

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO: ANUHCV 2008/0371

BETWEEN:

OLIVE TONGE

Claimant

and

**SOTCHSON WHITFIELD TONGE
Also known as SEYMOUR TONGE**

Defendant

Appearances:

Steadroy Benjamin for the Claimant
Jason Martin for the Defendant

.....
2011: December 20
2012: May 16
.....

JUDGMENT

[1] **MICHEL, J.:** This case revolves around a not-untypical Caribbean family of the twentieth century, more particularly in the period prior to the 1970s when family planning was not so popular.

- [2] George Tonge and Olive Tonge were married and had eight children together, although - as with many Caribbean families of that era - there were a couple other children fathered by the husband outside of the marriage.
- [3] The nuclear family unit appeared to have been a closely-knit one, with the husband and wife and their children living together in a family-owned property in Bolans.
- [4] Again, not usually during that period, some of the children headed to New York in search of greener pastures. But in New York, as in Antigua, the closeness among the family members persisted because, even as the brothers (Godfrey, Vernon and Scotchson) - who were the witnesses in this case - migrated to New York, they came together to purchase and renovate an apartment building which became their shared residence and the residence of other family members who travelled to or lived in New York.
- [5] The family bond which developed in Antigua and was transported to New York was repatriated to Antigua when - according to the Claimant's case - a decision was made to construct a new family home in Antigua to be used as a permanent residence for George and Olive Tonge and as a temporary residence for their children on their visits to Antigua.
- [6] It is this return voyage of the family bond to Antigua that is the subject of the dispute between the parties to this case.
- [7] The now-deceased claimant, Olive Tonge, her son and substituted claimant, Godfrey Tonge, her son and witness for the claimant, Vernon Tonge, all say that there was an agreement made by the

family members (with Olive Tonge, Godfrey Tonge, Vernon Tonge and the Defendant participating in the discussions) to purchase a portion of land and to build a dwelling house on it which would become the new family home. They also say that – pursuant to this agreement – a portion of land was purchased in Bolans Village in the name of the Defendant, but paid for by contributions from George and Olive Tonge, Godfrey Tonge and Vernon Tonge, and a US\$500 contribution from the Defendant. They also say that, through their pooling of resources, both in cash and kind, a four bedroom dwelling house was constructed on the land, with substantial contributions coming from George Tonge (\$40,000), Olive Tonge (\$80,000), Vernon Tonge (materials and labour) and Godfrey Tonge (an unspecified amount) and – after the house had been substantially completed – the Defendant did some finishing work on a portion of the building for his occupation, along with a lady friend of his.

- [8] The Defendant, however, denied that there was any agreement to buy land in his name or construct a dwelling house on the land. He says that he purchased the land (on the suggestion of his mother) and paid for it in the following manner (and I am quoting here from "THE FACTS" in the written closing submissions filed on his behalf on 11th January 2012) – "He gave her US\$500 towards this purchase and authorized her (and she agreed) to use the money from the rent that she was collecting for him to continue to make the payments in respect of this property." Of course, the "she" and "her" being referred to is the Defendant's mother, Olive Tonge, and the purchase price of the property being referred to is \$12,598. Then the Defendant says that the dwelling house was constructed on the land by his mother without his permission and notwithstanding his specific demand that she cease construction of it; and that, upon its near completion, his mother told him that she had used his funds from the rent she was collecting for him to build the house for him.

[9] The family bond between the members of the Tonge family appeared to continue through the years, except that the Defendant ended up in dispute with his brothers over their joint property in New York and with his brothers and his parents over the ownership and possession of the Bolans property.

[10] It is for this Court to determine on the evidence presented to it whether it accepts the Claimant's or the Defendant's version of the circumstances leading to the acquisition of the portion of land at Bolans and the construction of the dwelling house on it.

[11] Before dealing with the evidence in the case, I must first address an issue raised by Counsel for the Defendant, first in an application filed on 2nd July 2010, then as a point in limine at the commencement of the trial on 20th December 2011, and then in written closing submissions filed on 11th January 2012.

