

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2008-485-2494

UNDER Part 4 of the High Court Rules

IN THE MATTER OF The equitable interest of the late Eileen
Amelia Johanna Williams in 78 Salamanca
Road, Wellington

BETWEEN ALISON ELIZABETH MORGAN
Plaintiff

AND DENIS JOHN MORGAN
Defendant

Hearing: 13 October 2009

Appearances: P S Davidson and J Fyfe for plaintiff
B A Corkill QC for Defendant

Judgment: 10 December 2009 at 9am

I direct the Registrar to endorse this judgment with a delivery time of 9am on the 10th day of December 2009.

RESERVED JUDGMENT OF MACKENZIE J

[1] In my interim judgment of 26 June 2009, I reserved a number of aspects for further consideration after an opportunity for further evidence and submissions. Further affidavit evidence was filed and a hearing held on 13 October 2009 at which submissions were presented. I am now in a position to give final judgment.

[2] The particular matters upon which I considered that further enquiry was necessary were set out in paragraph [27] of my interim judgment. For the plaintiff, further affidavits were filed from Mrs Morgan, and Mr Greig, the solicitor who had acted on the sale of the Easdale Street property. For the defendant, affidavits were

filed from Mr Morgan, and from Mr Connor, a very experienced property lawyer, giving expert evidence of the steps which should be taken on a property transaction involving circumstances such as this. Mrs Morgan filed an affidavit in response.

[3] Mr Greig gave evidence of his recollection, refreshed by such of the contemporary documents as were available to him from Mrs Morgan. His firm's file was no longer available. The instructions as to payment of the proceeds of sale of the Easdale Street property were contained in a handwritten note to him from Mrs Morgan. Those instructions covered repayment to the mortgagee, and payment of the nett proceeds into the joint account of Mr and Mrs Morgan, as described in paragraph [22] of my interim judgment. He cannot now recall what written authority as to payment was obtained from Mrs Williams. His clear recall is that his impression was that Mrs Morgan was driving matters financially and that Mrs Morgan and Mrs Williams were, at the times he saw all three, happy with the direction provided by Mrs Morgan. He is in no doubt that all three persons involved (including Mrs Williams) were fully agreed in his presence that he should ultimately deal with the sale proceeds as directed by Mrs Morgan.

[4] Mrs Morgan's evidence is that so far as she can recall Mrs Williams had no contact with Mr Greig independently of any meeting that the three of them may have had with Mr Greig. It is her recollection that when the transfer documents were signed all four persons present (herself, Mr Morgan, Mrs Williams and Mr Greig) were aware that her share of the sale proceeds was to be used to build her an apartment at the property in Salamanca Road (which I have termed the Kelburn property). She does not think that Mrs Williams gave Mr Greig any written instructions; that if she had done so it is most likely that she would have asked Mrs Morgan to type it for her, and she did not prepare any such document. Mr Morgan's evidence is that he does not now recall the specifics of any particular meeting with Mr Greig. He disputes Mrs Morgan's statement that all four persons present were aware that her mother's share of the sale proceeds was to be used to build her an apartment at the property the Kelburn property on the basis that that was not his understanding, based on his previous affidavit, and also that Mr Greig does not say that he was aware of the use to which the proceeds would be put. Mr Morgan also says:

[Mrs Williams] would have assumed that any proceeds from the Easdale Road property would be applied, at least in part, to Salamanca Road, but I do not believe that the details of how that was to happen would not have been known to her, in the same way that they were not known to me

As I understand Mr Morgan's evidence, it seems that the double negative in that passage is an error. I understand his evidence to be to the effect that he did not know the account and payment details by which the application of the funds to the Kelburn property were effected, and he did not believe that Mrs Williams would have known those details.

[5] In reply, Mrs Morgan says, as to Mr Morgan's belief:

He knew that:

- (1) An apartment was to be built at the Kelburn property;
- (2) My mother would live in the apartment once it was built;
- (3) The money to build would come from the sale of Easdale Street;
and
- (4) My mother was at Mr Greig's office to sign, and did sign, the transfer for the sale of Easdale Street

[6] On the second question in paragraph [27] of my interim judgment, Mrs Morgan has in her affidavit given further details of the various borrowings by the parties, and has tabulated those, to assist in determining what liabilities were secured by the ANZ mortgage, which was repaid, to the extent of \$322,000, from the sale proceeds of the Easdale Street property. The balance was repaid from the later sale of the Kinross Street property. Briefly stated, the position is that the ANZ loan was taken out in about November 1993 to refinance an existing facility with AA Finance Limited of approximately \$580,000, secured over the Kinross Street and Easdale Street properties. The facility granted by ANZ was for a total amount of \$620,000. The security was to be first mortgages over the Kelburn and Kinross Street properties, and an unregistered mortgage over the Easdale Street property, to be registered if that property was not sold. Mrs Morgan's letter applying for the loan said that on the sale of the Easdale Street property:

We will then shift to Salamanca Road where we intend to do up to \$250,000 to \$300,000 in improvements which will include a separate three bedroom

apartment for my mother which will be capable of unit titling in the future if desired.

