

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 86 OF 1992

BETWEEN MARY ANN CHRISTIE PLAINTIFF

AND FERDINAND RILEY DEFENDANT

CONSOLIDATED WITH

SUIT NO. E114 OF 1992

BETWEEN FERDINAND RILEY PLAINTIFF

AND MARY ANN CHRISTIE DEFENDANT

Nesta Claire Smith for Mary Ann Riley instructed by Ernest Smith & Co.

Mrs. Gloria Langrin for Ferdinand Riley.

Heard on the 12th day of July 1999, and the 11th day of April, 2000 (Written submissions completed 18th January, 2000)

JUDGEMENT

COURTENAY ORR J

The Background

Mary Ann Christie was a contributor to the National Housing Trust an organization set up by the Government of Jamaica to assist lower and middle income persons in becoming proprietors of their own houses. In 1980 she was given the right to obtain a housing unit in the Fern Grove Housing Scheme in Saint Ann. An agreement was signed that same year between the National Housing Trust on the one part and Miss.

Christie and Mr. Riley on the other by which the unit was purchased on mortgage in their joint names as tenants in common. That unit is known as Lot 161 Buckfield Mansfield Ocho Rios, St. Ann and is registered at Volume 1169 Folio 176 in the Register Book of Titles (Fern Grove)

By her originating summons Miss. Christie seeks an Order:

- “1 Declaring that she is the legal and equitable owner of Lot 161 Buckfield, Mansfield, Ocho Rios, Volume 1169 Folio 176
2. That the Defendant (Ferdinand Riley) has no legal or equitable interest in the said property registered at Volume 1169 Folio 176.
3. That the Registrar of the Supreme Court be empowered to sign any documents, deeds, titles, papers, or other documents in relation to the said premises.”

Mr. Riley on the other hand by his originating summons seeks an order in the undermentioned terms; that is to say, that the court:

- “1. DECLARE the shares to which the Plaintiff (Ferdinand Riley) is entitled in the premises registered at Volume 1169 Folio 176.
- 2 ORDER That (a) the said premises Registered at Volume 1169 Folio 176 be sold.
 - (b) That subject to the costs of transfer being paid the proceeds of sale be divided between the parties in the proportion declared by the Court.

- (b) That the Registrar of the Supreme Court be empowered to sign the Transfer.
- (c) That the Plaintiff deliver the said Title to my Attorney-at-Law.
- (e) That my Attorney-at-Law LANGRIN, PARIS-WOODSTOCK, have the Carriage of Sale of the said premises.”

Appendix C to the National Housing Trust Act (The National Housing Trust (Housing Benefits) Order 1979, contains the following provisions at paragraphs 6 (3) and 6 (5).

- “(3) Where a contributor selected for a home acquisition loan so elects he may, for the purposes of the loan, request the Trust to Treat as part of his earnings or emoluments as the case may be, the earnings or emoluments of such members of his family as signify their consent thereto in writing and as are approved by the Trust, and in addition, for the purposes of making the calculation of the loan request the Trust, to base the calculation aforesaid on the age of one of the said members of his family instead of his own age.
- (5) For the purposes of this paragraph, in relation to any Contributor’ -

“Spouse” includes, where the Trust is satisfied that it should be construed - ...

- (b) In the case of an insured person who is a single woman or widow, a single man or widower living with her as if he were her lawful husband.”

The following facts are common ground between the parties:

Miss. Christie had been living in the house of Mr. Riley at Charles Town Saint Ann which is about a mile from St. Anns Bay since 1971. In 1980, while still living there she successfully applied to the National Housing Trust to purchase the housing unit mentioned above.

During an interview which led to her selection, she was informed by an official of the National Housing Trust that because of her age and basic salary she needed “someone to countersign the application in order to benefit.” Mr. Riley co-signed the application with her.

Miss. Christie worker at the Parish Council from 1976 to 1981 in a temporary job. Her salary was then \$40.00 per month: When she left the job at the Parish Council she remained unemployed for a while. She later obtained a job at Iona High School. This was a permanent job which enabled her to have a National Insurance number. Miss. Christie moved into the house at Fern Grove. With the assistance of her children she made substantial improvements to the house.