[12] Learned Counsel sought to argue that the proceedings instituted against him by Olive Tonge and continued by Godfrey Tonge were caught by the doctrine of res judicata and ought therefore to have been or to be struck off, not proceeded with or dismissed, on the basis of the judicial decision pronounced by the court in Claim No. ANUHCV2005/0588. But what was Claim No. ANUHCV2005/0588? To answer this question I will simply reproduce in its entirety paragraph 7 of the written closing submissions filed on behalf of the Defendant:

"As a consequence of the harassment of Vernon Tonge, (Olive Tonge's son and only witness in this matter), the Defendant by fixed date claim form dated and filed on 18th November 2005 brought a claim (ANUHCV2005/0588) against Vernon Tonge seeking inter alia the following relief against Vernon Tonge (the Defendant in #588/05) (1) an injunction to restrain

the Defendant, whether by himself, his servants or agents or otherwise, howsoever, from occupying or otherwise using the said property on parcel 205 as his residence; and (2) damages for trespass."

[13] The Defendant cited and quoted from several English cases with a view to establishing that the judgment pronounced in ANUHCV2005/0588 justified a plea of res judicata as a basis to strike out, not proceed with or dismiss the present case. What is clearly established by all of the authorities, including the case of **Halstead v Attorney General of Antigua and Barbuda**¹ decided by our Court of Appeal on appeal from the High Court in Antigua and Barbuda, is that a party will be estopped by the doctrine of res judicata from re-litigating an issue that has already been determined by a final and binding decision of the court.

[14] In order to invoke the plea of res judicata, it must be established that the matter which one party is seeking to litigate against another party has previously been litigated by the same parties and determined by a final and binding judgment of a previous court.

[15] Having regard to what was earlier-quoted from the Defendant's written submissions as having been the subject of and parties to ANUHCV2005/0588, it cannot reasonably be argued that a case brought by Olive Tonge against Scotchson Tonge (seeking declarations of the Claimant's entitlement to an interest in the house and land at Bolans Village in the Parish of St. Mary and an injunction to restrain the Defendant from evicting the Claimant) has previously been litigated in the suit described by the Defendant in paragraph 7 of his closing submissions.

¹[1995] 50 WIR 98

[16] The Defendant's plea of res judicata is not enhanced or advanced by the submission that the family members of the Defendant knew about his claim to the land and that his mother did not apply under Rule 19.3 (2) (b) of the CPR to be added as a party to ANUHCV2005/0588. This would have required Olive Tonge to make an application to the High Court for permission for her to be added as a defendant to a suit brought by Scotchson Tonge against Vernon Tonge to restrain the latter from occupying or using parcel 205 as his residence and to obtain damages against him for trespass. It is the Defendant who instituted proceedings against Vernon Tong to restrain him from occupying the property in question and to obtain damages from him for trespassing on the property. At the time that the Defendant instituted these proceedings, Olive Tonge was living on the property and had been living there for several years, but the Defendant did not seek to evict her or to allege any trespass by her, why then would she go and find and retain a lawyer with a view to asking a court to make her a defendant in an action for trespass?

[17] The Defendant's plea of res judicata is also not enhanced or advanced by his submission that his mother (Olive Tonge) was served with a notice pursuant to Rule 42.12 of the CPR, and that she did not apply to set aside, vary or add to the terms of the Order of Thomas, J attached to the notice. The fact is that Olive Tonge was not entitled to make any such application - entitlement to do so being derived only from an order of the court directing that the previous order be served together with a notice that the party ordered by the Court to be served is bound by the terms of the order. No such order was made by the Court and it is not open to a party to a suit to simply determine that he will take it upon himself to serve someone who was not a party to the suit and thereby bind that person to the terms of an order made in a suit in which the person was not involved.

