NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E218/93

BETWEEN	JUDITH FEARON	APPLICANT
A N D	ARTHUR FEARON	RESPONDENT

Miss Carol Davis for Applicant instructed by Mrs. Crislyn Beacher of Playfair, Junor, Pearson & Company.

Mr. Gordon Steer for Respondent instructed by Messrs Knight, Pickersgill, Dowding and Samuels.

Heard: 2nd, 3rd & 5th May, 1995

McINTOSH,J. (Ag.)

Application under the Married Women's Property Act.

The parties were married in 1971 and they raised a family. They pooled their resources and purchased a house, several businesses, apartments and motor vehicles. In 1988 their marriage broke down and in 1991 a Decree Nisi was granted. The Court is now asked to divide the property which was acquired by them during their marriage.

The applicant claims under what she refers to as an agreement between the parties, set out in a document entitled "Proposal for the Division Assets owned by Arthur and Judith Fearon"

In the alternative she claims as follows:

1. More than half (½) share in the matrimonial home.
2. Half (½) share in all the other properties and assets.
3. One hundred percent (100%) share in Quilted Opulence.

The respondent contends that he is entitled to fifty percent (50%) share in the following:-

1. The matrimonial home
2. Top Security Company Limited
3. Dish, Antennae and Supplies
4. Quilted Opulence
5. Mercedes Benz jeep
6. One hundred percent (100%) interest in Apartment 44E Turtle Towers, St. Ann.

The matrimonial property at 6 Rockview Close in Kirkland Heights was purchased in or about 1978 in the joint names of the applicant, the respondent and one Laurice Hunter-Scott. The third signatory, an aunt of the respondent, had no financial input and was never intended to have an interest in the property.

According to the applicant at the time of the purchase she worked as a supervisor at Xerox. The respondent said the applicant was then an accounting clerk, while he did painting and bought and sold motor cars as well as household articles.

It was agreed however that as the respondent was unable to prove his income and the mortgagor needed someone apart from the applicant, whose income could be proved, Laurice Hunter-Scott was added as a signatory to the mortgage.

In his deposition the respondent claimed that all the deposit on the matrimonial property came from the sale of his Schimitar motor car which he owned absolutely. However the evidence adduced in Court indicates that the deposit came from the joint savings of both parties and that from 1978 to 1981 the applicant paid all the mortgage payments and most of the household expenses from her salary. Then from 1981 to April 1990 the payments were made from Top Security Company.

After April, 1991, the applicant alleges that she alone paid off the balance of the mortgage and the insurance and taxes owing on the matrimonial property. At this time her only source of income was from her earnings from Quilted Opulence, a company which she began.

The 'Top Security' Company was incorporated by the respondent and one Kenneth Ian Carson King in about 1980. They were then the sole directors and shareholders, each owing a fifty-fifty (50-50) share in the company.

In 1981 the shares of Kenneth King were transferred to the applicant who then became entitled to a fifty percent (50%) share in this company. The applicant then gave up her job at Xerox and worked full time with Top Security. It is from this business that the mortgage payments were met thereafter as also the household expenses.

The business was profitable and motor vehicles and dogs were acquired and were used in its operations. Both parties were signatories to the accounts and were entitled to make draw downs from the accounts.

In or about 1983 the parties started another business, Dish Antennae and Supplies, which they both operated.

In or about 1987 they bought a Mercedes Benz Jeep and a Lada motor car. The jeep was used by the respondent and is still now being used by him. The Lada was to be used by the applicant but was modified by the respondent for racing purposes and was subsequently sold by him in 1990.

They purchased an Apartment at Sand Castle in Ocho Rios. This was later sold in 1990 and the net proceeds of the sale divided between them.

In 1991 the respondent purchased Apartment 44A Turtle Towers, Ocho Rios. The applicant avers that the money came from Top Security Company whilst the respondent avers that the money came from his salary. Quilted Opulence was formed by the applicant alone and the respondent did not contest her evidence that he had no interest at all in that company.

It is clear that the real issues related to the document headed 'Proposal for the Division Assets owned by A & J Fearon' which is set out here in its entirety:

"PROPOSAL FOR THE DIVISION ASSETS OWNED BY A & J FEARON

BY A. FEARON

(1) J FEARON TO GET THE HOUSE LOCATED AT 6 ROCK VIEW CLOSE (INCLUDING ALL FURNITURE AND SATELLITE DISH)
J FEARON TO GET THE APT. AT OCHO RIOS (SAND CASTLES)
J FEARON TO GET THE M/BENZ JEEP
J FEARON TO KEEP POSSESSEON OF ALL LANDS GIVEN TO HER BY HER LATE FATHER.
J FEARON TO BE SOLE OWNER OF COMPANY CALLED QUILTED OPULENCE
A FEARON TO BE THE SOLE OWNER OF TOP SECURITY CO. LTD.

