



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION 2011: No. 161

**BETWEEN:**

**BARBARA DIANA MARY LAMBERT**

**-and-**

**MYRON ADWIN PIPER (As trustees of the Kwanza Trust)**

**Plaintiffs**

**-and-**

**DARNELL TODD-WYNN**

**Defendant**

**Date/s of Hearing: 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> March 2012**

**Date of Judgment: 10 January 2013**

**Ray DeSilva of Conyers Dill & Pearman, for the Plaintiffs**

**Jai Pachai of Wakefield Quin for the Respondent.**

### **JUDGMENT**

1. The Plaintiffs are Barbara Diana Mary Lambert and Myron Adwin Piper (as Trustees of the Kwaanza Trust). By a specially endorsed writ the Plaintiffs claim "*inter alia*" an order for possession, rent and compensation / mesne profits, and damages to be assessed.

2. The Statement of Claim '*inter alia*' states:-

The Trustee holds the legal title to the property, Unit 1 "Grotto Heights", 20 Blue Hole Hill, Hamilton Parish ("the Property").

That Mrs. Wynn is presently the tenant who is currently residing (holding over after the termination of the tenancy) with her children at the Property.

3. Mr. Myron Adwin Piper ("Mr. Piper") filed a Witness Statement and testified in these proceedings on behalf of the Trust.

4. The Defendant Darnell Todd-Wynn ("Mrs. Wynn") is sued personally. She is presently residing with her children in the Property.

5. By her defence and counterclaim Mrs. Wynn denied "*inter alia*" that the Plaintiffs have beneficial ownership of the Property. She claims "*inter alia*":-

a declaration that the legal and beneficial estate of the Property is held upon constructive trust by the Plaintiffs on trust for her benefit;

an assessment of the purchase price to be paid by her for reclaiming the property taking into account the rents paid by the tenants and by her and the tenants; and

the cost of repairing the "illegal and destructive excavation" carried out by Mr. Piper.

6. Mrs. Wynn filed a witness statement and testified on her own behalf in these proceedings. Her two sons filed joint witness statements. In addition, her son Michael Paynter, gave evidence on behalf of the Defendant.

## **Backdrop**

7. This case came before the Courts for trial in March 2012. The Court heard evidence and submissions over three days. When the matter was first filed with the Courts it concerned two questions. However, before the trial commenced the parties had resolved the first issue and the Court was now called on to address the second issue.
8. At the commencement of the trial the parties informed the Court that they have agreed that the Court should proceed on the basis that the Defendant's claim that the Plaintiffs hold the Property for the benefit of the Defendant had been resolved. The resolution gives effect to the Defendant's claim based on constructive trust and the court can proceed to declare that the legal and beneficial estate of the property is in law and/or in equity held by the Plaintiffs upon constructive trust by the Plaintiffs on trust for the benefit of the Defendant. In keeping with this agreement the court hereby declares that the legal and beneficial estate of Unit 1 Grotto Heights, 20 Blue Hole Hill, Hamilton Parish is in law and or in equity held upon constructive Trust by the Plaintiffs on Trust for the benefit of the Defendant.
9. At the end of the hearing the Court informed the parties that delivery of the judgment would not be immediate. Because of the delay prior to finalizing this decision the Court had a transcript of the entire trial including Counsel's prepared submissions. Consequently, notwithstanding the delay, the Court had the benefit of and considered together with the Court's notes the full record of the evidence that was before it at the trial.
10. The competing issues for the court are:-

Whether the Plaintiffs are correct that in order for the Defendant to have the property conveyed back to her she should pay the Plaintiffs \$1,075,000.00 on the basis that in July 2008 the trust purchased the Defendant's property for \$1,000,000.00. Additionally, whether the Defendant is liable to pay the Trust \$75,000 for the refurbishing works carried out by Mr. Piper to improve the property.

11. Mr. Desilva argues that the evidence will show that the Defendant has never had any positive equity in terms of her beneficial interest in the Property. The question is how we get to a figure that puts the Plaintiffs back in the position that they should have been in, if everyone had lived up to their responsibilities under this arrangement.
12. On the other hand the Defendant seeks an Order that she be allowed to pay the Plaintiffs \$850, 00.00 the market value of the property when it was valued in February 2012 prior to the commencement of the trial.
13. The task of the Court is to:-
  - (a) Settle on the price which the Defendant should pay to buy the Property back;
  - (b) Determine what amount, if any, she should pay for the refurbishing works carried out on the Property by Mr. Piper; and
  - (c) Assess the amount, if any, to be paid by the Plaintiffs in respect of the Defendant's claim against the Plaintiffs for the cost of repairing the "illegal and destructive excavation" carried out by Mr. Piper.

