IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN DIVORCE

SUIT NO. D. A003/86

BETWEEN	DAWN GENEVIEVE AZAN	PETITIONER
A N D	GASSON ELIAS AZAN	RESPONDENT

Mr. R. Carl Rattray Q.C. and Mr. Andrew Rattray instructed by Rattray, Patterson and Rattray for Petitioner.

Mr. Donald Scharschmidt and Mr. Douglas Brandon instructed by Livingston, Alexander and Levy for Respondent.

HEARD: March 26; April 24 & 29
May 22, 1987

JUDGMENT

RECKORD J. (AG.)

This is an application under Section 16 of the Married Woman's Property Act for a declaration that the petitioner is entitled to half interest in the shares standing in the name of the respondent in the company Elias Azan and Sons Ltd. and half interest in the respondent's share of the assets of the company and that the respondent pay to the petitioner such sum as represents her half interest in the said shares and assets.

PETITIONER'S CASE

Both parties were married in 1960. She was then 19 years old and he 21. She was a Secretary - he a Salesman. They had no independent assets.

The respondent's father had a small haberdashery business in grave financial difficulties. The father left the island in 1962 and the mother ran the business - sons not involved.

In 1962 the Petitioner changed job to work at a ceramic factory. Through contacts she got rejects at very reasonable prices and damaged crockery free for the Azan business. They pooled all their resources for all their needs.

In 1964 she left and formed Cradlecraft Manufacturing Company which manufactured infant's clothing. This company was registered in the names of both petitioner and respondent. She started at home with one sewing machine - she did the manufacturing and he, in his spare time, did the sales and kept the accounts.

In 1969 she formed two other companies - Tiny Town Manufacturing Company Limited for children's clothes and Tiny Town Limited for Sales. Both held shares equally.

Subsequently, the respondent left his job and started assisting in the father's business and at the same time continuing assisting the petitioner. His only source of income was from Cradlecraft which was incorporated in 1974.

In 1971, the respondent and his two brothers took over the father's business and formed the company Elias Azan and Sons Limited. The shares were divided equally between the 3 brothers. Respondent had no independent funds to pay for his shares - same paid for from their pooled resources - savings in common fund earned from Cradlecraft and Tiny Town.

In keeping with the general pooling of assets she understood that his earnings from the Azan company would be for the benefit of them both. At the same time he was sharing in half the profits from their companies. Because of the great amount of work and time she put in running these companies the respondent was able to devote most of his time to the Azan Company. The staff that was employed to do the books and accounts in their companies also did the books and accounts in the Azan company without any special charge.

In 1981, Kandy Kane Manufacturing Company and Markall Labels Limited were formed - both parties holding equal shares.

After the Azan company was incorporated she obtained from that Company not only whatever household goods that were needed but also a regular monthly sum of $1,500.00

From funds drawn from the Azan Company, the Respondent purchased apartment 35D Turtle Towers and registered in jointly in their names.

As time went by the respondent became a compulsive gambler both at home and abroad - he gambled day and night. Although this never affected his financial abligations to his home, due to his lack of sleep it affected his work pattern - the only interest in the businesses was the collection and control of money.

The respondent was not keeping up with certain commitments at the bank which resulted in the bank writing to him threatening to foreclose on properties which they jointly owned also on their personal guarantees.

The petitioner worried about the likely outcome of such a move- she eventually fell ill - her doctors diagnosed thyroid cancer - she underwent surgery in 1984.

The petitioner discussed her fears with an Attorney who advised her about separating their assets. On the 21st of March 1985, an agreement was entered in writing between them both relating to assets jointly owned.

In her viva voce evidence she said the respondent threatened to transfer his shares in Elias and Sons to his father but she never believed him, thought he saying this in jest. The settlement was amicable.

Because of her illness she left Jamaica in June 1985 for Miami to undergo further medical treatment. Serious marital problems began which led to the wife petitioning for divorce. In November 1986, a decree nisi was granted to the petitioner.

In December 1986, petitioner took out Summons under Section 16 of the Married Woman's Property Act.

In support of this summons she filed three affidavits dated 9th December, 1986, 20th January 1987, and 19th March, 1987. In reply the respondent filed two affidavits dated

8th January 1987 and 9th February 1987 denying the claim.

