[2012] JMCA Civ 62

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 17/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**EUTETRA BROMFIELD**	**APPELLANT**
AND	**VINCENT BROMFIELD**	**RESPONDENT**

Raphael Codlin and Miss Melissa Cunningham instructed by Raphael Codlin & Co for the appellant

Lawton Heywood for the respondent

26 and 27 July 2011 and 20 December 2012

PANTON P

[1] This is an appeal from the judgment of Brooks J (as he then was) who, on 6 January 2009, ruled that the appellant had failed to establish an entitlement to an interest in any of the properties or shareholdings claimed in an originating summons filed a decade earlier against the respondent, her former husband. However, the learned judge gave effect to the respondent's offer to transfer his interest in one of the properties to the appellant. That property, situated at 3 Pinkneys Green, Kingston 6,

was the former matrimonial home and is not involved in the appellate proceedings. There was also before the learned judge an application by the appellant to increase the amount that had been ordered by Harris J (as she then was) to be paid by the respondent to the appellant for her maintenance.

[2] The order made by the learned judge reads as follows:

> "IT IS HEREBY ORDERED AS FOLLOWS:
>
> 1. By and with the consent of Mr. Glen Vincent Bromfield, all his estate and interest in all that parcel of land known as No. 3 Pinkneys Green, Kingston 6 in the parish of Saint Andrew, being all that parcel of land comprised in Certificate of Title registered at Volume 1209 Folio 545 of the Register Book of Titles with buildings thereon, be forthwith transferred to Eutetra Bromfield of 3 Pinkneys Green aforesaid
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> 2. That the said Glen Vincent Bromfield deliver up the Duplicate Certificate of Title for the said land to the said Eutetra Bromfield and execute such instruments of transfer and other documents as are required to give effect to this order
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> 3. That in the event that the said Glen Vincent Bromfield shall fail and/or refuse to execute such documents, as are mentioned above, within ten days of being required in writing so to do, the Registrar of the Supreme Court is hereby empowered to execute the said documents in order to give effect to this order;
>
> 4. Mr. Glen Vincent Bromfield shall pay to Mrs. Eutetra Bromfield the sum of $3,000,000.00, being a lump sum payment in respect of her maintenance. The sum shall be paid in three equal monthly instalments [sic] commencing on the 12th day of January 2009 and thereafter on the first days of each succeeding month

5. This order supersedes the order made by Harris, J. on 20th October, 2000

6. No order as to costs."

The originating summons

[3] In the originating summons, filed under the Married Women's Property Act (now partially repealed), the appellant, while claiming that she and the respondent were owners in equal shares of the various properties, sought a judicial determination as to their respective interests in the following:

- townhouse # 4, 1 Waterworks Road, Kingston 8;
- 85 Lady Musgrave Road, Kingston 6;
- 53-55 Hope Road, Kingston 6;
- 3 Pinkneys Green, Kingston 6;
- 5 Chaves Avenue, Kingston 3;
- 2 Halls Crescent, Kingston 8;
- the company known as Medallion Hall Limited; and
- the company known as Bloomfield's Motor Coaches Jamaica Limited.

It will be readily seen that the order of the learned judge referred only to the property at 3 Pinkneys Green and to maintenance.

The evidence generally

[4] The parties filed affidavits and were cross-examined thereon. There was no viva voce evidence from an independent source to assist the learned judge in his decision-making. However, there was documentary evidence in the form of certificates of title with endorsements thereon, memoranda and articles of association and cheques.

[5] The appellant is the holder of three degrees: a Bachelor of Arts degree in sociology and psychology, a Master of Arts degree in social service administration and research, and a Master's degree in public administration. Between 1972 and 1974, she was employed in the Liberian Ministry of Finance, Planning, Information and Tourism. Thereafter, up to 1980, she was employed to the Government of Jamaica in the Ministry of Finance and Planning as a planning and development officer. She said that she left her employment with the Government of Jamaica at the suggestion of the respondent, after she had given birth to the last of the three children that they have had together. The respondent challenged that explanation as he said that she left her employment due to disputes with her co-workers.

[6] The respondent did not have the experience of a university education. He started his working life as a mechanic and tractor driver. He later bought a car and started operating as a taxi driver in 1962 at the age of 27. His aim, he said, was to "build himself in the transport industry". And that he certainly did. He said that in 1974 "the Government of Jamaica advised all taxi operators to form one unit in order to better represent themselves as a body in the transportation industry". That gave birth to the Jamaica Union of Travellers Association (J.U.T.A.), and he was the first president of the Kingston chapter. He was instrumental in the formation of other chapters in Ocho Rios, Port Antonio and Montego Bay. After the formation of the four chapters, he became the all-island president of the association.