NB. ALL OUTSTANDING LOANS NOW IN FORCE FOR TOP SECURITY WILL BE MY RESPONSIBILITY.
ALL LOANS FOR THE FINAL PAYMENT FOR THE SAND CASTLE APT. BE THE SOLE RESPONSIBILITY OF J FEARON.
ALL OUTSTANDING MORTGAGE ON 6 ROCK VIEW CLOSE BE THE SOLE RESPONSIBILITY OF J FEARON.

(2) WE MAINTAIN ALL PROPERTIES OWNED JOINTLY BY BOTH OF US FOR A PERIOD OF 12 MTS. ALL BILLS (I.E. LOANS, HOUSE UPKEEP CAR UPKEEP EVERY THING) WILL BE MET BY BOTH OF US BUT WE

LIVE APART AND OPERATE BOTH BUSINESS APART THEREBY GIVING THE BOTH OF US A CHANCE TO SEE IF THIS IS WHAT WE REALLY WANT. (THIS WOULD SAVE US A LOT OF LEGAL FEES) WE WOULD BE FREE TO DO AS WE LIKE WITHOUT QUESTIONS FROM EACH OTHER

IF THE ABOVE IS TO YOUR LIKING AND PROPOSAL #1 IS WHAT YOU WANT THEN WE GO TO THE LAWYERS AND DO THE NECESSARY LEGAL THINGS OR IF YOU HAVE ANY OTHER SUGGESTION LET ME KNOW.

REGRETS: THAT WE COULD HAVE BEEN BETTER PARENTS TO OUR TWO CHILDREN (HOPE THAT THEY WILL FIND THE STRENGTH TO FORGIVE US)

HOPE: THAT NONE OF THE ABOVE WILL BE NECESSARY AND THAT WE CAN SOME HOW FIND THE STRENGTH TO FORGIVE EACH OTHER AND RESUME A NORMAL LIFE AND BE THERE TOGETHER FOR OUR TWO CHILDREN AND THEIR CHILDREN.

YOURS TRULY

A. FEARON

The applicant deponed that in about February 1990 the parties discussed the division of their property pursuant to the total break down of their marriage and that the respondent came up with the above proposal which she adopted. He put it in writing and signed it.

Consequent on the above agreement she (the applicant) paid all the outstanding mortgage, insurance premium and property taxes on the matrimonial property. She further deponed that she was unable to pay all loans for final payment on the Sand Castle Apartment so on her suggestion that Apartment was sold.

The applicant admitted that the signature on the document was not the same as the signature on the affidavit of respondent but maintains that it is her husband's signature and that he signed it in her presence. She stated that he signs like that sometimes, and that was how he signed their marriage certificate.

She claims that she kept her part of the agreement but the respondent has not kept his part.

The respondent denied signing the document though he admits to making spelling errors and he denied having typed the document on his computer. He admits that his wife removed Quilted Opulence from Sandringham Avenue where the other businesses were located and that she was no longer able to draw down from the accounts of these other businesses but says these were financial sacrifices to get out of his life.

The respondent denied that he, the applicant and his secretary Mrs. Elliot had a discussion about the agreement and that spelling errors were pointed out to him.

On behalf of the applicant Miss Davis submitted that the law as it relates to beneficial interest of Matrimonial Home is stated in Gissing v. Gissing 2 AER at p.780 and is to the effect that where there is an expressed agreement between the parties with regard to the property this will be implimented by the Courts.

This she submitted was followed in our Courts in Azan v. Azan C/A 1985 see Forte, JA at p.4.

She urged Court to accept that the document entitled 'proposal for the Division Assets owned by A & J Fearon' was in fact an agreement as to their beneficial interest, to which this court should give effect.

She said that the applicant's evidence indicates that she acted on this agreement and that she made all the payments due on Rockview Close - i.e. - mortgage, insurance and taxes. This is not contested.

Further, when she left Top Security Company she no longer received the Drawings which she had been entitled to receive from that company and was no longer a signatory to the accounts of either Top Security or Dish Antennae and Supplies. She also removed her business, Quilted Opulence, from the premises where these companies were located.