### **History**

14. Mr. Piper and Mrs. Wynn testified on behalf of the Plaintiffs and the Defendant respectively.  
They filed witness statements, which constitute their evidence in chief, and each was cross-examined. Mrs. Wynn called one witness her son Michael Paynter.
15. Whenever there is a conflict in the evidence of Mr. Piper and Mrs. Wynn I prefer the evidence of Mrs. Wynn. I find her to be believable. She testified in a very straightforward, un-convoluted and convincing manner.

16. The evidence shows that Mr. Piper and Mrs. Wynn were in a romantic relationship from November 2006 to April 2009. The pair discussed plans, which they would pursue as a couple.
17. Mrs. Wynn shared with Mr. Piper that she owned the Property for over 20 years. She and her former husband had owned the property which is a two unit condominium company. They had a mortgage with Capital G. Her sister owns one of the condominium units. Her ex-husband eventually left the Island leaving her with significant debts; subsequently she had to take on the responsibility for repayment of these debts.
18. I accept the evidence and find as a fact that early in their relationship it was the common intention of the parties to renovate the Property and eventually live there as a couple. In keeping with their intention Mr. Piper prepared some plans. The Plaintiff produced a set of plans which he said were the architectural plan that he had prepared when he and the Defendant were actually considering purchasing the sister's unit and living in it at some future time. Mr. Piper said, "We had Shy Architects come up to the property and they actually measured both apartments and drew up this scheme as to how we can join the two apartments into one". The Defendant had owned both apartments at one time and she wanted to get the apartment her sister had back at some point. The plan is the outline of the discussions he and the Defendant had about that. I accept the evidence that the works go back to 2007 and were done while they were in a romantic relationship. Mrs Wynn also accepted that not all the works were of a cosmetic nature.
19. In due course, Capital G asked the Defendant for repayment of the arrears. Capital G was pressuring her to sell the Property because she had a number of debts, which they were not prepared to refinance. Capital G was pursuing an order from the courts for foreclosure after denying an application to refinance the Property with Mr. Piper offering to be the sponsor.
20. By June 2007, Mr. Piper suggested to Mrs. Wynn that she should seek alternative financing and that he would help her to do so. The Defendant successfully secured a stay of the Capital G proceedings until she secured re-financing.

21. Mr. Piper suggested that he seek refinancing of his Mount Area property in St. David's and she should transfer the Property into the Kwaanza Trust where it would be better protected. In 2007 the Property was valued at \$1.2 million. Mr. Piper, a builder by profession, suggested that the Defendant should move out of the Property and rent it. Before renting it he would carry out the necessary refurbishing so that they could secure an executive rental. Mr. Piper secured a rental for two years from July 2007 to June 2008 at \$6,500.00 monthly and, July 2008 to June 2009 at \$6,750.00 monthly.
22. HSBC agreed to refinance the Plaintiffs in the amount of \$2.4 million part of which related to the Grotto Bay Property in order to pay off the indebtedness at Capital G. As part of the refinancing arrangement in July 2008 the legal title of the Property was transferred into the name of the Plaintiffs for \$1 million. The Defendant's salary was included in the application process. The Defendant is jointly, severally and personally liable to HSBC for the amount of \$2.4 million. The loan facility is across two mortgages \$1,733,750 against 11 Mount Road and \$666,250 against the Grotto Heights Property.
23. The level of the Defendant's default to Capital G was about \$80,000.00 at the time of the pay out to settle the Capital G's account. From the proceeds Capital G received \$921,541.43.
25. The parties' relationship ended in 2010.

**Plaintiffs claim for renovations**

26. In paragraph 15 and 16 of his witness statement Mr. Piper testified that he carried out extensive renovation works on the Property comprising \$75,000.00. He produced a schedule of items listed 1 through to 12, which he had put together. These works included repairing the roof, removing the skylights, replacing exterior door, fencing the grounds and landscaping. The internal work included refitting the kitchen to a higher standard, as well as the master bedroom and bathroom, installing air conditioning units in three of the bedrooms and refinishing the ceilings throughout; replacing the electrical system and the washing machine, ceiling fans and lighting fixture. The interior was completely repainted

with two coats of paint. He said that he and the Defendant agreed to rent out the Property and in order to get an executive rental certain repairs or capital works had to be effected and the schedule of items pertains to having those works done. In response to Mr. Pachai's question in cross-examination as to when he prepared the actual invoice he replied that the actual invoice was done some time ago, rough handed and he retyped it just this last week after the witness statement of the 28<sup>th</sup> February. He agreed that except for items 3, 5 and 6 no invoices have been produced for any of the other items. Mr. Pachai concluded that the Defendant accepts that some items were done, some were not done properly and, some items were not done at all.