[7] When the parties met in 1974, the respondent was the owner of a motor car and a 12-seater motor bus which he operated in the transport industry. These motor vehicles were not the only things he owned then as he was also the owner of his own house at Lagoon Avenue, Harbour View, and a plot of land in Mandeville. They became married in July 1977 and took up residence at Lagoon Avenue. Prior to the respondent's ownership of that house, he had owned a house at Shakespeare Avenue in Duhaney Park which he sold to facilitate the purchase of the house in Harbour View. About a year after the marriage, the parties moved to 3 Pinkneys Green. There is a dispute as to its acquisition. The appellant said that they bought it after selling the Harbour View house and pooling their incomes. On the other hand, the respondent said there was no contribution financial or otherwise from the appellant. That is no longer important as the respondent, as said earlier, decided to transfer it to the appellant solely. The appellant was also an owner of property, in her own right. She owned a citrus and cash crop farm in St Catherine and a lot of land in Green Acres, St Catherine. She was also a partner in her family's business enterprise which consisted of a grocery shop, a hardware, a store and a bar at Point Hill, St Catherine. During the marriage, she also owned two houses in her sole name at different times.

[8] Prior to the marriage, the respondent had fathered six children. He fathered three more with the respondent, and two others outside the marriage, making a grand total of 11. The marriage was not a happy one, as the respondent claimed that the

appellant showed him neither love nor affection, whereas the appellant pointed to his extramarital affairs as the source of the problem.

[9] In July 1998, the marriage was terminated but the parties had separated several years before then. During the marriage, there were several property acquisitions that form the subject matter of the instant proceedings. The first event of significance in the scheme of things was the incorporation of Bloomfield's Motor-Coaches Jamaica Limited. This was on 31 March 1980. It was incorporated with a share capital of 1,555 at a par value of $1.00, and is now known as Bloomfield Jamaica Ltd. The shares were allotted as follows:

- Glen Bloomfield 1000
- Laverne McFarlane 5
- Elaine Bloomfield 200
- Lorraine Bloomfield 200
- Judith Heron 25
- Eutetra Bloomfield 100
- Calmeta Wright 25

During the hearing before Brooks J, one of the contentions of the appellant was that monies from the operation of this company were used to acquire some of the properties; consequently she, as a shareholder in the company, claimed part ownership of the properties so acquired. Incidentally, it is noted that there is a difference in the spelling of the surname of the family members in the documentation as "Bloomfield" appears where one would have expected "Bromfield". However, nothing turns on this.

[10] The minutes of the first directors' meeting of Bloomfield Jamaica Ltd. held at 53 Hope Road, Kingston 6, on 23 June 1980, show the following persons as directors:

Mr Glen Bromfield - Chairman
Miss Lavern McFarlane
Miss Elaine Bromfield
Miss Lorraine Bromfield
Miss Judith Heron
Mrs Eutetra Bromfield
Miss Calmeta Wright

At that meeting, Miss Lavern McFarlane was appointed secretary, Rattray Patterson Rattray as attorneys-at-law and the Bank of Nova Scotia Jamaica Limited as bankers to the company.

[11] Bloomfield Jamaica Ltd obtained from the Government of Jamaica a sub-franchise in the public transportation business. To execute that sub-franchise, the respondent incorporated Citizens Omnibus Services Association Ltd. He gave the appellant six buses "to run for herself", and an additional bus was given to her with a driver to earn income for the home. According to the respondent, the appellant was not required to account for monies received by her in this way, and he did not interfere in the operation.

[12] Subsequent to the incorporation of Bloomfield Jamaica Ltd., that is, on 31 March 1983, Medallion Hall Ltd was incorporated. The respondent said that the purpose of this company was to operate Medallion Hall Hotel which he had started on properties located at 86 Lady Musgrave Road and 53 and 55 Hope Road, Kingston 6. In her affidavit in support of the summons, the appellant said: "...in 1983, we incorporated a Company known as Medallion Hall Limited..." This statement gave the impression that

she was involved in the incorporation. However, the memorandum of association which she exhibited shows that the subscribers were one Gladstone Ron Burgess (150 shares) and the respondent (149 shares). The appellant said also that throughout the marriage she took care of expenses (presumably household expenses) from her own funds, "thereby relieving [the respondent] of all the responsibilities so that he has been able to channel some of the finances earned from the Companies into other areas such as the purchase of lands, the subject matter of the Application". She said that she had an account at the Bank of Nova Scotia, Newport West in which she would put the profits from her bus package operation, and some of the funds would be transferred to the respondent's account from her account due to an arrangement that they had with the said bank, and such funds were invested in the hotel.

[13] The appellant claimed that she was very attentive to the personal and business welfare of the respondent. She said that she took keen interest in the operation of the various business projects on which they had embarked as it was their joint intention that she would have a half share in all acquisitions. She was, she claimed, surprised when she discovered that her name was not on the certificates of title in respect of these acquisitions. However, she did not regard it as a problem as the respondent had assured her that all that they had acquired was theirs as joint owners. She expressed herself thus in her affidavit in support of the originating summons:

> "44. That when I discovered that the Titles above including our matrimonial home was not in our joint names, I did not concern myself overly, particularly as it was our matrimonial home and I

> believed my husband when he said we were joint owners as that was always our intention to own everything jointly."

And at paragraph 46, she added:

> "That the Defendant and I at all material times agreed that we be joint owners of all our businesses and in breach of that common intention the Defendant has deprived me, of my rightful share in the Companies and all the properties described herein."