Sometime about 1988 Miss. Christie deposited the sum of \$15,000.00 with Mr. Howard Hamilton Attorney-at-Law. This was intended to be paid to Mr. Riley. The payment was subsequently withdrawn.

Miss. Christie's Case

Her relationship with Mr. Riley was merely platonic. She lived at his house as a tenant with her three children, a niece and a policeman named Gladstone Davis. Mr. Riley did not give her receipts for her rent, and she did not ask him for them.

During the time that she was unemployed 1980 – 1981 Mr. Davis who had by then migrated to the United States of America and was the father of her son, sent her money and hence she was able to “survive”.

She had asked Mr. Riley to join in her application for a house as a friend not a spouse since she could not have qualified for the mortgage by reason of her age and her salary. Mr. Riley had signed the application on the clear understanding that the house belonged to her alone and that she would make all payments. It was also agreed that on completion of the mortgage payments Mr. Riley would have his name removed from the Duplicate Certificate of Title.

In 1988 she told Mr. Riley that she intended to pay off the mortgage and that she wished to have his name removed from the title. He replied that it was his signing the application which had enabled her to obtain the loan and therefore she would have to pay him \$15,000.00 in order to get him to remove his name. She paid the sum demanded to Mr. Howard Hamilton, Attorney-at-law but later returned and collected it.

She denied that she and Mr. Riley had ever lived as man and wife or that they had agreed to get married eventually. She said they did not make a joint

application for a loan, and Mr. Riley paid no mortgage instalments. Nor did he ever give her money while she was unemployed.

When she lived at Mr. Riley's house with her children and Constable Davis, Constable Davis was then stationed at the Saint Anns Bay Police Station. He migrated to the U.S.A. in about 1971.

In 1980, the family moved to the Fern Court house. Miss. Christie migrated to join Constable Davis in 1993.

Lionel Campbell Mr. Riley's witness had never worked for the family in the yard at Charles Town, as it was a small yard and the family could not afford to employ anyone.

Mr. Riley's Case

See pages 2, 3 and 4 of blue bundle.

I hope I do no injustice in the following Summary of the submissions made on behalf of the parties.

The Submissions on Behalf of Miss. Christie

The crucial issue is whether the relationship between the parties was platonic or one of common husband and wife. The Court ought to accept Miss. Christie's evidence that they were platonic friends in view of inconsistencies in Mr. Riley's evidence and because her evidence was more credible.

This is particularly true of his evidence regarding Millicent Riley his wife, especially with regard to when they became married, how long he had known her, and in contrast to the age of the child they both produced.

There were also glaring discrepancies between Mr. Riley's evidence and that of his witness Lionel Campbell.

The Submissions on Behalf of Mr. Riley

Both Mr. Riley and Miss. Christie admitted to having spouses prior to the period 1970's to 1986.

The Court is asked to accept that although the application to the National Housing Trust was Miss. Christie's, Mr. Riley was joined from the commencement as it was his National Insurance number that was used on the application. Support for this is found in Miss. Christie's admission that "she later got a job at St. Hilda's and it was there she got her National Insurance Number." This means that she obtained a National Insurance number after the application and the selection of the house.

They both lived at Lot 42, 2 Fern Grove, the land the subject matter of this suit. While Miss. Christie claimed to be a mere tenant at the home of Mr. Riley Charles Town in the 1970's, yet she produced no evidence to contradict his statement that they lived as man and wife at Fern Grove. Hence the court may infer an earlier relationship of man and wife at Charles Town.

Miss. Christie admitted depositing \$15,000.00 with her attorney Mr. Hamilton for Mr. Riley, and later withdrawing it. The court is asked to accept his

evidence that he did not accept the money for taking his name off the title as he was expecting to be paid for his interest in the house, and that from the outset he had opted for a tenancy in common as his intention was to create an investment which he could later devise.