27. The Property is in a two apartment condominium complex. Mr. Piper said, of the work he did Grotto Heights was responsible for 2/3 of the exterior works. The work carried out was in the region of 105,000.00. He has not received any monies because at one point they had an agreement with the Defendant's sister to purchase her apartment sometime in the future and when he spoke to her sister she told him that "we could settle up the expenses, when we do the purchase". We had an option to actually purchase Unit 2.
28. On 22<sup>nd</sup> February 2012, HSBC sent a notice, which shows the Kwaanza Trust loan account with HSBC was in arrears of \$386,000.00. Mr. Piper blames this on the fact that Mrs. Wynn had not met her obligations.
29. The Defendant submits that she made payments from 2009 to September 2011; the accounts show a consistent pattern of payments made by the Defendant between \$1,200, \$1,500 and \$5,000 after she took occupation in May 2010. Although the evidence of the payments is not precise nor was there the fullness of detail it was competent enough to satisfy the court that she met the payments required by Mr. Piper.
30. Rents were paid by two tenants from 2007 to 2010 until the last tenant vacated in April 2010.

31. Mrs. Wynn testified that she moved into the Property after the last tenant vacated. It was agreed that she would pay \$5,000.00 monthly as rental. She stopped making payments in September 2011, after Mr. Piper broke into the house, threatened to sell the Property. If one looks at the calculation from September 2011 to March 2012 (the hearing began in March 2012) gives a total of \$30,000.00. In my opinion it would be inequitable to have the Defendant reside in the Property and not defray the cost of the monthly mortgage in the sum agreed by the parties. It is right and just that the payment of \$5,000 monthly should be accounted for otherwise Mrs. Wynn would be living rent free for the period after the parties ended the relationship and the Plaintiffs continue to bear the burden of her not paying her share of the mortgage payment yet get the benefit of the Plaintiffs carrying the full brunt of the mortgage payments. Having regard to Mr. Piper's conduct of breaking into the apartment and having threatened to evict Mrs. Wynn I find that Mrs. Wynn should not be penalized with any arrears or penalty charges. I leave it to Counsel with the help of HSBC, if necessary, to try and assess and agree the amount that Mrs. Wynn ought to have paid which should be added to any amount assessed as the repurchase price. It would be inequitable to have her reside in the Property and not defray the cost of the monthly mortgage at the time agreed by the parties.
32. Mr. Pachai for the Defendant submits that the operative date for the assessment of the value of the Property is the current market value of the Property which is \$850,000.00. It should not be assessed by reference to the 2008 valuation of the Property as suggested by Mr. Piper. She is asking that she be should be allowed 90 days within which to raise the capital to pay this amount. She will vacate the Property if she cannot raise sufficient funds to buy back at the price set by the Court.
33. Further, Mr. Pachai is asking the Court to deduct the amount of \$60,000.00, which is the costs that the Defendant will have to pay in order to put right the illegal excavation, which was done without planning permission and has caused a dangerous state of affairs to exist at the Property. \$60,000.00 is the amount Woodbourne Associates, the quantity surveyor, states in their Report as the cost of correcting the illegal and destructive excavation carried out by Mr. Piper.



34. In addition to the \$850,000.00 Mr. Pachai submits that Mrs. Wynn expects to pay her share of stamp duty and conveyance fees. Also, the Defendant seeks an order that Mr. Piper uses his best efforts to obtain the release of the Defendant from any personal liability in return for the payment of \$850,000.00.
  
36. On the other hand, Mr. Desilva on behalf of the Plaintiffs submit that the Plaintiffs and the Defendant start from a somewhat similar place but they differ in the end result. In order to make the trust whole the Defendant should pay the Trust \$1,075,000.00. It is not disputed that there was a Capital G mortgage against the Defendant's Property that was paid off by an HSBC mortgage that was held by the Trust. Looking at that initial transaction takes us down the Plaintiffs route in establishing the amount to be repaid. Monies were borrowed to pay off the Capital G loan and all the expenses and thereafter to have that mortgage serviced in two parts. The Grotto Hill Property portion of the payments required about \$7,500 per month to be paid the balance of some \$17,000 was to be paid by Mr. Piper. The Grotto Heights property was rented out and there was a supplement paid by the Defendant to make up this \$7,500 per month.

