mistakenly treating it as if it were an ancillary or counter claim. That same day, Mr Benjamin filed an application for the judgment to be set aside, explaining that he had been held up in traffic and had arrived late at court to discover that his case had been disposed of. On 24 January, 2003, the court granted his application with an order for costs and directed that a new trial date be fixed. This date was eventually notified to the parties as 30 June 2003.

- [12] On the assigned date, the trial duly commenced with both parties and their witnesses present. Both counsel advised the court that they were ready for trial and that costs had been agreed at \$5,000.00. Mr Benjamin made no objection to Mrs Benjamin not strictly having filed any affidavit in response to his. The trial proceeded on the basis that Mrs Benjamin's affidavit filed without leave late on 31 October was to be treated as having been properly filed. The affidavits were to be treated as evidence in chief, and the parties produced for cross-examination. During the course of the trial, as Mr John was cross-examining Mr Benjamin with a view to establishing Mrs Benjamin's interest in Parcel 114, Mr Benjamin's counsel, Miss Marshall, took objection to the line of cross examination. She pointed out that Mrs Benjamin had filed and served no counterclaim, or ancillary claim. The only claim before the court was that of Mr Benjamin.
- [13] Mr John protested in reply that it was unfair for Miss Marshall to raise this point for the first time during the course of the trial, in the middle of his cross-examination. He submitted that the trial was one being conducted by way of a Fixed Date Claim Form and affidavit evidence, with no further pleadings, and that it was open to the court to deal in full with the equitable interests of the parties. The court directed that the cross-examination should proceed and that the court would rule in due course.
- [14] An application filed by way of a Form 6 Application Form, as Mrs Benjamin did in this case, is not a proper way to plead for counter relief in an action in the High Court. A Form 6 Application form is appropriate only for some interim or interlocutory relief. It is not a substitute for a defence or ancillary claim. The application filed by Mrs Benjamin on 31 October was strictly an interlocutory application that has never been dealt with prior to the trial. No relief was capable of flowing from it at the trial itself. To find otherwise would be to throw the law of civil procedure out of the window. Such an application is out of order if filed, as this was, without leave after directions for trial had been given at the date of the first hearing.

[15] The affidavit of Mrs Benjamin filed on 31 October was admitted as her evidence in chief at the trial only by reason of Mr Benjamin's express consent. Strictly, Mr Benjamin was entitled at the trial to have asked that judgment be entered for him in the absence of any evidence on the part of Mrs Benjamin to contradict his. He might have applied at the trial or at any earlier stage to have Mrs Benjamin's affidavit struck out as having been filed without leave. What the court would have done in the face of such an application, if it had been made, is not certain. However, Mr Benjamin's acceptance of Mrs Benjamin's late and unauthorised affidavit by his act of filing an affidavit in reply to it and not objecting to its being used at the trial as her evidence in chief amounts to express consent to it being treated as her evidence at the trial. What is not capable of acceptance is that her Form 6 application for interlocutory relief filed at the same time should be treated as a counter claim for relief at the trial.

[16] In the State of Antigua and Barbuda, the only statutory provision governing the rights of husband and wife to matrimonial property is the old nineteenth century United Kingdom **Married Women's Property Act, Cap 267**, originally adopted as local law in the colony of the Leeward Islands by the General Assembly of the Leeward Islands. Either the husband or the wife may claim relief under its provisions. But, they must bring their action before the divorce is granted. The Act only applies to married persons, and once they are divorced they are no longer man and wife and the Act does not apply to them any longer. There is a long train of British and West Indian authorities to that effect. The **Divorce Act** of Antigua and Barbuda contains no property rights provisions. There is no **Matrimonial Causes Act** or other modern statute governing the property rights of divorcing spouses and other separating life partners. The only remaining avenue for a couple, who have not had their property rights settled by agreement or by a court prior to the dissolution of their marriage, is the law of trusts. Where one spouse has contributed substantially to the purchase of the property, title to which was taken in the name of the other spouse, the court will find a resulting trust, and declare that the one spouse holds the property in trust for himself and the other.

[17] Where there is no evidence of contribution, the only hope of the other spouse is if the court finds a constructive trust. Nourse LJ in his judgment in the English Court of Appeal decision in **Grant v Edwards [1986] 2 All ER 426**, quoted by Bishop CJ in his Court of Appeal judgment in **Williams v Williams (1986)39 WIR 140**, has aptly described this as climbing the familiar ground which slopes down from the twin peaks of **Pettit v Pettit [1969] 2 All ER 385** and **Gissing v Gissing [1970] 2 All ER 780**. The basic principle in such a case is that, where there has been no written declaration of agreement, nor any direct provision by the party out of title of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the party with title, acted on by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant party with title to deny that interest, and will construct a trust to give effect to it. There must be conduct from which the common intention can be inferred on the one hand, and conduct which amounts to an acting on it on the other. As to the quality of the conduct required, it must be conduct on which the deprived party could not reasonably have been expected to embark unless she was to have an interest in the house. Applying the words of Mustill LJ in his judgment in the **Grant v Edwards** decision [supra] to the position in Antigua and Barbuda, the law does not recognise a concept of family property, whereby people who live together in a settled relationship by that fact alone share the rights of ownership in the assets acquired and used for the purposes of their life together. Nor does the law acknowledge that by the mere fact of doing work on the asset of one party to the relationship the other party will acquire a beneficial interest in that asset. The question whether one party to the relationship acquires rights to property the legal title to which is vested in the other party must be answered in terms of the existing law of trusts. There are no special doctrines of equity applicable in this field alone.

[18] In this case, I am satisfied from the evidence of Mrs Benjamin and from the admissions made by Mr Benjamin in cross examination that Parcel 114 was acquired in his name with the intention of it being the jointly owned matrimonial home of the two of them. Mrs Benjamin worked long and hard hours to help the two of them to acquire and build that property. I do not accept his contrary evidence on this point. The exact amounts

contributed by either or both of them is not known. Neither of them has produced a shred of evidence on the amounts spent by either of them. In the absence of any reliable evidence, the court is entitled to assume that they contributed equally. There is no need for the court to find a constructive trust, though there is evidence from which the court could have so found. That the title to Parcel 114 was placed in Mr Benjamin's name alone was due to the uninformed decision of an official in the government department with whom the parties dealt, and does not indicate the true beneficial ownership. The house was built by their joint endeavours for their mutual benefit and comfort. If Mrs Benjamin had filed a claim for an equal interest in Parcel 114, she would have had no difficulty in succeeding in it. However, the proceedings before the court at this time do not permit the court to make a declaration of interest in her favour. The best that can be done to give justice to the parties is that the claim of Mr Benjamin will be dismissed with costs as agreed of \$5,000.00 to be paid to Mrs Benjamin.

I D MITCHELL, QC
High Court Judge