[18] The Defendant's plea of res judicata is also not enhanced or advanced by his allegation of his mother being a privy of his brother, Vernon Tonge. Olive Tonge was not a privy of Vernon Tonge on account of Vernon Tonge being her son, her witness, or a co contributor to the construction of the dwelling house on the land at Bolans Village. Olive Tonge's claim against the Defendant was founded on her claim of having sourced, organized the purchase of and paid for (along with her husband) the land on which the dwelling house was located (apart from a US\$500 contribution from the Defendant); and having constructed the dwelling house on the land with her funds, her husband's funds, contributions from Godfrey Tonge and materials and labour provided by Vernon Tonge, and with only some finishing touches undertaken by the Defendant. Besides, Vernon Tongue made no claims whatsoever in ANUHCV2005/0588 so as to determine whether there was any identity in the claims made by him in that prior suit with the claims made by his mother in the present suit; and the attempt by the Defendant to call into service the claims made by Vernon Tonge in the two suits instituted by him against the Defendant - which never got off the ground (having been both shot down by res judicata) - cannot enhance or advance the Defendant's plea. So the Defendant's plea of res judicata, which was dismissed on 12th July 2010, which was not entertained on 20th December 2011 as having been already disposed of, is again denied, although it could merely have been disposed of as being itself caught by the res judicata principle.

[19] Turning now to the evidence in this case, there was the affidavit and viva voce evidence of Godfrey Tonge and Vernon Tonge on behalf of the Claimant and the affidavit and viva voce evidence of the Defendant himself, who called no other witnesses.

[20] Godfrey Tonge testified that he is the son of Olive Tonge and George Tongue, as are his brothers, Vernon Tonge and Scotchson Tongue, and five other siblings; that he migrated to New York in the

1970s, as did his aforesaid brothers; that the three of them lived in New York in an apartment building jointly purchased and renovated by them, and which was like a family home in New York; that in 1990 or 1991 their mother visited them in New York where discussions were held among them and it was agreed that a family home would be built in Antigua where their parents would reside and other rooms would be available to accommodate other members of the family whenever they returned to Antigua on holidays; that their mother negotiated the purchase of a piece of land through government officials whom she knew, which it was agreed would be put in the name of the Defendant; the Defendant contributed US\$500 towards the purchase of the land, while their parents paid the balance of the purchase price. He testified that his brother, Vernon, who was a building contractor, journeyed to Antigua to make all of the arrangements for the construction of the dwelling house; that because the land was recorded in the name of the Defendant, the Defendant had to and did give his consent to the DCA for approval of the drawings for the proposed family home and to commence and complete the construction of the house on the land. His testified that his mother contributed approximately \$80,000 towards the construction of the family home, his father contributed about \$40,000, Vernon purchased most of the building materials for the house and did most of the work on the house, while he (Godfrey) assisted. He testified that construction of the house commenced in 1992 and was completed in 1994; that in or about that same year, the Defendant returned to Antigua and met the house almost completely constructed; that up to that time the Defendant had made no contribution towards the construction of the house; that the Defendant then carried out certain work on the house (using mostly materials purchased by Vernon) in order to ready a room for the arrival of his female friend in Antigua. He testified that shortly thereafter it was noticed that the Defendant's attitude towards their parents and other family members began to change; that the Defendant began to say that he wanted the house since it was built on his land; that he (the Defendant) began to make life unbearable for their mother - cursing,

abusing and maligning her at every available opportunity. He testified that in an effort to resolve the issues, the Parish Priest was called in June 2007 to mediate, but the Defendant appeared to have been unmoved and determined to proceed as he had been. He testified that the Defendant caused a lawyer's letter (dated 27th May 2008) to be sent to his mother demanding that she vacate the property and threatening legal action against her if she did not vacate the property. He testified that his mother replied with a lawyer's letter of her own and then instituted the present proceedings against the Defendant.