The evidence supports his contention that he was a joint applicant to the National Housing Trust from the outset and that the parties had the common intention to hold beneficial shares in Fern Grove as tenants in common, that the parties lived there with the intention that it would become their matrimonial home, and that Mr. Riley contributed to the mortgage payments; especially when Miss. Christie was unemployed.

The National Housing Trust Act Appendix C, The National Housing Trust (Housing Benefit) Order 1979 paragraph 5 makes clear that only family members including common law spouses may be joined as applicants. Miss. Christie must therefore have joined Mr. Riley as a spouse. Even if such a declaration was false, she would be estopped from denying it.

As the parties are not married there can be no presumption of advancement. The beneficial interest should therefore be shared, albeit in unequal shares (See *Bernard v Josephs* [1982] 3 ALL ER 163.)

The shares should be valued at the date of sale of the premises *Turton v Turton* [1987] 2 ALL ER 641.

Mr. Riley should be awarded a forty per centum of the value of Fern Grove.

Analysis and Conclusion

(a) Does estoppel arise?

I shall deal firstly with the submission in law made by Mrs. Langrin that if Miss. Christie had signed a false declaration that Mr. Riley was her spouse she would be estopped from denying that assertion now.

I adopt the definition of estoppel by representation given by the learned authors of the Third Edition of Spencer Bower and Turner :

Estoppel by Representation at paragraph 3:

“Where one person (“the representor”) has made a representation to another person (“the representee”) in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or in action, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.”

(emphasis mine)

Estoppel cannot arise between these two parties on the basis of Miss. Christie having falsely declared to the National Housing Trust that Mr. Riley was her spouse; because the representation was not made to Mr. Riley and this

benefits to which she was not entitled, Milligan had debarred herself from asserting the equitable rights which she would otherwise have had to the property.

Both at first instance and in the Court of Appeal, Milligan's counter-claim was successful. The Court of Appeal used a "public conscience" test, and held that Milligan's improper conduct was not sufficiently serious to merit so severe a penalty as depriving her of her interest in the house. The House of Lords, rejected this test unanimously, but were divided 3 to 2 as to whether Milligan should succeed. The position of the majority Lord Jauncey, Lord Lowry and Lord Brown-Wilkinson, was stated by the latter at page 86 as follows:

- (1) Property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract.
- (2) A plaintiff can enforce property rights so acquired provided that he, does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right.
- (3) It is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the plaintiff had acquired legal title under the illegal contract that is enough."

He further denied that there was any significant difference in the general principles between common law and equity. Although Milligan was putting forward an equitable claim (Since the sole legal title was in Tinsley), her claim did not depend in any way on the fraud perpetrated on the Department of Social Security. It depended only on the presumption of resulting trust which arose from the fact of Milligan's contribution of one half of the purchase price and that the

relationship between them was not one which could give rise to the presumption of advancement.

The argument regarding estoppel therefore fails.

(b) The affidavit of Miss. Christie dated 30th September 1992

There are two curious features of this affidavit about which I must comment. Both suggest that the draftsman approached the task as if drafting pleadings. It is trite law that affidavits are not pleadings – Re Bedlam's Patent [1911] 1 ch. 60 at 63. So too is an originating Summons, though it may be ordered to stand as a writ. Lewis v Packer [1960] 1WLR 452 similarly, a General endorsement on a writ is not a pleading – Murray v Stephenson (1887) 19 QB1) Go. Affidavits unlike pleadings should contain evidence.

I have degressed. The first paragraph which has evoked criticism is paragraph 8 of Miss. Christie's affidavit in reply to that of Mr. Riley. It reads thus:

“In respect of paragraph 8 of the Plaintiff's Affidavit the Defendant will say that the title was issued as Tenant – in –Common in order to facilitate the transfer of the property to the Defendant when she has completed paying for the property.”

(emphasis mine)

The affidavit was meant to be Miss. Christie's evidence and though she was cross-examined, she never said what she promised to say in the above quoted paragraph!

