IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. HCV0654 OF 2003

BETWEEN	*MARTIN O'KEITH KELLIER*	*CLAIMANT*
A N D	*STEPHANIE KELLIER*	*DEFENDANT*
	A N D	
BETWEEN	*STEPHANIE KELLIER*	*ANCILLARY CLAIMANT*
A N D	*MARTIN KELLIER*	*1ST ANCILLARY DEFENDANT*
A N D	*KENNETH KELLIER*	*2ND ANCILLARY DEFENDANT*

Mrs. S. Usim instructed by S. Usim & Co. for the Ancillary Claimant.

Mr. Gordon Steer and Ms. D. Dowdie instructed by Chambers, Bunny & Steer for 1st Ancillary Defendant.
2nd Ancillary Defendant absent and unrepresented.

Heard: June 12 & 23, & November 28, 2006

Williams, J.

Background

The ancillary claimant Stephanie Kellier, wanted to purchase a property, ultimately for investment purposes. She looked for and identified a property she felt could have been converted into a guest house.

Her relationship with the first ancillary defendant, Martin Kellier, was such that although they were in the process of being divorced she thought nothing of approaching him about purchasing the property since she was not financially able to do so.

The property located at Lot 344 Torado Heights in the parish of St. James was eventually purchased with Martin Kellier and the 2nd ancillary defendant Kenneth Kellier named as the purchaser on the sale agreement. There is no dispute that the funds to buy it came entirely from Martin Kellier.

Stephanie Kellier is now claiming an estate and/or interest in the property and is asking the court to determine that interest. In her particulars of claim she said hers is an equitable interest by virtue of a gift from the 1st ancillary defendant to her and the arrangements and intention of the parties at the time of acquisition.

In her witness statement she indicated she makes no claim to any portion of the property which the court finds to be the estate an interest of Kenneth Kellier, the 2nd ancillary defendant. He is made party to the proceedings for the sole purpose of ensuring that the judgment is binding on him to secure enforcement if necessary.

Her Story

Stephanie Kellier asserted that having located the property and deciding to purchase it, she gave instructions for the agreement of sale to be prepared with Tanya Campbell,- her daughter,- and Kenneth Kellier, - a child of the marriage,- being named as the purchasers. She intended to secure a loan in their names since she was unable to secure financing in her own name due to other commitments with the bank. Her name she felt could be added to the title at a later stage. She claimed upon being advised that the income of Kenneth and Tanya was insufficient to secure the loan, she was advised to

add Martin's name to the agreement. This she said was to improve her chances of getting the loan. She felt her name could be added later in accordance with an and/or nominee clause.

In her witness statement/evidence in chief she said she was advised by her then attorney against this course of action as she "would be at mercy of the parties to the agreement". She however felt nothing would go wrong and instructed the clause be added. She also said she removed Tanya's name since the agreement would slow down the process she was seeking to expedite.

She stated that Martin's name was being substituted for Tanya's and that both hers (Stephanie) and Tanya's would be added on transfer. She said she approached Martin and requested the sum of $908,000.00. She proposed to transform the premises into a guest house for use and benefit of herself and her minor children in view of the fact that she was about to become unemployed.

Under cross-examination she admitted that at the time of purchase there was only one minor child, Alex. She also said that if she had secured the loan without Martin's help she would repay it from proceeds from the guesthouse. Martin would have repaired and fixed the guesthouse with his own funds. She did not know how long this process would have lasted but in the interim she would have continued to work in America and used money from that to start repaying.

She agreed that although Martin initially applied for a loan with the same bank she was using, he eventually secured the loan from elsewhere to purchase the property although she cannot say why this was done.

At the time she approached him with the idea of purchasing the property she asserted that they were "together on". The $908,000.00 was in fact the deposit on the property – she said it was a gift. She agreed the cheque was not made out to her but to the Administrator General, the vendor of the property.

Under cross-examination she said when the Realtors – New World – were involved and she gave them initial instructions, Martin was at that time only giving her the deposit – not buying the property for her. This was in February 2001.

Later in her evidence she said he was to purchase the property for her and her kids.