[7] On the third question posed in paragraph [27] of my interim judgment, which related to the extent to which the net proceeds of Easdale Street were expended in effecting alterations to the Kelburn property, Mrs Morgan has undertaken a detailed and helpful analysis of the expenditure. The renovations undertaken included work on the lounge at the property, work on Mrs Williams' apartment, work on an upper floor comprising a bedroom, bathroom and spare room, and conversion of the main living area including conversion of two back bedrooms into an office and renovation of the en-suite bathroom and kitchen. The total cost came to around \$250,000 to \$300,000 and was financed by the \$255,000 proceeds of the sale of the Easdale Street property, plus further borrowings from ANZ bank.

[8] That additional evidence is of assistance to me in making the principal finding which remains to be made, namely whether the circumstances of the application of funds from the sale of the Easdale Street property are such as to give rise to a beneficial interest for Mrs Williams in this Kelburn property, which should be recognised as prevailing over the legal interest of Mr and Mrs Morgan. In making that assessment, I take into account all of the evidence, including that originally filed, and in particular the matters to which I referred at paragraphs [15] and [20] of my interim judgment. I also have regard to the additional evidence to which I have referred, as to the way in which the funds which resulted from the sale of Mrs Williams' legal interest in the Easdale Street property came to be applied to the improvements to the Kelburn property.

[9] In considering this issue, I do so by reference to the two essential requirements for the recognition of an equitable interest in property referred to by Hardie Boys J in *Lankow v Rose* [1995] 1 NZLR 277 (CA) set out at paragraph [6] of my interim judgment. The first is that Mrs Williams contributed in more than a minor way to the acquisition, preservation, or enhancement of Mr and Mrs Morgan's asset, namely the Kelburn property, whether directly or indirectly. The second is that, in all the circumstances, the parties must be taken reasonably to have expected that Mrs Williams would share in that asset as a result. Those two requirements are, on the face of them, separate and distinct. However, the amplification of them given

by Hardie Boys J makes it clear that they are in fact closely linked. The contribution to assets does not include contributions that are adequately compensated by the benefits which the relationship between the parties itself confers. The contribution must manifestly exceed such benefits. That amplification makes it clear that the nature of the contribution, and the relationship between the parties, are relevant in determining both whether a contribution has been made, and what, in the circumstances, the parties must be taken reasonably to have expected from the contribution.

[10] That discussion of the legal test to be applied makes it clear that, in determining the consequences of the contribution by Mrs Williams to the improvements to the Kelburn property, there is not a stark choice between two alternatives: on the one hand, a gift of the amount of the contribution; on the other, a constructive trust (or possibly a resulting trust) in favour of Mrs Williams. The possibilities are considerably more nuanced than that. There is also the possibility that the contribution was made in the expectation of a benefit such as would deprive the payment of the gratuitous element essential for a gift, yet not create an expectation of an equitable interest in the property.

[11] I have in my earlier judgment rejected the proposition that the 1984 document constituted a completed gift of Mrs Williams' interest in the Easdale Street property. I also reject the proposition that the payment of the total net proceeds to Mr and Mrs Morgan's joint account was intended to constitute a completed gift of the proceeds. Mr Greig's evidence does not establish a clear intention on the part of Mrs Williams to make such a gift.

[12] I find, on the evidence, that all three parties were aware, and intended, that the whole of the net proceeds of the Easdale Street property would be used to finance improvements to the Kelburn property. Because, as I have held, Mrs Williams did not make a gift of her one third interest in the Easdale Street property or in the proceeds of sale of that property, it follows that she made a contribution to the enhancement of the Kelburn property. That contribution amounted to her share of the sale proceeds. It was more than minor.

[13] I therefore find that the evidence does disclose a contribution by Mrs Williams in more than a minor way to the enhancement of the Kelburn property.

[14] For the reasons given in my interim judgment, I do not consider that that contribution arose at the time when the Kelburn property was acquired. As I noted at paragraphs [17] and [18] the only contribution made at that stage was the charging of Mrs Williams' one third interest in the Easdale Street property, and the assumption of liability under the personal covenant, under the mortgage taken out for the purchase of the Kelburn property. That was not, as I have held, a contribution to the purchase price sufficient to give rise to a resulting trust.

