

("Mr. Piper"). Because of the manner in which the matter came to be argued before the trial judge, it is important to start with the pleaded cases of the respective parties.

2. It was common ground before the trial judge that by 2008, Ms. Wynn was having difficulty meeting her mortgage obligations, and the mortgagee, Capital G Bank, had called the mortgage, and had issued proceedings seeking possession of the property. Ms. Wynn was attempting to refinance her mortgage, but was experiencing difficulty in this regard.

The Pleadings

3. Paragraph 6 of the Statement of Claim refers to Mr. Piper having arranged for the Appellant trustees to obtain financing with a view to purchasing the property from Ms. Wynn, using another property owned by The Kwaanza Trust as collateral. Paragraph 7 then refers to a sale and purchase agreement having been entered into on 20th June 2008 between Ms. Wynn as vendor and the Appellants as purchasers of the property, with a purchase price of \$1,000,000. The Statement of Claim indicates that there was a deposit of \$100,000 with a balancing payment of \$900,000.

4. Paragraph 8 of the Defence agrees in terms that the property was sold to the Appellants for a purchase price of \$1,000,000 in July 2008.

There is a denial in regard to the payment of the deposit, but that is not relevant for the purpose of this appeal.

5. Paragraph 16 of the Statement of Claim refers to an offer made on behalf of Ms. Wynn by her attorneys to buy back the property for \$900,000, less the cost of restoration, Ms. Wynn having alleged that Mr. Piper had undertaken illegal and

extensive excavation which had affected the value of the property adversely. Paragraph 16 continues with the statement that Ms. Wynn's offer to purchase the property was rejected. Paragraph 18 of the Statement of Claim refers to Ms. Wynn's claim to have beneficial title to the property, coupled with an offer to buy the property for \$900,000.

6. The Defence then refers to the arrangements which Mr. Piper and Ms. Wynn made for the property to be rented, and the fact that Ms. Wynn was to make a payment of \$1,500 per month to make up the shortfall between the rent received and the mortgage payment due. There are further matters pleaded which are not relevant at this stage, and then in paragraph 13 of the Defence, there appears a plea that the Appellants hold the property as constructive trustee for the benefit of Ms Wynn. No particulars are given as to how a constructive trust came to be established, and the plea is immediately followed by an admission that Ms. Wynn had offered to buy back the property from the Appellants for the sum of \$900,000 less the cost of restoration. The paragraph continues by referring to an offer said to have been made by Mr. Piper that he would settle for \$850,000. A buy back does not appear to be consistent with a constructive trust.
7. There is then a Counterclaim made in paragraph 16 of the Defence and Counterclaim, averring that the Appellants held the property as constructive trustee on trust for the benefit of Ms Wynn "for the reasons set out in the foregoing paragraphs." No such reasons had been advanced anywhere earlier in the pleading. However, later in that same paragraph appears the following plea:

"Significantly, he did not purchase the property at market value but simply for the cost of transferring the mortgage and the associated legal costs to do so. During the course of the parties' relationship, there was a mutual sharing of their assets, with a mutual understanding and agreement that the

Grotto Heights property would be transferred into Piper's Trust as a home for the parties in the long term. The Defendant did not transfer her home to Piper as a sale for his benefit. The parties were always going to live in the property."

8. The Appellant's reply and Defence to Counterclaim starts with a denial that Ms Wynn has a beneficial interest in the property, and then carries on to say (paragraph 1) that "There was an option for repurchase of the said property by the Defendant which has now expired as set out below." There is nothing in the pleading to indicate the terms of the option, save a reference in paragraph 9, where it is pleaded that the option "passed in June 2010." Importantly, no figure is given for the cost of exercising the option and neither is there a formula by which this can be calculated.
9. The pleading refers to the various offers and counter offers already referred to, and then in paragraph 16 avers that Ms Wynn "failed to obtain adequate financing to exercise the option to repurchase the Demised Premises/Grotto Heights property at the \$1.1 million price", said to compromise a purchase price of \$1,025,000 (not \$1,000,000) and \$75,000 for subsequent renovation work.
10. Paragraph 20 of the Defence to Counterclaim denies that Mr. Piper and Ms. Wynn shared assets or had any long term plan for the property to be a home for the parties, and then carries on to refer to the purchase of the property having been made "simply to avert the foreclosure and subsequent sale on the open market" by Capital G Bank, and then averring that "There was simply an option for repurchase by the Defendant as set out below." Details of the alleged option appear in the following paragraph with the purchase price apparently being set at \$1.025 million, and with the option being exercisable by June 2010.