The second curious element is one of style. To each of Mr. Riley's averments in paragraphs 4, 6, 10 and 13 of his affidavit dated 16th March 1992, Miss. Christie responds by saying "No admission is made."

The relevant paragraphs in Mr. Riley's affidavit, read as follows:

4. That at the time the application was made to the National Housing Trust the Defendants (Miss. Christie) did not have a National Insurance number because she was only a temporary worker at the St. Ann Parish Council. In addition her salary was only Forty dollars (\$40.00) per week and not adequate to enable her to obtain a house from the National Housing Trust.
6. That my joining in the application was permitted in my capacity as the Defendant's spouse under and by virtue of the National Housing Trust (Housing Benefits) Order 1979. (He then quotes paragraph 6 [3] and 6 [5] of the Order)
10. That the Defendant was not my lawful wife and I had therefore not intended to create any Trust or right of Survivorship in her favour. I was intending to facilitate her immediate benefit and to create a long term investment for myself.

(emphasis supplied)

13. That the defendant eventually got a job as a Nurse at St. Hilda's Girls School and was in a position to pay her half of the mortgage.

(emphasis added)

The statements in paragraphs 4 and 6, and those portions underlined in paragraphs 10 and 13, are matters which if they were true would have been within

Miss. Christie's own knowledge. Although affidavits are not pleadings the draftsman should be guided by the rule governing the interactions between denying and not admitting facts pleaded. There is no difference in effect whether one denies or does not admit an allegation. Hall v London and North Western Railway (1877) 35 L.T. 848 per Grove J and Worner v Sampson [1959] 1 QB 297 AT 319 per Hodson L.J.

Nevertheless good draftsmen observe the distinction that one denies any matter which, if it had occurred, would have been within his own knowledge, while he refused to admit those matters which are not within his own knowledge. But it must be added, that a denial is more emphatic than a non-admission.

Conclusion - The Merits of Each Case.

Mr. Riley did poorly under cross examination, and the witness he called to support his case contradicted Mr. Riley's own statements in important areas. Mr. Riley was evasive and made contradictory statements when asked about Miss. Christie's son and his wife. This is how he responded to questions about the son:

"I didn't know Gladstone Davis.
(The policeman who alleged to be
the father of Miss. Christie's son)

Don't know of Miss. Christie
having a child in 1976.
know Christies children.
know she has a son.
Don't know his name.
Son didn't live with Miss. Christie."

(emphasis mine)

He was particularly evasive when asked the very next question to which he gave this response;

“I don’t know Richard Davis.”

His evidence continued as follows:

“She told me she had a son. I don’t know who she had son for. Lived with Christie in Charles Town. About 8 – 9 years. From about the 70’s. Think it is early 70’s until 1986. During time I lived with her she never got pregnant.

“She had a son in 1976. It was not my child. I didn’t know who was father. I never asked. After she had child she came back to house and I accepted her.

(emphasis mine.)

At first he lied when asked about how long he had known his lawful wife Millicent Riley. His evidence went as set out hereunder:

“Married her 1986, 3rd June. I knew her couple of years before that but we weren’t friends. – about a year or two. Now say 2 or 3 years I know her. Not true I knew Millicent from 1970’s.

Not true Millicent and I
were living together
from 1970. ... Millicent
has children for me.

Q. When was first one
born?

A. I would say in the seventies.
I had one with Millicent
That child I think over
20 years now. Yes. Yes.”

(emphasis added)

His supporting witness Lionel Campbell contradicted him on the length of time for which he had been married to Millicent Riley. This is what Lionel Campbell said on the subject:

“Couldn’t tell you from when Riley married.
Know his wife from in 1970’s going up. ... When
I met her first she was his wife. He and wife
lived in Lime Hall.

Mr. Campbell thus supports a part of Miss. Christie statement under cross-examination that:

“Not true Lionel Campbell was
employed to clear up around house
etc. Riley was living with his wife in
Lime Hall.