She however denied the deposit was handed to her after the contract was in Martin's and Kenneth's names. However, she agreed that only they were signatures to the sale agreement.

She insisted, when pressed that once Martin's name was on the agreement it was never to come off.

She in her witness statement explained that a dispute developed over the addition of Tanya's name resulting in Martin's refusal to sign the papers to add her name "even though he knew the property was not intended for his benefit or for him."

Under cross-examination she first sought to deny this explanation, but when confronted with her statement she said what contained there was true.

Further when she was asked under cross-examination if the property was never intended for his Martin's benefit – she declared that it was. He was to be owner with Tanya, Kenneth and herself.

Mrs. Georgia Gibson-Henlin gave evidence on behalf of Mrs. Kellier. She it was who was initially acting for Mrs. Stephanie Kellier in the agreement to purchase the property.

Although a dispute has arisen as to where money for her retainer came from, Mrs. Gibson-Henlin in preparing the agreement held herself out as the attorney for the purchasers – Martin and Kenneth Kellier.

She explained her role in this transaction as being under the instructions of Stephanie to have firstly Tanya and Kenneth as the purchasers and then Martin and Kenneth and indeed it was the latter two who signed as purchasers. She did add the and/or their nominee clause.

In her affidavit, she deponed that after the initial instructions and having Martin and Kenneth signing – Stephanie told her to include herself and Tanya as the nominees. Martin thereafter, called her and advised her that he was the one buying the property and only his name and Kenneth were to be registered on the title. Stephanie insisted her name was to go on and in this conversation Stephanie advised her "she would be willing to return Mr. Kellier's money to him even though it was agreed that he paid on behalf of all four (4) persons".

She said Mr. Kellier thereafter indicated he wanted back all of his money. She agreed, under cross-examination, after being confronted with her affidavit, that Martin had said he did not want Stephanie's and Tanya's name on the title.

His Story

Martin Kellier agreed that it was Stephanie who first identified the property. He agreed she told him she wanted them to buy the house to convert it into a guest house.

He said he initially refused as due to her behaviour in the past he did not want to own anything with her or have dealings with her. He did not trust her, he admitted under cross-examination.

He said three (3) months later she approached him again and he looked at the property and thought it would be a good investment. He said he told her he would purchase it for himself and his sons, Kenneth first and later Alexander's name would be added.

He agreed he did give her a cheque for $908,000.00 but said having decided to use "her" lawyer he gave her the money to send to the lawyer. He insisted she was acting as a courier and nothing more.

He agreed he had initially been to the bank Stephanie used to secure a loan and indeed she accompanied him as she said she had a friend at the bank. He said up to this time they were not on so good terms – "fifty – fifty."

He insisted he made it clear the loan was to be in his and Kenneth's name. He maintained there was no discussion about Stephanie's name being on the loan agreement or anything else. He said that after learning that Stephanie's and Tanya's names were to be on the loan agreement, he indicated he no longer wanted the loan and withdrew all his money from he bank.

He later demanded back his deposit from both Stephanie and her attorney who was now representing him in the sale.

Upon not being able to get it back he retained his own attorney and the matter was placed before the court. He asserted that he was successful in the matter and was given the option of taking his money back or continuing with the sale. He opted for the latter

course secured a loan for three million five hundred thousand dollars for the balance of purchase price.

He insisted the deposit he gave Stephanie was not a gift and it was clear in his mind he was buying the property for himself and eventually to benefit his sons.

He insisted that at no time did he agree to Stephanie benefiting from the property. He maintained she was never to be added to the title.

The Issue

Did Stephanie Kellier acquire an interest in the property stemming as she asserts from the circumstances of its acquisition?

The Law and the legal submissions

The most useful starting point for gleaning of the applicable principle in matters of this nature is to be found in the words of Lord Bridge in **Lloyd Banks plc v Rossett [1990] 1All ER 111 at page 1118**

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think be based on evidence of express discussions

> between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel."

This is to be considered against the background that in the instant case Martin and Stephanie Kellier were in the process of being divorced and the property in dispute is not a matrimonial home.

The claimant relied on the authority of **Cox v Jones 2004 EWHC 1486**. In that case Mr. Justice Mann's judgment recognized that similar to this case.....