[14] The respondent expressed disagreement with the appellant on this question of their intention. He said that he "never told the [appellant] at any time that everything [he] had was for us". He added that he "could not have done that in light of the fact that [he had] 11 children" (page 74 of the record). He continued at pages 80 and 81:

> "76... In particular I deny that at all material times or at any time at all there was any agreement between the plaintiff and me that we would be joint owners of my premises and joint owners of everything I acquired. No common intention existed between the plaintiff and me that she should share in the beneficial interest in my properties.
>
> 77. If what the plaintiff alleges were true, then 8 of my children would be left out in the cold. I am not a foolish man, and I could never ever have put my children in a position of never being able to share in what I have worked so hard for."

The evidence in respect of the particular properties

Townhouse #4, 1 Waterworks Road, Kingston 8

[15] The transfer of this property was registered on 18 October 1996 in the name of the respondent for his natural life and thereafter to his infant son David Bromfield born on 26 October 1993. A mortgage was registered on the said 18 October 1996 to Scotia

Jamaica Building Society to secure $4,800,000.00 with interest. The appellant said in her affidavit that the respondent had used the profits of both companies to purchase this property. Under cross-examination, she said that it was acquired in 1990 and it was the respondent who told her that he had purchased it out of the funds of the business. The respondent denied these statements by the appellant, pointing out that he bought the property through a loan after the marriage had broken down and he had ceased living in the matrimonial home. Prior to the purchase, he said he had been living at Medallion Hall Hotel.

85 Lady Musgrave Road, Kingston 6

[16] The appellant filed an affidavit and gave oral evidence in respect of 85 Lady Musgrave Road. In her affidavit, she said that it was purchased as a result of her encouragement and business attitude, and with monies from the joint efforts of the respondent and herself. She said she contributed to its purchase through the sale of a house they owned in Mona Heights. The house was sold for $32,000.00 and the sum of $30,000.00 from that amount was deposited towards the purchase price of 53 Hope Road and 85 Lady Musgrave Road. Under cross-examination, however, she said she was not sure if there was a property known as 85 Lady Musgrave Road. The fact is that 85 Lady Musgrave Road was not a property bought by the respondent. The appellant also gave evidence in relation to 86 Lady Musgrave Road. In her affidavit, she said that it had been purchased from the profits of the business and the net proceeds of the house they owned in Mona Heights. The respondent had a markedly different tale. He said that 84 Lady Musgrave Road was purchased by him and his daughter Elaine with

monies from her and from his transportation business. He said that there was never any intention for the appellant to share in that property. As regards the sale of the Mona Heights house, he said that he gave the appellant 50% of the net proceeds although she had not contributed to its purchase. The records show that a transfer of 84 Lady Musgrave Road was registered on 24 September 1979, to the respondent and Elaine Miranda Bromfield, a teacher, as tenants-in-common, the consideration money being $36,000.00. The said property was transferred in less than 18 months to Carl and Norma Reece, with the consideration money stated as $60,000.00. Number 53 Hope Road was also purchased in the names of the respondent and his daughter Elaine, according to him. As regards 86 Lady Musgrave Road, there was a transfer registered in the respondent's name on 23 October 1985, the consideration money being $30,000.00. Between 30 December 1987, and 8 March 1994, there were three separate mortgages registered in favour of the Bank of Nova Scotia Jamaica Limited. The properties at 53 and 55 Hope Road and 86 Lady Musgrave Road are contiguous and provide the necessary space for the development of the hotel.

53 & 55 Hope Road, Kingston 6

[17] The acquisition of 53 Hope Road has already been dealt with in the previous paragraph. As regards 55 Hope Road, the appellant said that she had used some of the profits from her bus package operation to purchase 6 Bradley Avenue. The respondent, she said, had the title issued in the name of Bloomfield Jamaica Limited. Bradley Avenue was sold in 1991 and the net proceeds used to purchase 55 Hope Road in his

name only, but for the purpose of expanding the hotel. The respondent on the other hand said that 6 Bradley Avenue was indeed purchased by Bloomfield Jamaica Limited. The deposit had come from the proceeds of the operation of the bus packages by Bloomfield Jamaica Limited. The mortgage payments were made by Bloomfield Jamaica Limited. When Bradley Avenue was sold the proceeds of sale were used to purchase 55 Hope Road and to repay a loan that had been obtained from the Bank of Nova Scotia to carry out extensive repairs on Bradley Avenue.

[18] The certificate of title for 55 Hope Road confirms that the property was registered in the name of Bloomfield Jamaica Limited, the consideration money being stated as $2,500,000.00. There is also a mortgage noted on it on 9 May 1994 to the Bank of Nova Scotia to cover the amount of $3,500,000.00.

5 Chaves Avenue

[19] The appellant said in her affidavit that this property was bought from the funds of Bloomfield Jamaica Limited. Under cross-examination, she changed her story by saying that it was bought from pooled funds from a bank account which may have been at the Bank of Nova Scotia. However, she does not recall when it was acquired. The respondent said the property was bought for $28,000.00. A "deposit of $10,000.00 was obtained and a mortgage financed the balance of the purchase price". He said that although it is registered in his name, it is intended for his daughter Karen who had been threatened with eviction by her landlord. The appellant, he said, contributed nothing to

its acquisition, and it was bought without consulting her. The certificate of title shows that the transfer to the respondent was registered on 16 April 1981, the consideration money being $24,000.00. Two mortgages to the Bank of Nova Scotia were registered on 17 June 1981, and 18 December 1981, respectively.