Counsel's Agreement

11. When the matter came on for trial, counsel for the parties indicated to the trial judge that the issue of a constructive trust had been settled. For Ms Wynn, Mr. Pachai said to the judge "So the position now is that the Plaintiff holds the property in constructive trust for the benefit of the Defendant." Confirming that there was agreement in that regard, Mr. Pachai continued "So the question that Your Ladyship will have to decide is how much the Defendant should have to repay to the Plaintiff in order to have the property conveyed back to her." However, Mr. Pachai then made the issue of the re-conveyance of the property to Ms Wynn subject to the following caveat. He said that he would be asking the Court "to assess the price for which she should buy the property back. I will be asking Your Ladyship to give her sufficient time, once the price is established, to raise the necessary financing." However, he then continued "And depending on what Your Ladyship decides as the price, she will need that time to raise the financing and decide, frankly, whether or not she wishes to proceed, to have the property back." In answer to the learned judge's question as to what would happen if Ms Wynn decided that she did not wish to repurchase the property, Mr. Pachai indicated "Then the property will stay where it is," and in answer to the learned judge's further question as to whether Ms Wynn would still have an interest, Mr. Pachai responded "Well, she doesn't have an interest." Mr. Pachai carried on to say "So currently, the legal title is held by the Plaintiff and the position will be that we will ask for a transfer of that title to the Defendant...if she's able to raise the financing, or willing to proceed – and willing to proceed with the purchase back of the property."

12. So the basis upon which matters then proceeded before the trial judge was not on the basis that the Appellant trustees held the legal title in the property on trust for Ms Wynn, but that MS Wynn effectively had an option to repurchase the property, the exercise of which depended both upon her ability to obtain financing, and the price to be fixed by the trial judge as representing the value of the property. This seems to accord with the reference to an option made by the Appellants, and referred to in paragraph 8 above, albeit that the option there referred to was set to have expired in June 2010. As I have indicated, there is no figure given in the pleadings for the cost of exercising the option, and neither is there a formula by which this can be calculated. The parties appear to have agreed that the option figure should be calculated by the judge, and the learned judge appears to have accepted her role, in paragraph 13 of the judgment, where she set out the task of the Court in the following terms:-

- (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 to the Defendant's claim against the Plaintiffs for the cost of repairing the "illegal and destructive excavation" carried out by Mr. Piper.

13. So in practical terms, the plea on behalf of Ms Wynn which was based on a constructive trust for her benefit (in support of which there is in any case no factual basis pleaded) does not appear to have been argued before the learned judge. It was presented to the learned judge as an agreed position that the outset of the trial, notwithstanding, first, that there was no pleaded basis to support a finding of a constructive trust, and, secondly, that the matter proceeded thereafter on a basis inconsistent with a constructive trust, namely that the

Respondents had the benefit of an option, the exercise price of which was to be set by the learned trial judge.

14. In considering whether the Plaintiffs' claim of \$75,000 for refurbishing works carried out on the property and the claim of \$60,000 by Ms Wynn to put right the "illegal excavation", should be allowed, Wade-Miller J. held:

39. Regarding the Plaintiffs' 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 \$75,000.00; except for these 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 overseers of the property and, Mr. Piper commenced the work in 2007 when the parties declared their interest 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 Ms. Wynn, until the relationship ended, or to date her sister, the overseer 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 Ms. 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.

15. I can see no reason for interfering with Wade-Miller J. decision in not allowing the claim either by the appellant or the respondent.
16. In assessing how much the respondent should pay to have the property conveyed back to her, Mr. Perinchief for the appellant submitted that this was not a market price situation.