### **Court**

39. Regarding the Plaintiff's claim of \$75,000.00 for refurbishing work carried out on the property, the evidence of Mr. Piper has left me in doubt that he spent \$75,000; except for three invoices he has not produced any contemporaneous documents supporting his claim. I can find no evidence to show that there was an agreement that the Defendant should pay for the refurbishing work that was carried out.
  
40. No invoices were produced at the time and it was only during the hearing that Mr. Piper tried to support this claim. The Plaintiffs were not the owners of the Property and, Mr. Piper commenced the work in 2007 when the parties declared their intent to live together as a couple.
  
41. It is not an unreasonable inference to draw from the evidence of the parties conduct in 2007 that there would be no claim for the costs of the work carried out by Mr. Piper. No claim

was made from Mrs. Wynn, until the relationship ended, or to date her sister, the owner of Unit 2.

42. Ms. Wynn made the point that had the romantic relationship not been terminated there would be no invoices from Mr. Piper for the work.
43. In my judgment the same is to be said of Mrs. Wynn's claim in seeking a repayment of \$60,000.00 to put right the "illegal excavation" that has devalued the property. In my judgment she would not have made any claim had the relationship continued.
44. Now, I turn to assess how much the Defendant should pay to have the property conveyed back to her. The parties have referred the court to a number of authorities I do not propose to reiterate the authorities although I have had regard to each one.
45. Mr. Desilva submits that the circumstances in this case give rise to an equitable lien for the \$1 million purchase price in favour of the Plaintiffs; as a result while the market price of the property has fallen it should not be taken to value the total sum payable. Mr. Desilva stressed that a trustee's equitable lien does not rise and fall with market price. This case differs from the authorities that look to determine respective beneficial ownership in properties that the parties have lived in, and where the legal title is in the name of one of the parties but both have made contributions. This is not that sort of a case.  
With due respect to the proficient argument of Mr. Desilva, I believe that the issue in this case requires the court to determine the true intention of the parties when they were in their romantic relationship. This determination is fact-specific and fact-sensitive and requires consideration of all the evidence before the court.
46. In my judgment, here we have a man and woman – his mistress – they intend to set up home together, and took steps to put that into effect. Although the relationship lasted for a short period the principles are no different from a husband and wife who built a home together and thereafter separated. The test is an objective one. What reasonable inference would a reasonable man draw from the words and conduct of these two individuals?

47. It is clear on the facts that the parties were levelheaded and conceded that the Plaintiffs held the Property on constructive trust for the Defendant.

48 Mr. Pachai referred the court to a line of authorities which dealt with the question of the effective date of attributing the value. It is without doubt that the courts are not prepared to go back to the date of separation or as Mr. Desilva submits the date of acquisition.

In Walker V Hall [1984] FLR 126, [1984] Fam. Law 21, 127 Sol Jo 550 held that the trust for sale did not end when cohabitation ceased, but continued until such time as either the property was sold in execution of the trust for sale or one party, by buying out the other, became solely and absolute entitled property in equity. There is no reason by the Plaintiff's interest in the house be valued at the date when she left. See also Turton v. Turton 1988 Chancery 542.

49. It is therefore ordered and declared that the legal and beneficial estate of Unit 1 Grotto Heights, 20 Blue Hole Hill, Hamilton Parish is in law and or in equity held upon constructive Trust by the Plaintiffs on Trust for the benefit of the Defendant. It is further ordered that the Defendant should pay the Plaintiffs \$850,000.00 the market value (assessed in February 2012). The parties should bear their respective share of the stamp duty and conveyance costs. Mr. Piper is to use his best efforts to obtain the release of the Defendant from any personal liability in return for the payment of \$850,000.00. The Defendant has 60 days within which to raise the capital to pay this amount. She will vacate the Property if she cannot raise sufficient funds to buy back the property. The claim by the Plaintiffs and the Defendants for renovation of the property is rejected.

50. The cost of this application shall be the Defendant's to be taxed or agreed.

Dated this                      day of January 2013

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Norma Wade-Miller

Puisne Judge