2 Hall's Crescent, Kingston 8

[20] The certificate of title to this property shows the registration of a transfer on 1 July 1993, to one Dorette Abrahams, a businesswoman of 68 Barbican Road, Kingston 6. On the said date, a mortgage was also registered to Victoria Mutual Building Society to secure $1,500,000.00 with interest. The consideration money was recorded as $2,400,000.00. In her affidavit, the appellant stated that this property had been purchased by the respondent using the profits of the companies and that the respondent was operating "another Hotel" there. She said further in cross-examination that the respondent was the person who had bought the property and that the companies were paying the mortgage. She said she gave her previous attorney-at-law Mrs Priya Levers the cheques. However, they were never tendered in evidence. According to her, the respondent later transferred that property into the names of his wife and himself. Under cross-examination, the respondent denied that he purchased this property in the name of Mrs Abrahams. In his affidavit, he denied that he was operating a hotel at that address.

The judge's findings as regards the properties

[21] The learned judge considered the affidavits, filed by the parties in support of their respective positions, and also the evidence they gave under cross-examination at the hearing in Chambers. In the end, in respect of two of the properties (Lady Musgrave Road and Chaves Avenue) the learned judge found that the respondent's version of the acquisition was more credible, and in respect of the others, he did not find it possible to make an award in favour of the appellant – either because the property was entirely a company asset or the evidence adduced by the appellant was insufficient.

[22] In respect of townhouse #4, Waterworks, the learned judge found that to be the respondent's house having moved there after vacating the matrimonial home. The account as to its acquisition as given by the respondent was found to be more credible and probable than that given by the appellant. The latter had said that she had made a contribution to its acquisition and that profits from both companies had been used to purchase it. However, the judge preferred the respondent's evidence that he had bought the property by taking out a loan. In arriving at that conclusion, the judge noted that "the endorsement on the certificate of title for the property supports the aspect concerning the loan". In any event, said the judge, if company funds had been used to purchase the property then the benefit would accrue to the company and not to the appellant.

[23] As regards 55 Hope Road, the learned judge found that the property was owned by Bloomfield Jamaica Ltd and so, he felt, it would have been improper for him to have awarded the appellant any interest in it.

[24] The judge dealt with 86 Lady Musgrave Road and 53 Hope Road together because, he said, of their connection with Medallion Hall Hotel. According to the judge, the appellant's evidence left him with the belief that these properties were purchased together from the proceeds of sale of a house at Anthurium Drive (the Mona Heights house referred to earlier) that the parties had owned together. However, the certificates of title show that 53 Hope Road was acquired a year after 86 Lady Musgrave Road. The judge preferred the evidence of the respondent that he had given the appellant half of the proceeds of the sale of the house at Anthurium Drive and that he was the sole purchaser of 86 Lady Musgrave Road. As regards 53 Hope Road, he purchased same with one of his daughters. The learned judge found significance in the fact that the appellant acquired a house at Farringdon Drive within two months of the sale of the Anthurium Drive house. This indicated that her interest and finances were directed towards Farringdon Drive, the judge concluded.

[25] The appellant initially contended that 5 Chaves Avenue was bought from company funds and put in the name of the respondent. However, during cross-examination, she said that it had been purchased from "pooled funds from the bank account" which she said was in their joint names at the Bank of Nova Scotia. On the other hand, the respondent said that the purchase had been financed by a loan. This

was verified on the certificate of title which showed that a mortgage was registered two months after the title had been transferred to the respondent. The inconsistency in the evidence of the appellant resulted in a finding by the judge that the respondent's evidence was more credible.

[26] The property at 2 Halls Crescent is registered in the names of the respondent and his current wife and this has been so since 9 October 2006. Previously, it had been registered in the name of the wife alone. The appellant said that it had been purchased by the respondent during the marriage but there was no evidence produced to justify that statement, the judge said.

Maintenance

[27] As regards the application for an increase in the maintenance sum, the learned judge refused the application and instead ordered the payment of a lump sum in order, he said, to bring closure to the situation, given the changed circumstances of the parties.

The grounds of appeal – maintenance

[28] The following grounds of appeal were filed as regards the maintenance order:

- "The learned judge misdirected himself when he said that Mr. Bromfield did not provide any credible evidence as regards his income but the Court nevertheless discharged the maintenance order and substituted same for a lump sum payment of three million dollars. Having found that Mr. Bromfield failed to show

what his income was, His Lordship misdirected himself when he used that failure to discharge the order having showed that the failure could result in the maintenance order and therefore the Court could not properly on its own initiative discharge a maintenance order which was properly enforced without justification. His Lordship failed to take into account what was said by Justice Hazel Harris when she made that maintenance order that at Mrs. Bromfield's age, which was some nine years ago, it is not likely that she would obtain employment. Mrs. Bromfield has testified and His Lordship has accepted that she is unlikely to obtain gainful employment."

- "The reasons given by His Lordship for discharging the maintenance order is [sic] not consonant with the law. Indeed His Lordship appears to have given no reasons at all when the said circumstances of the parties required that periodic payments should be ended."