> ".....the answer lies in the slightly different, though probably conceptually related line of cases involving one person standing aside from purchasing a property on the understanding that another purchaser could take the property and provide an interest to the former."

Mr. Justice Mann quotes extensively from **Banner Homes Group plc v. Luff Developments Ltd. [2000] Ch. 372.**

The reasoning of Chadwick L.J. was pointed to as being applicable on this case.

> ".....it is necessary that, in reliance on the [pre-acquisition] arrangement or understanding the non-acquiry party should do (or omit to do) something which confer an advantage on the acquiring party in relation to the acquisition of the property, or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or the detriment to the other, gained or suffered as a consequence of the arrangement or understanding which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding which enabled him the acquire it."

Mr. Steer for the defendant pointed out points of difference between the instant case and **Cox v. Jones** which made the latter not relevant. Of significance he stressed there was no detriment suffered by Mrs. Kellier. He referred to cases to show that if Mrs. Kellier was relying on principles involved in perfecting an incomplete gift or equitable estoppel – she failed.

There was no proof of any continuing intention that she was to benefit.

Ref. Re: Gonin 1977 2 All ER 718.

There was no assurance given to her which relying upon she had acted to her detriment.

Ref. Greasley and Others v. Cooke [1980] 1WLR 1306

Pascoe v. Turner [1979] 1WLR

Application of the law to the facts as found

The first hurdle is trying to determine the intention of the parties at the time of acquisition. Neither agree on any expressed intention so one has to infer from their behaviour. As is to be expected in matters such as these, sorting out what actually went on some five years ago is difficult, especially since the parties are no longer the loving couple they must have been when they first got married. Their memories and recollections to my mind are even more clouded as at the time of acquisition they were in the process of being divorced – awaiting the decree nisi to become absolute.

It is against this background that their respective credibility has to be assessed.

Mrs. Stephanie Kellier came across at times confused and confusing. However there is no dispute she found the property and that she started the arrangement to purchase it using "her" lawyer. She delivered the initial deposit. At times she said the deposit was a gift yet at other times she said the property itself was intended as a gift for her.

It does appear that despite his protestations to the contrary, Mr. Kellier trusted her to have her initially assist in the purchasing of the property. He allowed her to accompany him to the bank to meet her friend to secure a loan, he used "her" attorney and gave her the deposit to deliver.

Mrs. Kellier admitted she had been advised and was thus well aware of the risk involved in having her name omitted from the original agreement and waiting to have it included later via the and/or nominee clause.

There is no dispute that Mr. Kellier did not in fact secure the loan from the bank Mrs. Kellier had introduced him to. She does not know the reason for this – he

maintained unchallenged that it was because he had learnt that Stephanie and Tanya's names were to be party to the agreement.

His actions thereafter in seeking a loan elsewhere, clearly indicate his desire not to have Stephanie and Tanya involved.

There is no dispute that Mr. Kellier did not want their names included on the sales agreement. Mrs. Gibson-Henlin attested to that fact.

There is no challenge to Mr. Kellier's assertion that it was only after the intervention of the court that he opted to continue with the sale.

Hence, whatever one may make of the intention when the property was first identified and agreement first drafted, what occurred when Martin discovered Stephanie's insistence to have her name on the title determines the matter.

He refused to go further with the purchase, he insisted on getting back his money. Mrs. Gibson-Henlin said Stephanie indicated she would be willing to return the money to him.

The behaviour indicated that the supposed terms of any agreement which included Mrs. Kellier was not to Mr. Kellier's understanding. What more could he have done to demonstrate he was not purchasing property for or with Stephanie?. Certainly after the intervention of the court the completed purchase could not be seen as involving any intention for Stephanie to benefit.

Her efforts in locating the property does not give her an interest. When Martin refused to continue the purchase and wanted to get back his money she had a clear indication she was getting no interest. She did no acts to her detriment which would give her an interest.

I therefore declare that Stephanie Kellier the ancillary claimant has no interest in Lot 344 Torado Heights in the parish of St. James registered at Volume 1061 Folio 180 of the Registered book of Titles.

There is therefore judgment for the ancillary defendant Martin Kellier with costs to him.