[15] It is necessary, then, to consider what, in the circumstances, the parties must be taken reasonably to have expected from the contribution. I find, on the evidence, that all three parties intended that Mrs Williams would continue to live with Mr and Mrs Morgan, in the flat which was to be built on the Kelburn property. From Mrs Williams' perspective, she had expressed herself, in the 1984 document, as "secure in the knowledge that my daughter and her husband will continue to support me until my death". Nothing had occurred in the intervening period which would give reason for her to revise that view. Mr and Mrs Morgan were both content for the living arrangement to continue. Their plans (subsequently implemented) to build a separate flat for Mrs Williams are clear evidence of that. Mrs Williams did in fact continue to live with Mr and Mrs Morgan until their separation, and, following that, she continued to live in the flat until her health rendered that impractical. That was a benefit of the relationship of the type referred to by Hardie Boys J in *Lankow v Rose*. I do not consider that a financial contribution to the cost of the flat can be said to manifestly exceed that benefit.

[16] There are a number of other circumstances which are relevant to the question whether the parties must be taken reasonably to have expected that Mrs Williams would retain an equitable interest in the funds expended in the improvement of the Kelburn property. First, there is the 1984 document. I have held that that did not constitute a perfected gift. However, as I noted at paragraph [15] of my interim judgment, the circumstances in which it came to be signed, and Mrs Williams' intention and motives in signing that document, are relevant on this question.

Mrs Morgan's evidence about this, in her first affidavit, is that the document was motivated by concerns about the implications of Mrs Williams' share in the Easdale Street property for the cost of rest home care if that became necessary. She said:

The meagre amount of money that people were allowed to keep made this difficult when they had taken care throughout their lives to provide for their families. My mother made it very clear that she did not want to form a trust or do anything that would mean that she lost control of her asset.

[17] The evidence that Mrs Williams wished to retain control of her asset is quite at variance with the form of the document, which suggested (though, as I have held, did not fully effect) a gift of Mrs Williams' interest. If I were to accept Mrs Morgan's evidence on this point, in the face of the contrary evidence of the 1984 document, two conclusions would necessarily follow. The first would be that the document did not reflect Mrs Williams' real intentions. That would tend to a finding that the document was a sham. I do not consider that the 1984 document should be regarded as a sham. The second conclusion would be that the document must have been intended to provide a basis for concealing from relevant authorities the extent of her assets. There is no evidence to establish what effect the ownership (legal or equitable) of property, would have on Mrs Williams' eligibility to rest home entitlements. I do not consider that it would be proper to assume an intention, on the part of either Mrs Williams or Mrs Morgan, to conceal the existence of an interest, whether legal or equitable, in the event that an application for rest home subsidy had to be made. For these reasons, I consider the terms of the 1984 document point against any reasonable expectation that the expenditure of Mrs Williams' money on the improvements to the Kelburn property would give rise to an equitable interest as beneficiary of a constructive trust.

[18] I also find in Mrs Williams' actions at the time of the sale of the Easdale Street property no change in that position. As I have held, she was aware that the proceeds of sale of Easdale Street would be used to improve the Kelburn property. She was content to rely upon her daughter to undertake arrangements on her behalf, and she must be taken to have known that those arrangements did not include her obtaining any recognition of any legal interest in the Kelburn property. There were a number of steps which could have been taken to protect Mrs Williams' position, if the intention had been that she should obtain a legal interest in the Kelburn property.

A number of these possibilities are referred to by Mr Connor. In addition to those, Mrs Morgan had noted in her letter to ANZ that the apartment built for Mrs Williams could have been unit titled. Nothing was done to take any such steps.

[19] I consider that the absence of any such steps, in circumstances where such steps might reasonably have been expected, is a pointer against a common intention by the parties that an equitable interest in the Kelburn property would arise from the expenditure of the funds.

[20] If Mrs Williams' intention in making the funds available for the building of the flat was to ensure that she could continue to live with Mr and Mrs Morgan, it might have been appropriate for her to obtain some more formal security for her tenure of that flat. She did not take any such steps. It might be suggested that the absence of any legal protection of her right to live in the flat is a pointer against the possibility that the right to occupy the flat was a sufficient benefit from the contribution. I do not consider that the absence of the formal right to occupy is of such significance as that. This was a family arrangement. Mrs Williams had in 1984 expressed confidence that Mr and Mrs Morgan would continue to support her until her death, and nothing had occurred in the intervening 10 years to call that confidence into question. The onus is on Mrs Morgan, as executrix of Mrs Williams' estate, to establish on the balance of probabilities that there was a common intention to create an equitable interest. I do not regard the absence of any formality in securing occupation rights for Mrs Williams as supporting the proposition that what was intended was the conferral of rights, additional to the occupation of the unit, which should be recognised by the imposition of a constructive trust.