The other grounds of appeal (as to property entitlement)

[29] The following are the other grounds of appeal in relation to the claim for an entitlement to an interest in the various properties:

"1.The learned judge misdirected himself when he failed to indicate in his written reasons the law applicable to the situation as explained by the Privy Council in ***Green v. Green*** and to apply the facts of this case to the law and then to give reasons why the Claimant's case does not satisfy the legal criteria as laid down in ***Green v. Green.***

2. The learned Judge in failing to make a finding as to whether or not the parties had a common intention that assets acquired during the marriage, both in the Companies and otherwise, would belong to them both and if so, in what proportional share is fatal to the judgement handed down, in that since the parties ownership of property does not turn on shares

evidenced by them then there must be a determination as regards their common intention.

3. There is a myriad of objective facts which the learned Judge has not made any findings on thus falsifying what he has done.

4. His Lordship has not explained how it is that Mrs. Bromfield is shown on the evidence by virtue of share certificate to own one-eleventh of the assets of Bromfield Jamaica Ltd and to relate that to the question of the parties' common intention.

5. His Lordship has not shown why it is that Mrs. Bromfield was the only other Director apart from Mr. Bromfield who attended Directors meetings yet he does not accept that she played any part in Bromfield Jamaica Ltd which entitles her to share in the Company's assets thus explaining what was the purpose of her attending the meetings.

6. It is well known in legal circles that attendance at Director's Meetings and Annual General Meetings is the foundation of ownership and participation in small family companies unless it can be shown that a person attended in the capacity of an employee.

7. The minutes of the meeting show that whenever the employed secretary did not attend a Directors Meeting Mrs. Bromfield as Director would perform the role of secretary without taking any salary, evidence consonant with her oral and written statements, which His Lordship ignored.

8. In a small family company as happened in this case the attendance of persons minus employees at Directors' meetings show that the persons are Directors and if that is not so, the person's capacity is clearly shown

as happened in the present case. Moreover there are only two persons to whom share certificates were issued as evidenced by Mrs. Bromfield's affidavit and no person can own any share in a company unless:

(1) Share certificate is issued to that person.

(2) There is evidence to show that the person has paid for the shares and the entitlement would turn on the equitable doctrine that equity regards as done what ought to have been done.

9. Although the learned Judge has said that he accepts Mr. Bromfield's evidence over that of Mrs. Bromfield in cross-examination he has not dealt with the evidence of the parties as shown in their Affidavits and therefore one does not know what his findings are. For instance, His Lordship has said that because Mrs. Bromfield purchased a property after the Anthurium property was sold and after 53 Hope Road was bought that Mrs. Bromfield did not assist in the purchase of 53 Hope Road. There is no fact proved [sic] to the court's satisfaction as to the destination of Mrs. Bromfield's share of the proceeds of Anthurium Drive and His Lordship was not entitled to infer what in his own words amounted to a speculation.

Although the learned judge has said that he accepts [sic].

10. Not having dealt with the question of Mrs. Bromfield's shareholding in the company along with that of Mr. Bromfield the learned Judge misdirected himself when he said that the assets of the company belong to the company and therefore he could not give company's assets to Mrs. Bromfield as shareholder His Lordship on his own finding would be equally wrong in giving company assets to Mr. Bromfield.

11. Mrs. Bromfield's evidence is that she left her job with the Government, she being a hard working lady with two University Masters degrees, to work and help build the businesses which her husband and herself were engaged in. Since the evidence shows clearly that Mrs. Bromfield has been involved with her husband in all the businesses operated by him and since the evidence also shows acquisition of the assets during their marriage His Lordship has not shown why Mrs. Bromfield is not entitled to a share in the assets acquired by her husband and herself during the marriage.

12. His Lordship again misdirected himself when he said that because mortgages were taken out on the properties that showed that Mrs. Bromfield had no interest in them. Clearly most persons purchasing property do so with the aid of mortgages. The evidence shows that mortgages were taken out to pay for properties ex post facto initial purchase. The evidence showed that assets were purchased, whether with the help of mortgages or otherwise, by the hard work of the Bromfield's [sic] together and since both deposit and mortgage were paid from the earnings of the businesses the ownership of the assets would reside with the persons who own the businesses. His Lordship's assertion about company assets could not properly apply to Mrs. Bromfield is incorrect [sic] because all companies that own assets own on behalf of shareholders subject to creditors.

13. His Lordship's findings on page thirteen (13) of His Judgement that Mrs. Bromfield is entitled to an interest in the company as a shareholder is correct. What is incorrect is His Lordship assertion that company property can belong to Mr. Bromfield but the same cannot be applied to his wife. His Lordship misdirected himself most fundamentally when he said Mrs. Bromfield cannot be allocated any of the company's assets although he

found that she was a shareholder and that shareholding created an interest for her in the company's assets (see page 13 of His Judgement)."

The submissions in respect of maintenance

[30] At the hearing before us, Mr Codlin said that the question of the maintenance was up for review, and that the court should at least consider the amount. The court, he said, should not say that an amount of $100,000.00, for example, is enough. Two years have passed since the order was made, he said, and so the court "should look at the situation and see what obtains". Mr Heywood, on the other hand, submitted that an order was made in the year 2000 and it was varied in 2008/9. "Litigation", he said, "must come to an end". The respondent was 74 years old at the time, and had assumed the responsibility of a wife. Section 23 of the Matrimonial Causes Act gave the court an opportunity to do what it did, he continued. A lump sum payment is ideal in the situation and in addition the respondent had made a generous offer along with the lump sum. Mr Heywood closed his submissions on this point by saying that the appellant had not succeeded in demonstrating that the learned judge had erred in his decision.