[21] Godfrey concluded his affidavit evidence by swearing to the fact that the house is a family home, that he and his siblings are equitable tenants in common of the property, and that the Defendant knows that and knows that the house was built with the resources of the family members and the labour of most of the male family members.

[22] In his oral testimony at the trial, Godfrey testified that he is currently residing at the family home (the subject matter of these proceedings); that he had at some time sent \$10,000 to his mother's account from which she was financing the construction of the house; that he bought a bedroom set and other bedroom furniture for the house; that the reason why they decided to build a new family home was that the previous family home was too small and so a four-bedroom house was built to accommodate everyone; that when the Defendant left Antigua and came to New York, he told him (Godfrey) that he had left his wooden two-bedroom house for his mother to take care of herself.

[23] Godfrey appeared to be relaxed and comfortable when he was being cross examined at the trial, although he seemed anxious to give his version of the events when questions were being asked of him or issues were being put to him by Counsel for the Defendant.

[24] Vernon Tonge testified that he is the son of Olive Tonge and the brother of Godfrey Tonge and of the Defendant; that he, Godfrey and the Defendant all migrated to New York several years ago and worked in the construction industry; that the three of them together bought an apartment building in New York, which they renovated and occupied, along with other members of their family who vacationed or resided in the apartments. He testified that in 1990/1991 their mother came to visit them in New York where it was discussed and agreed that the family would build a new and proper home in Antigua to house their parents in particular and other family members whenever they travelled to Antigua. He testified that it was agreed that the house would be constructed on a portion of land for which their mother had applied through her Parliamentary Representative; that their parents had decided to put the Defendant's name forward on the land and the Defendant gave their mother US\$500 to pay towards the land; that the balance of the purchase price of the land was paid by their parents. He testified that between 1992 and 1994 he purchased building materials, fittings and furnishings for the house and travelled frequently to Antigua, directing the building of and engaging in the construction of the dwelling house. He testified that by 1994 the house was practically complete and enclosed, with only some painting, tiling and finishes to be done on the inside of the house. He testified that in that same year the Defendant returned to Antigua and spoke to their mother about inviting a female friend from the USA to Antigua for carnival, requested whether she could stay in the house with him, and indicated that he intended to fix up a part of the house to accommodate his lady friend; that it was for this reason that the Defendant decided to do some work on the house; that the work done by the Defendant on the house consisted of tiling the front room, painting up the inside of the house and removing and replacing two doors originally installed by him (Vernon); that the Defendant subsequently bought a truck with furnishings which he put into the house, moved their parents out of the room that he

(Vernon) had specially prepared and finished for them to occupy at the front of the house, and the Defendant then occupied that front bedroom and put their parents in a middle bedroom.

[25] Vernon testified that when he questioned the Defendant as to why he was acting that way towards their mother and not communicating with him about what was happening at the property, the Defendant replied to him that the house was his and it was built in his name. He testified too that the Defendant well knew of the plans to build the house on parcel 205 and agreed to the building of the house there for the family to enjoy and to make their parents more comfortable in Antigua.

[26] Vernon asserted that the Defendant's ownership of the land should be deemed to be subject to the rights of the other members of the family by virtue of the common intention and agreement struck in 1991 to acquire the land and to erect a family home on it and on the basis of which a dwelling house was constructed on the land, with the result that the property is valued in excess of \$600,000. He further asserted that, in the circumstances, the Defendant holds the land in trust for the members of the family.

[27] Under cross examination, Vernon appeared to be uncertain about the timing and frequency of the meetings which took place in the course of which discussions were held and agreement was reached about the acquisition of the land and the construction of the family home on it. He was not as composed in the witness box as was his brother, Godfrey, and he seemed intent on challenging Defense Counsel when questions were being asked of him or issues were being put to him. Indeed, it became necessary for the Court to inform him and then to remind him that he could not ask Defense Counsel any questions but could only answer questions asked by Defense Counsel.

