ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.32 OF 2003

BETWEEN:

DANE NORMAN LAWRENCE ABBOTT

Appellant

and

LYNN ANNE ABBOTT

Respondent

Before:

The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon Mr. Hugh Rawlins	Justice of Appeal [Ag.]

Appearances:

Mr. Gerald Watt Q.C. with Mr. Norris Scholar for the Appellant
Ms. Catherine Kentish for the Respondent

2005: March 15;
2005: May 30.

JUDGMENT

[1] GORDON, J.A.: This appeal was heard on March 15, 2005 and an oral judgment was delivered on March 17, 2005. The appeal was in large measure allowed and these are our written reasons. The parties to this appeal were married in Canada on 21st May 1983 and were subsequently divorced. The issue of maintenance was dealt with in proceedings ancillary to the divorce in 2001 and so does not arise before us. The sole issue before us is the division of property comprising the matrimonial home, certain shares in Kentucky Fried Chicken (Antigua) company

and the proceeds of a joint bank account in the Cayman Islands which bank account was fed exclusively by dividends from the KFC shares.

[2] As the learned trial Judge put it: "There is no matrimonial causes Act in the State of Antigua and Barbuda, nor any other modern legislation governing the property of husband and wife on dissolution of marriage…There is the old nineteenth century Married Women's Property Act, with all the disadvantages and limitations that that Act carries with it."

The Matrimonial Home

[3] The evidence is that the mother of the Appellant (Audrey Abbott) donated the land on which the matrimonial home was subsequently built to the Appellant on June 26, 1984. The land is known as Registration Section McKinnons, Block 45 1696B, Parcel 227. The land register records only the name of the Appellant as the owner of that land. Some time around 1990/1991 the parties commenced construction of a home that was to become the matrimonial home. Funds for the construction were provided by bridging finance in the name of the Appellant only in the sum of $250,000.00 from the Bank of Nova Scotia and a further gift of $400,000.00 from Audrey Abbott.

[4] The learned trial Judge found the following in regard to the gift from Audrey Abbott to the Appellant:

> "There is nothing in writing or otherwise from Audrey Abbott to help with what her intentions were when she gave the land. She also contributed the major part of the costs of construction of the home…She had an excellent relationship with her daughter in law, which continued after the relationship between the spouses broke down in 1995. There is no reason to believe that she wanted to make a gift of the land to her son alone. On the contrary, there is every reason to believe that she intended the gift to be a gift to both parties for the purpose of building their matrimonial home in the early days of their marriage when they could hardly afford to build the home themselves. I am satisfied that she intended the gift to be for both of them equally."

[5] The evidence of the respondent on this subject is to be found both in her witness statement and in her viva voce cross-examination and it is as follows: (from her witness statement)

> "In or around June 1984, the Defendant's (Appellant's) mother, Audrey Abbott, now deceased, transferred a parcel of land 0.45 acres approximately to the Defendant as a gift to us. I was not then an Antiguan citizen which I later acquired on the basis of the subsistence of marriage and as a result, my name could not be added to the title without my obtaining a non-citizens land holding license. It was always my understanding from Audrey Abbott that that parcel of land was for us to build our family home"

And in cross-examination the Respondent further said:

- Yes, I see para 5 of the statement of claim
- Yes, I say there the home was constructed in 1991 by (sic) lands given to the defendant as a gift.
- Yes, at para 4 of my witness statement I say it was transferred as a gift to 'us'. There is no difference; we were a couple.
- No, there is no distinction
- The land was given to us to build our family home. That is what the land was given to him for. I was not a citizen at the time. It was given to us to build our home. It was not given to us in my name because I did not become an Antiguan until 1995
- We did not make an application for a license at the time because it was easier just to put it in his name, and start building
- At the time we did not discuss that it was not being put in my name because I was not a citizen
- No Mrs. Abbott did not say that. I was told by the defendant that his mother had a piece of land that we would be able to build our home on.
- No, at the time there were no discussions that the land would not be transferred in my name because I was a non-citizen.
- The land was for us to build our home. I was married in 1983 and the land was transferred in 1984. We were making plans to build our house and that land was to be used to build our house.
- I cannot remember what Mrs. Abbott said to me about it."

[6] In other words, as I understand the evidence of the Respondent, who it must be remembered was the claimant in the Court below, and to put it at its highest, is that she assumed that the gift of the land was to both her husband and herself although there was no conversation on the subject involving Mrs. Abbott as far as

she could recall. I am of the view that there is absolutely no factual basis (which is a matter of law) for the inference drawn by the learned trial Judge that Audrey Abbott intended the gift of the land to be to both the Appellant and the Respondent and I hold that the gift of the 0.45 acres of land and the $400,000.00 by Audrey Abbott was to the Appellant alone.