The earlier judgment as regards maintenance

[31] The judgment of Harris J (as she then was) as regards maintenance forms part of the record of appeal and has been referred to in the grounds of appeal. Consequently, it has to be looked at. It was delivered on 20 October 2000. The order was made at a time when the parties were no longer husband and wife. That very

learned judge gave consideration to their incomes, earning capacities and other financial resources. She noted that in the appellant's affidavit, she had not mentioned her ownership of a property known as 4 Farringdon Drive from which she had at the time been deriving income of rental. The judge noted also her ownership of the farm at Bog Walk which she regarded as a source from which income could be generated from the appellant's sister who was then farming the land. An agreement for sale had been entered into in respect of Farringdon Drive, and the mortgage indebtedness to the Bank of Nova Scotia had been cleared. The appellant, the judge noted, failed to give "a plausible explanation in accounting for the balance of purchase money". The appellant had also not disclosed in her affidavit that she had an interest in a gas station, with a food mart, at Liguanea. That business was sold and the proceeds unaccounted for.

[32] At the time of the order, the judge had found that there was some insincerity on the part of the appellant when she said that she had made job enquiries but had been unsuccessful. The "insincerity" was demonstrated, the judge said, by the appellant's statement: "I am not seeking any employment, my view is that as long as I live Mr Bromfield should maintain me".

[33] The judge found that she was then employable but given her closeness to retirement age, it was unlikely that an employer would recruit her. However, the judge noted the possibility of her pursuing self-employment given that she had operated her own businesses in the past. The learned judge did not seem to hold out much hope in this direction, though, due to the state of the Jamaican economy.

[34] As regards the respondent, the learned judge noted his age (64 years at the time) and that he was the principal shareholder in Bloomfield Jamaica Limited as well as "the principal shareholder of another company namely, Medallion Hall". The learned judge took into consideration the respondent's interests in all the properties listed in the originating summons that went before Brooks, J with the exception of Chaves Avenue and Hall's Crescent, but with the addition of the interest in the Pinkneys Green residence.

Decision as regards maintenance

[35] The appellant has not stated the nature of the order that she wishes this court to make. We do not think that she could possibly be asking for an increase of the sum ordered by Harris J and for that order to be in perpetuity. We note that in an affidavit dated 22 August 2006, the appellant, who is also a caterer, referred to the fact that a stove used for such purposes was in need of repairs. We should have thought that being a business woman of some note that the repair or replacement of a stove to conduct her business would be a matter of no moment.

[36] Where a marriage has been dissolved, and one of the parties has remarried and thereby taken on further responsibilities including children, it ought not to be expected that that party will ordinarily continue to maintain the other party of the dissolved marriage indefinitely. That is the principle that ought to be regarded as guiding the instant situation. We are of the view that Brooks J (as he then was) approached the matter in the correct way. There could not be a lifetime award in a situation such as

this, so he determined what would be a reasonable lump sum to award, on the basis of the material before him. The appellant has not shown that there is any fault in the approach of the judge nor has she demonstrated that the lump sum awarded is unreasonable in the circumstances. Accordingly, the appeal in respect of the maintenance order is dismissed.

The submissions as regards property entitlement

[37] Mr Codlin, in his oral arguments before us, submitted that the learned judge did not address all the questions that were posed for determination. He said that nowhere in the judgment did the judge deal with the question of the common intention of the parties. This, he said, was a grave error as the fundamental point in the case was the respondent's intention at the time of the acquisitions. The appellant, he said, gave up everything, but got nothing. He criticized the exclusion of the appellant from an award of interest in the property at 55 Hope Road on the basis that it was company property. This seemed, he said, to be a finding that once the property was company property, then the appellant was out of consideration whereas the respondent was not. He submitted that the various properties were acquired through contributions by the appellant and so there should be an order for an audit of the appellant's equity in the properties, and an apportionment done on that basis.

[38] In his written submissions, Mr Codlin pointed to the fact that there has been an acknowledgment of the share ownership by the respondent, yet the order of the learned judge did not reflect same. He referred to the well-known House of Lords

decisions in ***Pettitt v Pettitt*** [1970] AC 777 and ***Gissing v Gissing*** [1970] 2 All ER 780, as well as the Privy Council decisions in ***Green v Green*** (Privy Council Appeal No. 4/2002) and ***Chin v Chin*** delivered on 20 May 2008 (Privy Council Appeal No. 3/2007 delivered 24 October 2007) the latter two being appeals from this court.