[28] The Defendant, Scotchson Tonge, testified that he was one of the eight children of George and Olive Tonge; that he migrated to the USA in 1979, leaving his two-bedroom wooden house in care of his mother; that his mother was to collect and bank the rent, among other things; that this continued up to 1998 and he never questioned his mother's stewardship. He testified that when the house was constructed it was unlawfully placed on government land; that he was ordered to remove it and he did so and located it further into Bolans Village; that in or around 1989 his mother informed him that the government land on which he had been squatting was being developed for sale by the government; that the cost was \$12,598 and she encouraged him to buy it; that on 11th July 1990 he made the initial deposit of \$6,299 towards the purchase of the land by giving his mother US\$500 and instructing her to use the money she was holding on trust for him from the rental of his house to make up the balance; that he instructed her thereafter to apply the rent received towards the payments for the land; that in this manner he eventually paid off the balance of the purchase price of the land and was eventually issued with a land certificate dated 23rd May 2011. He testified that his mother was not being truthful when she had sworn that there was an agreement by family members to put the land in his name or that he only contributed US\$500 to the purchase of the land. He testified that if that were the case there would have been no need to put his name on the land at all; that the name or names of either or both of his parents could have been put on the land; that at the time that the land was bought he was living in New York with his brothers and he had two siblings living in Antigua and that he would therefore have been a very odd choice under the arrangement deposed to by his mother. (More on this later.)

[29] The Defendant testified that he was not a party to any discussions with his mother or any other members of his family about building a family home on his land, although he recalled walking in on a discussion among his mother, his brothers (Vernon and Godfrey) and his sister (Cecilia) on one

of his mother's visits to New York and he was told that his mother wanted to build a house in Antigua, which he thought was a good idea because he knew that his parents' house was not in a good condition, but he assumed that his parents would either renovate or extend their house or build a new house on their land, which was sizeable enough (presumably to accommodate another house).

[30] The Defendant testified that in or about 1995 he was first informed by his brother-in-law (Charles Greene) who was on vacation in New York with his (the Defendant's) sister (Melvina) that a house was being constructed on parcel 205; that he was shocked to learn of this development as his mother had never sought his permission to build a house on the land, and that he would not have given her permission if she had asked. He testified that, upon learning of this, he immediately telephoned his mother to find out what was going on and told her to stop any building that she may have been doing, because he needed his land for when he returned to Antigua to live, as was always his intention. He testified that his mother did not respond to him, except to repeatedly ask him in an angry manner who had told him so, and she never formally acknowledged that she was building on the land. About two to three months later he got a call from Melvina informing him that his mother had resumed construction on his land; that he again called his mother and remonstrated strongly with her and expressed disbelief that after he had already spoken to her she had resumed building on his land; that his mother was not responsive on that occasion; that she was not responsive even when he insisted that she account for the rent collected over the fifteen years that she was in charge of his rental property. He testified that nobody sought his permission to construct a house on his land; that the house was there incomplete when he returned in 1998; that his mother told him that that she had built the house for him but that she wanted to live there; that she said that she had used the money she had saved from the rents she was collecting from him

and that Vernon had given her some money and she had taken some money out of Godfrey's account, which she had to reimburse because Godfrey was angry at her for doing so; that his mother also told him that she and his father had put some money into the house; that she was not specific as to the amounts which she alleged was put into the house; that she suggested that he take over the house and finish it; that she was unable to account for the rent monies that she had been holding for him in trust; that he was upset with her for ignoring his directions and for not being able to account to him for his funds; that he was hesitant about taking any further action as she was his mother; that he withdrew his mother's custody and control over his affairs. He testified that he then put money in the property towards finishing it; that he spent about US\$23,000 at the time to bring the house to living conditions and that he then had to leave to go back to New York.