[7] In holding as I do, I take full cognizance of the dictum of Viscount Simon in Watt v Thomas[1] to the following effect:

> "If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[8] This finding by itself does not, however, dispose of the issue of the ownership of the matrimonial home. The Respondent might still have an interest in the matrimonial home derived through a constructive trust or a proprietary estoppel. The leading statement on this area of the law is that by Lord Bridge of Harwich in the House of Lords decision in Lloyds Bank p.l.c. v Rosset[2] where he said the following:

> "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 or arrangement to share in this

[1] [1947] A.C. 484
[2] [1991] 1 A.C. 107 at page 132

> 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 to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a 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 installments, 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." (my emphasis)

[9] As remarked at paragraph 3 above, the financing of construction of the matrimonial home was by a bridging loan from the Bank of Nova Scotia which loan was taken in the name of the Appellant only. He gave the land as security for that borrowing. After completion of construction of the house long term financing was sought and obtained from Barbados Mutual. According to the evidence of both parties Barbados Mutual insisted that the loan be securitized by life insurance policies on both parties' lives, in the case of the Appellant a policy in the sum of $150,000.00 and in the case of the Respondent in the sum of $100,000.00. At the time of taking out the loan from Barbados Mutual, and probably from some time prior, the parties had a joint account at the Antigua Commercial Bank. It is common ground that until January 1995, when the Respondent started to work at Kentucky Fried Chicken, the sole provider of money to that joint account was the Appellant.

[10] It is not contested that the payments towards the Barbados Mutual loan were serviced from that joint account, nor that during the period that the Respondent worked (a period of one year from January 1995) her salary went into the joint account, as did all the Appellant's earnings. Having disagreed with the learned trial Judge's finding that Audrey Abbott intended to make a gift of the land to both the Appellant and the Respondent, the respondent could only acquire an interest in the matrimonial home by way of direct contributions to the mortgage payments (the second limb of Lord Bridge's dictum). Learned Queen's Counsel for the Appellant, by way of concession, allowed that the whole of the Respondent's salary during the period that she worked, some $54,000.00 should be deemed to have been used for the payments on account of the mortgage loan. The cost of building the matrimonial home was $650,000.00. If one excludes any aspect of interest from the allocation of $54,000.00 towards the mortgage loan, then one comes to the conclusion that the Respondent made a 8.31% contribution to the cost of the home. The value of the home was given as $1,084,500.00 by the valuation provided on behalf of the Respondent. There is an outstanding balance on the mortgage on the home of $300,000.00 leaving a net equity in the home of $784,000.00. 8.31% of $784,000.00 is $65,192.00. On the basis of a resulting trust, therefore I hold that the Respondent holds an interest worth $65,192.00 and it is ordered that the Appellant do pay to the Respondent the said sum of $65,192.00 within three months.

The KFC shares

[11] Learned Counsel for the Respondent conceded that the shares belonged to the Appellant exclusively. There is therefore no issue left to the Court as to ownership of the shares, it merely remaining for the Court to reverse the finding in this regard by the learned trial Judge. For the avoidance of doubt, however, I feel that I should record the evidence of the Respondent regarding the shares. The Respondent stated in cross-examination the following:

> "Yes, I know how the defendant acquired the KFC shares. He acquired land from Mrs. Emily Knight and he sold it to KFC in exchange for 10,000 shares.
> "The shares are the joint property of us both.
> "Yes, the shares were in his name solely.
> "They were joint because he sold the land to KFC as an investment for both of us.
> "Yes the defendant told me the shares were joint property"

The learned trial Judge found that Mrs. Emily Knight, the aunt of the Appellant had given the land to the appellant in 1985 as a gift and that such gift was not intended to be to both the Appellant and the Respondent. The learned trial Judge found, on the balance of probabilities, that the Appellant intended that the shares be the joint property of the parties. However, at no point did he find, nor do I find any evidence that the Respondent acted to her detriment on the basis of that alleged expressed intention. I am of the opinion that the learned trial judge erred in his finding that the Appellant made himself the constructive trustee of one half of the KFC shares for the benefit of the Respondent.

The Bank account in the Cayman Islands

[12] The Respondent claimed that she was entitled to one half of the proceeds of the joint bank account in the Cayman Islands and the learned trial Judge so ordered. There was no appeal against this finding of the learned trial Judge and so that order is confirmed.

Costs

[13] In the court below the learned trial Judge awarded prescribed costs to the Respondent based on one half of the value of the matrimonial home, the shares and their proceeds. It was stated in the Grounds of Appeal filed on behalf of the Appellant that it had been agreed that prescribed costs would be awarded to the victorious side based on a value of $60,000.00. I am of the view that neither side could be described as victorious and by far the fairest order on costs would be that

each party bear its own costs both at first instance and in this appeal and I so order.

Michael Gordon, QC
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Hugh Rawlins
Justice of Appeal [Ag.]