(emphasis mine)

Mr. Riley and Mr. Campbell differ greatly as to the nature and frequency of work done by Mr. Campbell for Mr. Riley. On this subject Mr. Riley said:

“Employed Lionel Campbell ... Pay him to paint ... and cut the yard when it needed cutting: ... He brush yard 3 times per year.”

(emphasis added)

On the other hand Lionel Campbell described his work in these terms:

“Sometimes I go wash for Riley 2, 3, times per week. Sometimes ten times per month. Sometimes more than that ... I am handy man I was doing farming for him.

(emphasis supplied).

Mr. Riley said in his affidavit dated 6th July 1992, said :

“I later returned to the lawyer’s office to collect the money (\$15,000.00) and I was advised that the Plaintiff had withdrawn the said amount.”

But under cross-examination he said:

“Not true I returned to the lawyer’s office to collect the money and I was told that the Plaintiff had withdrawn the money.”

Miss. Christie was not an angel either. I find that she must had made a false declaration that Mr. Riley was her spouse at the time of the application to the National Housing Trust. But I accept the rest of her story as more probable in all the circumstances and reject Mr. Riley’s. I find it quite probable that during the period of her, unemployment Constable Davis sent her sufficient money from the United States of America to pay for the mortgage and subsist. I accept her daughter’s evidence that she has migrated to join him. Having regard to this fact, it is therefore probable that he should have sent her money on a timely basis.

In all the circumstances I find that Miss. Christie originally applied for the loan alone and was told that she needed someone to join her in the application and that she obtained Mr. Riley's assistance in this regard, purely as a matter of convenience and not intending to confer a beneficial interest on him. I find that they were platonic friends and not living as man and wife, and that he made no mortgage payments. I find too that the money offered to him was as a result of a demand by him for payment for his having lent his name to the application and not as a payment of any alleged beneficial interest. In short I accept Miss. Christie as a witness of truth notwithstanding my earlier finding that she lied in making her application to the National Housing Trust. It is trite law that a court may accept the bulk of a witnesses testimony not withstanding the fact that the witness is untruthful in other respects – see Lionel Wrights dictum in Powell v Streatham Manor Nursing Home [1935] AC 235 at page 267.

The order of the court is therefore as follows:

- (1) The Court grants a declaration that Mary Ann Christie is the legal and equitable owner of Lot 161 Buchfield, Mansfield, Ocho Rios registered at Volume 1169 Folio 176 of the Register Book of Titles.
- (2) That Ferdinand Riley has no legal or equitable interest in the said property registered at Volume 1169 Folio 176 of the Register Book of Titles.
- (3) That the Registrar of the Supreme Court is hereby empowered to sign any documents, deeds, titles papers or other documents in relation to the transfer of the said premises should Mr. Ferdinand Riley be unable or refuse to do so.

litigation is not between the representor Miss Christie and the representee (The National Housing Trust).

The case of Tinsley v Milligan [1993] 3 ALL E.R. 65 is instructive.

In that case estoppel was not pleaded no doubt because it was realized that such a plea could not be successful but other defences which are relevant to this case were utilized. The facts were as follows:

The parties were lesbian lovers. They jointly purchased a house which was registered in the name of Tinsley, as sole legal owner. They jointly ran a lodging house in the house. They had registered the house in Tinsley's name alone in order that Milligan could make fraudulent claims for benefits from the Department of Social Security. They shared the money so obtained.

After a while, Milligan had pangs of conscience and confessed everything to the Department and the matter was resolved without prosecution. Thereafter Milligan claimed only benefits to which she was properly entitled.

Later, the parties quarrelled and Tinsley moved out, and soon started an action for possession on the basis that the house was solely hers. Milligan brought a counter claim for an Order for sale of the house and a declaration that the house was held on trust for the both of them in equal shares.

Tinsley argue that Milligan's claim should fail on the basis of the maxim ex turpi causa oritur non actio, or on the equitable principle that he who comes to equity must come with clean hands. This twofold attack was launched on the platform that by choosing to put the house in Tinsley's name in order to obtain