[31] The Defendant testified that their family house in which his parents then lived was damaged in the hurricane in 1998; that both his parents moved into the partially - completed house on parcel 205; that this was to be so until their house was renovated; that his siblings who reside overseas would stay at the family home or with other relatives when they would have returned home for whatever reason; but that since the partial completion of the house all of them stay at that house. He testified that to date (23rd December 2008) his mother had not rendered account to him for his rent and that she said she put it in the house. He testified that all that time he was in the New York Court going through a financially costly and emotionally painful divorce from his first wife; that at the same time he was experiencing problems with his brothers (Vernon and Godfrey) in New York and that he did not have the time, the emotional energy or desire to begin legal action against his mother. He testified that in a bid to resolve the issue and to obtain peace of mind, he approached Messrs Christian, Lovell, Walwyn, through Mr. Harold Lovell, to obtain a valuation of the property and to seek from his mother the quantum of input, if any, from his siblings, with a view to paying

them out their share; that he did not insist on his strict legal rights then as he was hoping as a family to resolve the matter; that there was no reply to the letter; that meanwhile he was experiencing the derisive and cantankerous behavior of Vernon and Godfrey in the USA and he dreaded the fact that he was facing a similar debacle in Antigua.

[32] The Defendant then recounted his approaches to various lawyers about the matter (after Mr. Harold Lovell, but before Mr. Jason Martin) including Mr. John Fuller and Ms. Mary B.E. White. He also recounted various hostile encounters with members of his family and various actions he took against his parents, including having lawyers' letters sent to them, taking them to Magistrate's Court to evict them from the property, reporting his father to the police and causing him to be taken to the police station for threatening him. He also testified to having caused lawyers' letters to be sent to his brother, Vernon, and to filing a case to be filed against him in the High Court.

[33] The Defendant concluded his affidavit filed in the case instituted against him by his mother seeking, inter alia, a declaration that he holds the property in trust for his parents and siblings, with the following prayer - "In the interest of Justice and fair and, in the protection of my rights to my property and peaceful enjoyment thereof and being fearful for my personal safety, I humbly beseech this Honourable Court to grant the relief sought herein." In other words, he unwittingly urged the Court to rule against him in this case.

[34] In his oral testimony at the trial, the Defendant denied participating in any meetings with members of his family discussing the building of a family home and denied having a conversation with Godfrey about him (the Defendant) leaving his house for his mother to take care of herself.

[35] Under cross examination by Learned Counsel for the Claimant, the Defendant testified that since leaving Antigua in 1979 he never did any repairs on his wooden dwelling house and that his mother was the one who did repairs to the house; that she extended the house, including putting in a kitchen; that it is correct that his mother collected rent for the house for about fifteen years. He denied that the house was rented for \$80 per month and stated that his mother told him that she started to rent it for \$100 per month, but then he conceded that he did tell his lawyer and his lawyer did write to his mother's lawyer a letter dated 22nd October 2003 stating that the monthly rental of the house ranged from \$80 to \$600 per month. He denied that the most rent his mother ever received for the house was \$150 per month. He also denied that, apart from the US\$500 he gave his mother towards the purchase of the land, the rest of the purchase price came from his mother and his brothers, Godfrey and Vernon.

[36] The Defendant testified that he travelled to Antigua almost every year from the time that his immigration status in the USA was regularized in 1987/1988.

[37] The Defendant testified that his father lived in the house constructed on parcel 205 until his death in 2006; that his mother lived in the house until her death in 2009; that before he had obtained an injunction restraining Vernon from going onto the property, Vernon was living in the house whenever he was in Antigua; that before Godfrey had built a house elsewhere, Godfrey lived in the house whenever he was in Antigua. He testified that he did not know who paid for the drawings for the house, who paid DCA for approval of the drawings; he did not know whether Godfrey and Vernon contributed to the cost of building the house; he did not know whether Vernon did most of the work in the construction of the house; he has seen the receipts evidencing the purchase of building materials for the house, many of which are in the name of Vernon and some of which are

in the name of his mother or father, and none of which are in his name; he never disputed the assertion that his mother had contributed over \$80,000 in cash towards the construction of the house. He testified – in response to the concluding question from Mr. Benjamin – that despite of all of that, he wants the house for himself, because his mother told him that she used his money to build the house.