17. The plaintiffs submitted that in order to settle Ms Wynn's default to Capital G in order to save the property for Ms Wynn, the Kwaanza Trust Account was prepared to settle the Capital G Account and that Capital G received \$921,541.43. It was also agreed that the property should be transferred into the Kwaanza Trust.
18. It was also submitted by the appellant that in order for the trust to recover the money paid to Capital G the respondent should pay to the Kwaanza Trust the amount paid by the Trust, \$921,541.43 to transfer the property to MS Wynn.
19. The issue was whether the market value assessed at \$850,000 by the trial judge is the method to be used in assessing the amount to be paid by Ms Wynn.
20. It appears that the learned trial judge treated the matter as a matrimonial relationship in arriving at an assessment at the market value. It was not matrimonial property. There was to be no division of matrimonial assets.
21. The property was transferred to Kwaanza Trust and not to Mr. Piper. It was not transferred by way of a sale and purchase but a way out to avoid a foreclosure by Capital G. The Trust should not in those circumstances suffer a loss.
22. I would hold that the proper assessment would be for the appellant, the Trust, to recover the amount of \$921,541.43 the sum paid to Capital G for the transfer of the property to Ms Wynn.
23. The property was rented out from 2007 to April 2010. Ms Wynn moved into the property after the last tenant vacated. It was agreed that she would pay \$5000.00 monthly as rental.

24. On March 24, 2014 when the appeal came before the court, it was agreed that Ms Wynn owed the appellants rental in the sum of \$105,000 which has not been paid.
25. The order that Ms Wynn should pay the appellants \$850,000.00 is varied to one of \$921,541.43, omitting the words, the market value (assessed in February 2012) and the figure of \$850,000 wherever it appears in the Order and substituting the figure \$921,541.43.
26. In all other respects the Order remains the same.

Signed

Zacca, P

BAKER, JA

1. I agree that this appeal should be allowed and with the order proposed by Zacca P. Whilst the judge preferred the evidence of Ms Wynn to that of Mr. Piper there are limited findings of fact on which to form a conclusion as to the appropriate figure for Ms Wynn to pay in order for the property to be reconveyed to her.
2. The judge identified the threefold task of the Court as:
 - 1) Settling the price Ms Wynn should pay to buy back the property
 - 2) Determining the amount, if any, she should pay for the refurbishing work carried out on the property
 - 3) Determining the amount, if any, to be paid by the Trustees in respect of Ms Wynn's claim for the cost of repairing the "illegal and destructive excavation" carried out by Mr. Piper.
3. Like Zacca P I can see no basis for interfering with the judge's conclusions on the second and third issues which were based on clear findings of fact.
4. The essential background to the first issue is that in the summer of 2007 Capital G, who were then Ms Wynn's mortgagors, were pursuing foreclosure because she was in financial difficulty. Mr .Piper managed to arrange refinancing of the property through HSBC. The property was conveyed to Kwaanza Trust who paid off Capital G in the sum of \$921,541.43. Ms Wynn was a guarantor of the new mortgage between HSBC and Kwaanza Trust.
5. The critical question seems to be to be what was agreed either expressly or by implication between Ms Wynn and the Kwaanza Trust about a possible repurchase of the property by her. The judge makes no findings about this but instead refers to determining "the true intention of the parties when they were in their romantic relationship". The judge was wrong in my view to approach this on

the basis of a matrimonial relationship. It was the Kwaanza Trust that had paid off Capital G and not Mr. Piper.

6. At the hearing before the judge, at the instigation of both sides, the judge declared that the legal and beneficial estate of the property was in law and/or in equity held by the Kwaanza Trust on constructive trust for the benefit of Ms Wynn. I regard this as something of a red herring because the case proceeded on the basis that she had an option to purchase the property at a price to be fixed by the judge. The issue was the basis on which the price should be fixed.
7. The judge held that Ms Wynn should pay the market value of the property at the time of the hearing, March 2012, namely \$850,000. The market value today maybe more or less. The market value approach seems to me somewhat at odds with the concept that the property is held in trust for Ms Wynn. I prefer the approach submitted by Mr. Perinchief on behalf of the Kwaanza Trust that the Trust should recover its in outlay in paying off Capital G and that accordingly \$921,541.43 in the sum Ms Wynn should pay for re-transfer of the property. That seems to me to accord must closely with the implicit agreement of the parties.

Signed

Baker, JA

AULD, JA

For the reasons given by Zacca P and Baker JA, I agree that the appeal should be allowed so as to substitute the order proposed by Zacca P.

Signed

Auld JA