It was her testimony that from the very beginning of the marriage the understanding between them both was that all their assets both real and personal belonged to them jointly. In her own words "What is mine is thine and what is thine is mine." And this remained so until serious marital problems began in 1985.

Respondent had savings account before they were married. After the marriage he added her name to them making them joint account.

Petitioner opened savings accounts after marriage and placed his name in them also, making them joint accounts.

Respondent won money from his gambling habits and used same to purchase Apartment 7 Millsborough Court. He placed her name on the title.

She admitted writing several letters to Respondent while she was in Miami and that in none of those letters did she mention her entitlement to anything from the Shares respondent had in Elias Azan and Sons Limited. She denied however that her claim for interest in the shares was an after-thought.

After the settlement, the respondent informed her that he had bank account in Cayman with U.S. $250,000.00 - he offered her half share - U.S. $125,000.00 which she gratefully accepted. She was never aware of this account.

RESPONDENT'S CASE

In his reply respondent agreed that they had nothing when they got married.

That they pooled resources in the early years of marriage.

That he said on many occasions "that everything I had was hers

and everything she had was mine" - that was the understanding between them both.

The business of Elias Azan and Sons Limited was entirely a family one with his parents and two brothers - the arrangement "what is mine is hers and what is hers mine" related only to property jointly owned and did not include the shares and business of Elias Azan and Son Limited.

The shares were acquired in two stages - the first stage in 1971 when he purchased 20% which he paid from his own funds. The second stage 1974, he purchased 200 from his father from a loan from Bank of Nova Scotia which he repaid from his own resources.

He agreed that he put her name in his accounts and she put his in hers. That the payment for the first lot of shares was from his account in which her name was. But that payment of second lot was from earnings at Elias Azan and Sons Limited.

The reason for putting the names of each of them in the others accounts was for convenience only.

The $1,500.00 that she received monthly was an housing allowance the company paid to him which he passed on to her.

He denied that the petitioner was entitled to any share in the Azan company.

SUBMISSIONS

Mr. Scharschmidt submitted that:

(1) English Law does not recognize the concept of family property - status of marriage does not confir per se any rights to property

(2) Where legal title is in a party's name, that party is entitled to the full beneficial interest unless the other party can establish a resulting trust.

(3) The law of contract applied with the same regidity in marriage as it does out of marriage. The onus lies on the petitioner to prove that she entitled to half share - this she has failed to do.

Refers to Pettitt v. Pettitt (1969) 2 AER 385 Gissing v. Gissing (1970) 2 AER 280 Grant v. Edwards (1986) 2 AER 426.

On the question of joint accounts he submitted that the following should be considered.

(1) The purpose of the joint account

(2) Relative contribution of the parties to the account

(3) The rights of the parties in relation to the funds in the account

(4) The rights of the parties to property acquired out of the funds in the account.

Where money is withdrawn from a joint account and used to purchase property in the name of one spouse only, that property belongs to that spouse.

Haseltine v. Haseltine (1971) 1 AER 952 Re Bishop (1965) 1 AER 249 Hoddinott v. Hoddinott (1949) 2 K.B. 406

The question for the Court is - Whose property is it? Not - 'to whom it should be given'.

Neither her affidavit evidence nor viva voce evidence suggest that there was ever any agreement regarding Elias Azan and Sons Limited. The probabilities of her omitting to deal with the most important part of her claim is unlikely.

The respondent acquired the shares in two phases - this must be considered separately.

The fact that respondent gave the petitioner half-share in the Cayman account cannot be held that she entitled to half share in every other account.

There is no basis for any interest to be given to the petitioner in the Elias Azan and Sons Company.

Mr. Rattray: Submits:-

That it was the totality of the behaviour and conduct of the parties throughout that the court should look at in coming to a decision.

In particular he referred to the pooling of resources from the inception until the break down of the marriage.

The arrangements - what is yours is mine - what is mine is yours, the putting of each others name in their bank accounts.

After the sharing of the joint assets the respondent shared his Cayman account on a 50 - 50 basis.

He submitted that the relationship painted a picture of parties who had embarked on a joint enterprise. Consequently, whatever is acquired in that joint enterprise, whatever name it is put in, it belongs to both parties.