[38] The Defendant did not appear to be comfortable or composed in giving evidence in the witness box. He hesitated in answering several of the questions put to him under cross examination. Sometimes he would look at his lawyer and say nothing for a while after a question was asked of him, as if expecting his lawyer to tell him what to answer.

[39] The two witnesses for the Claimant were eminently more believable than the Defendant - who was the only witness in his case - not only because the evidence of Godfrey and Vernon was mutually corroborative, or because their composure in the witness box was far more convincing, but because their version of the events leading to the purchase of the land and the construction of the dwelling house on it was infinitely more credible than the Defendant's version.

[40] The Defendant attempted to anchor the credibility of his version of events (at least with respect to the purchase of the land) on the incredulity of the land being purchased in his name to build the family home, when the name or names of either or both of his parents or the name of one of his two siblings residing in Antigua could have been used. He testified that he would therefore have been a very odd choice to have the land registered in his name under the arrangement deposed to by his mother (which squared with the version of the two witnesses for the Claimant). But the Defendant may well have been the natural or obvious or even the only choice to be named as the

purchaser of the land, because his parents were already the owners of a house and land at Bolans and may have been consequentially disqualified from purchasing other land at Bolans from government, and the fact that the Defendant was the one who had had his house on the government land to be purchased may at the very least have rendered him best suited if not uniquely positioned to be the named purchaser of the land from government.

[41] What would be incredulous though is if the members of the Defendant's family decided to construct a family home valued between \$373,788 (the Defendant's valuation) and \$600,000 (Vernon Tonge's estimate) on land owned exclusively by the Defendant, without his prior knowledge and consent.

[42] There are also other aspects of the Defendant's version of the events which stretch the limits of credulity, like an entire four-bedroom concrete dwelling house being built on land owned by him over a period of two years (from 1992 to 1994, according to the evidence of the Claimant's witnesses) or up to six years (from 1992 to 1998, according to the Defendant's evidence) without the Defendant getting to know until three years into its construction, and then its construction continuing on his land for a further three years without his approval and despite his direct prohibition. This in the face of the Defendant's evidence under cross examination that from the time he got his papers (which he testified under re examination was between 1987 and 1988) he was travelling to Antigua almost every year. (It is to be noted that although the Defendant appeared to dispute that construction of the house was substantially completed by 1994, he never disputed that it commenced in 1992.)

[43] But the credulity of the Defendant's version of the events goes completely, and with it goes the credibility of the Defendant himself, when he testifies that the purchase of the land and the construction of the dwelling house on it were financed from the rent monies collected on his behalf by his mother. Even if one accepts the evidence of the Defendant that his mother was required to collect the rent on his house and hold the money in trust for him, and even if one proceeds on the basis that the house was always rented throughout the fifteen years that the Defendant said that his mother was collecting the rent on his house, and even if one accepts the position of the Defendant expressed in the letter from his lawyer that the house was rented for between \$80 to \$600 per month, the result would be that – using a median monthly rental of \$340 – the Defendant's mother would have collected on his behalf a total of \$61,200. How then could she have kept a wooden house in repair for fifteen years, finance an extension of the house, including adding a kitchen to it, pay \$12,598 (less US\$500) for the purchase of the land and then finance the construction of a house valued at between \$373,788 and \$600,000, all from a grand total of \$61,200? The incredulity of this proposition and the credibility of its proponent virtually decide this case.