[21] Mrs Williams' family circumstances are also relevant. Mrs Morgan was her only child, and the sole beneficiary under her will. Mr and Mrs Morgan's daughter was their only child, and is the intended sole beneficiary under Mrs Morgan's will. Any interest which Mrs Williams had obtained in the Kelburn property would have gone to Mrs Morgan on her death. The effect of not retaining an interest was that the benefit of the funding would accrue to both Mr and Mrs Morgan jointly. Mr and Mrs Morgan did not separate until 2006. Both of them had provided Mrs Williams

with a home. In those circumstances, it is not surprising that Mrs Williams might not have felt it necessary to retain an interest in the funds which were used to finance the building of her apartment.

[22] Mrs Morgan in her first affidavit says that she knows that her mother always believed she had an equitable interest in the Kelburn property and that was why she gave them so much money in the years that she lived there. She says that, when Mrs Williams could see that the marriage was in difficulties, she suggested that perhaps it would help if she moved and her share in the Kelburn property be used to purchase a unit in a retirement village. She further says that Mrs Williams was aware of and commented on a valuation of her interest obtained from Mr Arcus in 2006.

[23] It is important to note, in relation to that evidence of Mrs Williams' later actions, that the relevant intention is that at the time when the contribution was made. There is no evidence to suggest that Mrs Williams believed that she had an equitable interest in the property at that time. I would hesitate to attach importance to any views which Mrs Williams may have expressed, at the much later stage when difficulties in the marriage became apparent, as an accurate reflection of her views at the time the contribution was made.

[24] The other parties to the transaction were Mr and Mrs Morgan. So far as Mrs Morgan is concerned, I do not find any clear evidence that it was her intention, in 1994, that Mrs Williams should obtain an interest in the Kelburn property. She says:

We were still very much aware of the rest home issue and it seemed sensible to keep my mother off the title even though there was never any doubt that when the time came to sell Easdale Street, the Kelburn property would be my mother's home also.

[25] There is no reference at all, in the instructions given by Mrs Morgan to Mr Greig, of the need for any form of protection of Mrs Williams' interest. Mrs Morgan's evidence is that there was never any doubt that the Kelburn property would be Mrs Williams' home also. I consider that that proposition is correct, and it was borne out by events. It was her home, and remained so for many years. That,

however, is not the question. The question is whether she should have an ownership interest which should be recognised by the imposition of a constructive trust. Mrs Morgan's evidence does not squarely address her understanding on that question. It does not follow from the fact that the Kelburn property was Mrs Williams' home that there was an intention that the preservation of her home would be achieved by the retention of an equitable interest in the property, rather than by reliance on the family understanding that she could live with Mr and Mrs Morgan. Mrs Morgan was the person who took the responsibility of dealing with the legal arrangements. The absence of any reference in her instructions to Mr Greig of any need to protect Mrs Williams' position by recording a legal or equitable interest in the property weighs against any finding that it was Mrs Morgan's intention that Mrs Williams would obtain an interest.

[26] Mr Morgan's evidence is that he understood that the 1984 document was binding and he says:

To suggest that the document was not intended to have any legal effect as between Mrs Williams and us, is incorrect.

[27] Ms Davidson, counsel for the plaintiff, places considerable reliance upon some statements from Mr Morgan, following the separation and in negotiations for settlement of relationship property issues, that he accepted that Mrs Williams had an equitable interest. For reasons similar to those which I have expressed in relation to Mrs Williams' later expression of views, I do not attach significant weight to statements made in the context of the separation long after the relevant contributions were made. Mr Morgan now denies any equitable interest on the part of Mrs Williams. There is no evidence, close to the relevant events, to suggest that Mr Morgan believed that Mrs Williams had an interest in the Kelburn property.

[28] For these reasons, I do not consider that the parties must be taken reasonably to have expected that Mrs Williams would share in the Kelburn property to the extent of retaining a beneficial interest in the property extending beyond the right to live in the flat during her life time. I therefore find that the plaintiff has not established that the Kelburn property or any part of it is held upon a constructive trust for Mrs Williams. That means that the plaintiff's claim must fail.

[29] That finding makes it unnecessary for me to address a number of other issues which were canvassed in argument.

[30] Costs are reserved. The parties may submit memoranda if they are unable to agree.

“A D MacKenzie J”

Solicitors: M Duggan, Nelson for plaintiff
M C Jeffcoat, Wellington for defendant