Miss Davis asked Court to accept the applicant as a witness of truth and reject the evidence of the respondent as being riddled with inconsistencies and untruthful. She submitted that the applicant's evidence was entirely consistent and that if Court found that the document did set out the agreement and was acted on between them, then the proper order would be for the applicant to be awarded:

1. House at Rockview Close
2. Mercedes Benz Jeep
3. Quilted Opulence
4. Moneys which respondent received from sale of Apartment at Sand Castles.

5. A share of the portion of the proceeds of sale of Turtle Towers Apartment that represented moneys due to Top Security for work done prior to her departure there-from.

6. Repayment of loan of $15,000, made to respondent from Quilted Opulence, which loan is admitted by respondent.

7. Payment for Lada motor car sold by respondent, which the respondent admitted.

Miss Davis further submitted that if Court does not accept that there was an agreement then the Court should accept the applicant's evidence that her contribution in the matrimonial house was far greater than the respondent's. She alone paid the mortgage from 1978 - 1981 and alone made final payments between 1990 and 1991. She should therefore be awarded at least sixty percent (60%) of house otherwise all the assets of the parties should be split 50 - 50 except for Quilted Opulence which belongs exclusively to the applicant.

Mr. Steer in reply submitted that Cobb v. Cobb 1955 2 AER at p.698 negates a 60 - 40 proposition. If property is to be for both for life, it should be so regardless of who made the greater payments.

He referred to Sec.16 of the Act, then continuing, he submitted that the applicant deponed in her affidavit that she was the sole supporter of the household and their children but under cross-examination admitted that money came from Top Security.

He said the proposal contains three options. He pointed out that a proposal is not an agreement but a suggestion or plan. Further, the applicant's affidavit refers to this proposal as an agreement and deals with it in a particular fashion at pages 9 and 10 which differs from the second affidavit where it is dealt with at page 11.

He submitted that the applicant's payment of the mortgage could not have been due to any agreement reached.

He referred to paragraph 2 which he said, speaks clear - 'it's an option'. It calls for an agreement to implement some thing within

twelve months and paragraph 3 goes further. It states that if proposal number 1 is what she wants then they should go to a lawyer and have proper documents executed.

There is a further proviso - any other suggestion.

Then the document ends with a prayer 'that none of the above is necessary'. Mr. Steer submitted that that does not fall within the authority of:

Merrit v. Merrit

Gould v. Gould - 1969, 3 AER, 728

or Jones v. Padaratar - 1919, 2 AER, 616.

The important element is the uncertainty of terms. It must be clear what the parties intended. As far as case law is concerned the proposal would not be legally binding. The evidence is that both parties bought the assets together and they should be shared equally between them both.

The important element is the uncertainty of terms. It must be clear what the parties intended. As far as case law is concerned the proposal would not be legally binding. The evidence is that both parties bought the assets together and they should be shared equally between them both.

This Court had the opportunity to observe the demeanour of both parties as they were examined on oath and accepted the applicant as a witness of truth.

It seems clear on the evidence that with the exception of Quilted Opulence and Apartment 44A Turtle Towers, the parties acquired all the other property together.

This Court finds that when the marriage broke down and it became necessary to divide their assets, the parties had a discussion and the proposal was made by the respondent. It was signed by the respondent, clearly indicating what he thought would be a fair division of their assets. It was in the nature of an offer. The parties discussed it. It was accepted by the applicant and she acted upon it.

The only alternative which the respondent contemplated to his offer was a counter offer by the applicant - 'if you have any other

suggestions'. The applicant made no other suggestion and they are therefore both bound by the contents of the proposal as it sets out the division of assets agreed on by them.

It is the finding of this Court that the applicant carried out her part of this agreement so that even if the respondent sought to renege on or merely to carry out a part of the agreement, the said agreement is still binding on them both.

It would seem from the evidence of the respondent that Top Security and Dish Antennae which were once profitable enterprises are now no longer so. This may very well be due to his mismanagement. It is also clear that Apartment 44A Turtle Towers was bought before the Decree Nisi was granted and purchased through Top Security.

On the basis that the document sets out the agreement between the parties and is therefore binding, the applicant is awarded the following assets:-

1. House including fixtures, appliances and satellite dish at 6 Rockview Close absolutely.
2. The Mercedes Benz Jeep absolutely.
3. The one half (½) share - proceeds of sale of apartment at Sand Castle which was appropriated by the respondent, to be paid by him, with compound interest at ten percent (10%) per annum to date of payment.

If respondent refuses to execute any title or document the Registrar of the Supreme Court is empowered to execute the same.

Costs to be applicant's, to be taxed if not agreed.

Certificate awarded to counsel.