[44] In the circumstances, the Court prefers the evidence of the witnesses for the Claimant over the evidence of the Defendant and is satisfied on a balance of probabilities that there was a common intention of George and Olive Tonge and the eight children of their marriage that a portion of land would be purchased at Bolans Village upon which would be constructed a family home for the use and enjoyment of that family unit; that pursuant to that common intention, a portion of land was purchased by the family in the name of the Defendant upon which a dwelling house was constructed to be the family home of Olive and George Tongue and their eight children; that the aforesaid members of the family (apart from the Defendant) acted to their detriment in expending

money and otherwise contributing (in cash or in kind) to the acquisition of the land and the construction of the dwelling house on it; and that it would be inequitable and unjust for the Defendant to insist on his strict legal rights arising from the fact of the land being registered in his name and the house being affixed to it. Consequently, the Court makes the following orders:

1. It is hereby declared that the portion of land in Bolans Village in the parish of St. Mary's in the island of Antigua, described in the Land Registry as Registration Section: South West, Block: 53-1386, Parcel: 205, together with the dwelling house erected on it, is held by the Defendant in trust for Olive and George Tonge and the eight children of their marriage (including the Defendant) as equitable tenants in common..
2. It is further declared that the Defendant is not entitled, whether by himself, his servants or agents or howsoever otherwise, to remove, eject or otherwise prevent any of the aforementioned family members from use and enjoyment of the aforesaid land and house.

[45] The Court specifically declines to make any award of damages or any order as to costs, the making of which might serve to incinerate an already combustible situation among family members. The Court instead urges the children of Olive and George Tonge who survive their deceased parents to seek to rekindle (in the evening of their years on this side of the grave) the family bond which produced the common intention to build a family home for the use and enjoyment of all of the members of the family.

[46] The following authorities were cited by and provided to the Court by Counsel on behalf of the parties:

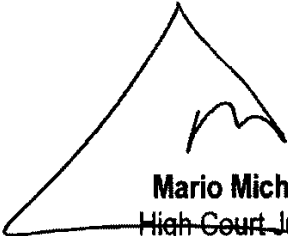
By Counsel for the Claimant -

1. Stack v Dowden [2007] UKHL 17
2. Bull v Bull [1955] 1 All ER 253
3. Falconer v Falconer [1970] 3 All ER 449
4. Gissing v Gissing [1970] 2 All ER 780
5. Grant v Edwards [1986] 1 Ch. 638
6. Abbott v Abbott [2007] UKPC 53

By Counsel for the Defendant –

1. Henderson v Henderson [1843-60] All ER 378
2. Carl Zeiss Stiftung v Rayner (No.2) [1966] 2 All ER 536
3. Arnold and Others v National Westminster Bank Plc [1991] 2 A.C. 93
4. Thoday v Thoday [1964] 1 All ER 351
5. Chief Adjudication Officer v Dowell 139 SJ LB 65
6. Bull v Bull [1955] 1 All ER 253
7. Duncan H.G. Finch v Denfield Christopher (Claim No. ANUHCV1998/0259)
8. Stone v Smith [1886] ChD 188
9. Capital Suisse S.A. v Hentsch Henchoz & Cie (Claim No. BVIHCV2001/0077)
10. Gleeson v J Wippell & Co. Ltd. [1977] 3 All ER 54
11. Wytcherley v Andrews [1871] 2 L.R. 327
12. Nana Ofori Atta II v Nana Abu Bonsra II [1957] 3 All ER 559
13. House of Spring Gardens Ltd. v Wait [1991] 1 Q.B. 241
14. Hunter v Chief Constable of the West Midlands Police [1982] A.C. 529
15. Time Group Ltd v Computer 2000 Distribution Ltd [2002] EWHC 126
16. Re Dellow's Will Trusts [1964] 1 All ER 771
17. Elitestone Ltd v Morris [1997] 1 W.L.R. 687
18. Ramsden v Dyson [1865] 1 L.R. 129
19. Savva and Costa v Harymode Investments Ltd (1980) 1977 S 8198
20. Blue Haven Enterprises Ltd v Tull [2006] UKPC 17.

[47] The Court applauds Counsel for both the Claimant and the Defendant for the industry and enterprise which they clearly manifested in the conduct of their cases on behalf of their respective clients.



Mario Michel
High Court Judge