This principle governed her behaviour in all future undertakings. The respondent recognise her interest in the Azan Company - she received a monthly sum from it. The accountants from Cradlecraft did the books in the Azan Company without charge. This, he submitted, shows the connection as to what the arrangements were. An apartment respondent purchased at Turtle Towers from earnings at the Azan Company was registered in both names. The first set of shares was purchased from funds taken from their joint account.

Mr. Rattray submitted that there was abundant evidence that the petitioner's contribution, traced historically, was substantial. There was an understanding that she would own

50% of his shares. If the petitioner believing that this was so by virture of his representation then the whole conduct of the petitioner afterwards in not insisting or checking on what the respondent did, would estop respondent from saying now that she has nothing in those shares. She acted to her detriment - whether or not she made any claim to the shares is completely immaterial - See Pettitt v. Pettitt (Supra) at 398 E Respondent held shares in trust for himself and wife See Gissing v. Gissing (Supra). Re Bishop (deceased)

Where money is put into a joint account and if the husband intends it to go to his wife on his death, them wife has beneficial interest in that account, and that this is so whether or not she contributed to the account. See Re Figgis (deceased) Roberts v. Anor. v. McLaren (1968) 1AER 999.

Finally he submitted that there was sufficient evidence of an agreement between the parties and joint interest. Alternatively, there was a resulting trust arising from his representation wherein she acted to her detriment and therefore entitled to the declaration sought.

FINDINGS

The parties had no assets on marriage in 1960. After marriage each put the others name in their savings account. They pooled resourses. There was an understanding from the very beginning that whatever either party had belonged to the other. (Although this was expressly admitted in his viva voce evidence, it was denied by the respondent in his affidavit evidence dated 9th February 1987 - para 18).

Between them they formed several companies - five in all commencing in 1964, with Cradlecraft. They both worked hard in this business - she with the manufacturing - he with sales and account. It is obvious that this business was doing

very well. Not only did they move the business from their home to rented premises in town but also by 1965 respondent had left his employment to devote his time to Cradlecraft and also to assist in his father's business.

In 1971, the respondent and his two brothers took over their father's business and formed the Company Elias Azan and Sons Limited. I find that his initial shares were paid for from an account owned jointly by the respondent and the petitioner in which they had both pooled their resources. He subsequently bought other shares with a bank loan.

They acquired several assets, the majority in their joint names. I find that the Petitioner did a tremendous amount of work in their joint companies and that because of this the respondent was able to spend most of his time in the Azan Company. From earnings from the Azan Company the respondent purchased apartment 35D Turtle Towers and registered it in their joint names. From winnings at gambling he purchased apartment 7 Marlborough Court and registered it in their joint names.

In the meantime the Azan Company was doing exceptionally well. It had grown considerably owning stock valued several million of dollars. I find that the Azan Company, recognising the petitioner's connection paid her $1,500.00 per month together with other household requirements.

I find that the agreement of the 21st of March, 1985, was reached as a result of the petitioner's desire to protect her interest in property that they jointly owned. It was an amicable settlement and was in keeping with the understanding they had over 24 years of marriage that 'what is mine is yours and what is yours is mine'.

It is observed, and I find it significant, that the two apartments owned in Miami owned jointly by them was not mentioned in the settlement, yet respondent subsequently assigned his interest in them to the petitioner.

I find it significant also that all the funds from three savings account in their joint names were given to the petitioner. In her own words "I don't know where the money came from in the savings account but in the settlement I got them".

What then of those property not jointly owned which have come to the attention of this Court?

(1) Bank Account with $200,000.00 on fixed deposit in respondent's name.

(2) Apartment 21E Turtle Towers in Petitioner's name.

(3) Bank account in Cayman, U.S. $250,000.00 in respondent's name

(4) Respondent's shares in Elias Azan and Sons Limited.

As to (1) the petitioner's affidavit evidence is that $1,000,000.00 was on fixed deposit in the brothers name. The respondent testified that this account was for $600,000.00 in the names of the three brothers - one third belonging to each - that the petitioner knew it belonged to him, hense they never discussed it.

As to (2), this was not discussed aparently because of the peculiar circumstances under which the petitioner acquired same.