[39] It is perhaps useful, because of Mr Codlin's reliance on them, to summarize the facts and decisions in those cases. In ***Pettitt v Pettitt***, a husband claimed under section 17 of the Married Women's Property Act to be entitled to a share in the proceeds of sale of the former matrimonial home. The parties lived for the first nine years of their marriage in a house inherited by the wife. During that time, the husband spent about £800 on redecorating and improving it. The house was then sold and the wife acquired another. There was a surplus from the sale and with the consent of the wife it was spent on paying for the husband's car. They lived together for about four years in this house until the wife left alleging cruelty on the part of the husband. They were eventually divorced. The husband continued living in the house rent-free until he brought the proceedings under the Married Women's Property Act. He had lived rent-free for about four years during which time he carried out improvements to the house and garden to a value of £723. He sought a declaration that he was beneficially interested in the proceeds of sale to the tune of £1000. He succeeded in having the registrar make an order that he was entitled to an award of £300. The Court of Appeal of England agreed with the registrar. However, the House of Lords allowed the wife's appeal, declaring that on the facts there was no stated intention that the husband was

to acquire a beneficial proprietary interest in the property by expending sums of money for its improvement; nor was there any evidence for any such intention to be inferred.

[40] It will be seen that the facts in ***Pettitt v Pettitt*** are far different from those in the instant case. However, Lord Morris of Borth-y-Gest made some observations which are of general interest. At page 803H – 804A, he said:

> "Where questions of ownership have to be decided the judge must weigh every piece of evidence as best he may; the fact that the parties are husband and wife with all that is as a result involved, is in itself a weighty piece of evidence. Sometimes the conclusion will be that ownership was in one party alone; sometimes the conclusion will be that ownership was in both parties. There will be some cases in which a court is satisfied that both the parties have a beneficial interest, and a substantial beneficial interest but in which it is not possible to be entirely precise in calculating their respective shares. In such circumstances, as Lord Evershed M.R. said in ***Rimmer v Rimmer*** [1953] 1 Q.B. 63, 72, "equality, I think, almost necessarily follows." There will be some cases in which, as Lord Upjohn said in ***National Provincial Bank Ltd. v Hastings Car Mart Ltd***. [1965] A.C. 1175, 1236,B, an equitable knife must be used to sever the Gordian Knot."

[41] In ***Gissing v Gissing*** [1970] 2 All ER 780, the matrimonial home was purchased in 1951 in the sole name of the appellant who paid the mortgage and the legal charges from his own money. There was no express agreement as to how the beneficial interest should be held. The respondent made no direct contribution to the payments but she provided some furniture and equipment for improving the lawn. The appellant paid the outgoings on the house, gave the respondent a housekeeping allowance and paid for their holidays. The parties, who had been married since 1935, were divorced in 1966, the marriage having broken down in 1961. The question was whether the

respondent had acquired a beneficial interest in the former matrimonial home. Buckley J declared that the appellant was solely entitled to it but the English Court of Appeal, by a majority (Lord Denning MR, Phillimore LJ; Edmund Davies LJ dissenting) held that the wife respondent was entitled to a half share in the house. The House of Lords reversed the decision of the Court of Appeal.

[42] The House of Lords held that on the facts, it was not possible to draw an inference that there was any common intention that the respondent should have any beneficial interest in the matrimonial home. Lord Reid, in discussing the general state of the law as regards the rights of spouses in situations such as the case under consideration, said:

> "If the evidence shows that there was no agreement in fact then that excludes an inference that there was an agreement." (p. 783e)

Lord Morris of Borth-Y-Gest expressed the following views:

> "When the full facts are discovered the court must say what is their effect in law. The court does not decide how the parties might have ordered their affairs; it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstance that harmony has been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment." (p. 784a-b)

[43] Lord Diplock's opinion contained a statement of the general principles, which statement commands a lengthy repetition here:

"Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts'...a resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

That is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interests shall be held, the court will give effect to it – notwithstanding the absence of any written declaration of trust." (p. 789g-790c)

[44] Lord Diplock was quick to qualify that statement by saying:

"Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing. But in the express oral agreements contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its

> acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased on mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement between the spouses beneficial interests in the matrimonial home shall be held as they have agreed."(p. 790c-e)

He continued:

> "An express agreement between spouses as to their respective beneficial interests in land conveyed into the name of one of them obviates the need for showing that the conduct of the spouse into whose name the land was conveyed was intended to induce the other spouse to act to his or her detriment on the faith of the promise of a specified beneficial interest in the land and that the other spouse so acted with the intention of acquiring that beneficial interest. The agreement itself discloses the common intention required to create a resulting, implied or constructive trust. But parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case – a common one where the parties are spouses whose marriage has broken down – it may be possible to infer their common intention from their conduct." (p. 790c-g)

[45] In giving his opinion as to the determination of the appeal, Lord Diplock, having posed the question as to the basis for the respondent's claim, mentioned the fact that the respondent had spent money to improve the lawn and to purchase furniture and household durables. He pointed out that there was no suggestion that the respondent's efforts had enabled the appellant to raise the initial loan or meet the mortgage

payments. He reminded that the court was not entitled to infer a common intention to share the beneficial interest from the mere fact that the respondent provided chattels for joint use in the matrimonial home. He noted that there was nothing else in the conduct of the parties at the time of the purchase or thereafter which supports such an inference. He concluded thus:

> "The picture presented by the evidence is one of husband and wife retaining their separate proprietary interests in property whether real or personal purchased with their separate savings and is inconsistent with any common intention at the time of the purchase of the matrimonial home that the wife who neither then nor thereafter contributed anything to its purchase price or assumed any liability for it, should nevertheless be entitled to a beneficial interest in it. Both Buckley J and Edmund Davies LJ, in his dissenting judgment in the Court of Appeal felt unable on this evidence to draw an inference that there was any common intention that the respondent should have any beneficial interest in the house. I think that they were right. Like them I, too, come to this conclusion with regret, because it may well be that had the appellant and the respondent discussed the matter in 1951 when the house was bought he would have been willing for her to have a share in it if she wanted to. But this is speculation, and if such an arrangement had been made between them there might well have also been a different allocation of the household expenses between them in the ensuing years."(p.794g-795a)

[46] In ***Green v Green***, the Privy Council restored the order of the trial judge, as did the House of Lords in ***Gissing v Gissing***. The Privy Council, in applying the principle in ***Watt v Thomas*** [1947] AC 484, gave due recognition to the findings of fact and the assessment of Courtenay Orr, J who had concluded that there was a common intention that the beneficial interest in the various properties was to be shared. It should be

mentioned that the Privy Council felt that Orr, J had not made full use of the advantage he had had of seeing and hearing the witnesses when he came to prepare his judgment. However, the Privy Council was not confident that the judges in the Court of Appeal had done full justice to the material available to them.

[47] In paragraph 18 of the judgment of the Privy Council, Lord Hope of Craighead said:

> "In this situation their Lordships must return to the reasons which were given for his decision by the trial judge. As Lord Macmillan said in ***Watt v Thomas*** [1947] AC 484, 491, where a decision either way may seem equally open (as may be thought to be the position in this case) the decision of the trial judge is of paramount importance. The question is whether it has been shown that his judgment on the facts was affected by material inconsistencies or inaccuracies or that he failed to appreciate the weight of the evidence or otherwise went plainly wrong."

[48] In ***Chin v Chin***, Clarke J found that much of the evidence of the husband was unreliable while he accepted most of the evidence of the wife. He therefore awarded the wife the half share she had claimed in the capital of Lasco Foods Limited. The Court of Appeal dismissed the husband's appeal, and the Privy Council in dismissing the husband's appeal said that it "will not, apart from exceptional cases, entertain grounds of appeal which ask the Board to differ from concurrent findings of fact" made by two lower courts" (Clarke J and the Court of Appeal).

[49] Mr Lawton Heywood, for the respondent, submitted that the court below had to be shown to be "plainly wrong" for this court to interfere with the findings of fact. He based his submission on the well-known and oft-quoted authority of ***Watt*** or ***Thomas v Thomas***, referred to earlier. The material in the record of appeal suggests, he said, that the parties were really operating separate businesses, and that the reasoning of Brooks, J was sound. The instant case, he said, was "much different" from the cases referred to by Mr Codlin. There was ample evidence of a lack of common intention to share in the acquisitions. He agreed that the learned judge ought to have made a specific finding to that effect. However, the failure to do so, he said, was not fatal. The appellant, he submitted, was not in a position to show acts indicating a common intention; hence, the claim failed. There was not a single financial account maintained by the appellant that she could have pointed to as being the source of any withdrawal to make any of the purchases made by the respondent. In the circumstances, Mr Heywood submitted that the appeal should be dismissed.

[50] The findings of fact made by the learned judge have been set out earlier. These findings indicate quite clearly that the learned judge was of the view that there was no common intention that the appellant should share in the ownership of the various properties in which she claimed an interest. The evidence shows that she was a property owner and businesswoman in her own right. She bought and sold properties at Morningside in Havendale and at Farringdon Drive, Kingston 6, in her own name. She was the operator of a service station and had interest in a farm and in shops. The proceeds of those businesses were hers, not theirs. It is rather surprising that, with her

own considerable experience in business, she had not one scrap of evidence to produce to show how these properties that she claimed an interest in were acquired. It was just her say-so. The learned judge was entitled to place no confidence in her evidence.

[51] In respect of 55 Hope Road, the appellant is not entitled, as she has claimed, to equal shares therein with the respondent. The evidence is clear that number 6 Bradley Avenue was purchased by Bloomfield Jamaica Limited. When that property was sold, 55 Hope Road was purchased from the proceeds. The appellant owns 100 shares in Bloomfield Jamaica Limited which owns 55 Hope Road. Any interest that she may have in 55 Hope Road is limited to her share ownership in Bloomfield Jamaica Limited. She is entitled to a declaration as to her share ownership. This declaration was not made by the learned judge, and formed no part of his order. The making of that declaration by us means that the appellant has partially succeeded.

MORRISON JA

[52] I have read in draft the judgment of Panton P and agree with his reasoning and conclusion. I have nothing to add.

HIBBERT JA (Ag)

[53] I too have read the draft judgment of Panton P and agree with his reasoning and conclusion.

PANTON P

ORDER

The appeal is allowed in part. The order of Brooks J (as he then was) made on 6 January 2009, is varied to include the following:

(i) the appellant is entitled to 100 shares in Bloomfield Jamaica Limited.

(ii) the appellant is not entitled to an interest in Medallion Hall Hotel Limited or the other properties in the particulars of claim, save as regards 3 Pinkneys Green, Kingston 6.

The appellant shall have one-half costs of the appeal to be agreed or taxed.