In relation to (3), it was the respondent who volunteered the existence of this account and promptly gave her U.S. $125,000.00 - a half share.

As to the fourth and relevant asset, the subject matter of this summons, it is the evidence of both parties that the petitioner has never before this claim, made any formal or direct claim to it or any part thereof. However, it is the evidence of the petitioner that the respondent threatened to dispose of his shares in the Azan Company in order to defeat any claim she may make to an interest. (See para. 40 of her

affidavit of the 9th December, 1986 and reply thereto at para. 26 of his affidavit of the 8th January, 1987.

What therefore, is the result of any finding that there was a common understanding as to ownership of property between the parties. A decision must be reached by applying settled law to the facts as they may be established.

In Pettitt v. Pettitt (Supra) Lord Morris said at p. 393 para (h - I).

> "It appears to have been generally accepted that if in a question as to the title to some property a judge is able after hearing evidence to come to a conclusion that there was a clear agreement between husband and wife in regard to the ownership, he must give his adjudication accordingly. He cannot them make an order which withdraws title from the party to whom on his findings it belongs".

What is the position where, as here, the respondent says that the understanding was only in relation to assets jointly owned? - Lord Morris at page 394 said

> "It would be unnatural if at the times of acquisition there was always precise statement or understanding as to where ownership rested. So, if at a later date questions arise as to the ownership of a house or various things in it, though as to some matters no honest difference of view will arise, as to others there can be such honest difference because previously the parties might never really have applied their minds to the question as to where ownership lay".

At page 398 Lord Morris continued:

> "Sometimes, an agreement, though not put in express words, would be clearly implied from what the parties did. But there must be evidence which establishes an agreement before it can be held that one spouse has acquired a beneficial interest in property which previously belonged to the other or has a monetary claim against the other".

Further on page 398 he continued:

> "The Court must find out exactly what was done or what was said and must then reach a conclusion as to what was the legal result. The Court does not devise or invent a legal result. Nor is the Court influenced by the circumstances that those concerned may never have had occasion to ponder or decide the effect in law of whatever were their deliberate actions. Nor is it material that they might not have been able - even after reflection - to state what

> was the legal outcome of whatever they may have done or said. The Court may have to tell them".

There was the uncontradicted evidence that accountants from Cradlecraft did the books for the Azan Company. Also that the work put in by the Petitioner in Cradlecraft allowed the respondent to apply his attention to the Asan Company. On this point Sir Nicholson Browne - Wilkinson had this to say in Grant v. Edwards (Supra)

> "Once it has been shown that there is a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify. The acts done do not have to be referable to the house".

In that same case Nourse L.J. said that there were cases where

> "Although there has been no writing, the parties have orally declared themselves in such a way as to make their common intention plain. Here, the Court does not have to look for conduct from which the common intention can be inferred, but only for conduct which amounts to an acting on it by the claimant".

It was his view that "The act of the defendant in crediting the balance of the insurance money to a joint account, when viewed against the background of the initial common intention and the substantial indirect contributions made by the plaintiff to the mortgage payments from August, 1972, onwards, was the best evidence of how the parties intended the property to be shared".

On a preponderance of evidence, I therefore find that there was a common intention between the parties from the inception of the marriage that their assets were to be shared equally.

That this did not apply only to assets in their joint names but also to other assets separately owned.

That the act of the respondent, among others, in sharing his Cayman account with the petitioner was powerful

evidence in support of how the parties intended property between them to be shared.

It is not without some significance that in the entire evidence (affidavit and viva voce) of the respondent it was never said that there was an understanding between himself and the petitioner that his shares and interest in Elias and Sons Limited were not subject to the common intention of the parties over all the 24 years that the marriage lasted.

Indeed, immediately after her claim was served upon the respondent in December 1986 there was a flurry of action at the Company with the connivance and concurrence of the respondent not only to get rid of his shares but also to dissipate the assets of the company for the sole purpose of defeating her claim.

Accordingly, there shall be an order in terms of paragraph 1, 2, and 4 of the summons - Cost to be agreed or taxed to the petitioner.

Certificate for counsel granted.

The Registrar to appoint appropriate party to make proper assessment of the value of respondent's share and assets in the Company as at 15th December, 1986.
Cost of this assessment to be deducted from respondent's share in the company.