

IN THE SUPREME COURT OF JUDICATURE OF JAMICA

CLAIM NO. HCV 1191/2005

BETWEEN	GILLIAN GLEANE-WALKER	CLAIMANT
AND	ERROL MOLOTOV WALKER	1 <sup>ST</sup> DEFENDANT
AND	MOLOTOV LIMITED	2 <sup>ND</sup> DEFENDANT

Ms. Carol Davis for Claimant.

Ms. Hillary Phillips and Ms. Andrea Bickhoff-Benjamin instructed by Grant Stewart Phillips and Company for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**Heard 15<sup>th</sup>, 19<sup>th</sup> and 24<sup>th</sup> May 2006**

**Campbell, J**

The Claimant, then Gillian Gleane, and Errol Walker began a relationship in 1975 which culminated in their marriage in 1979. They separated in 1999. The 2<sup>nd</sup> Defendant, Molotov Limited, was incorporated by the 1<sup>st</sup> Defendant in 1978, and is the registered proprietor of the properties, the subject of these applications. The husband, on the 18<sup>th</sup> November 1984, had made a gift of 47 shares in Molotov Limited to his wife, he retained 48 shares. A family friend holds five shares. Molotov Limited owns several properties during the currency of the marriage. Presently, Molotov Limited owns Rocaille 2, Seaview Road, which is the matrimonial home and a small office in Shortwood Professional Complex, which is registered in the joint names of Molotov Limited and one Dr. Patrick Robinson as tenants in common.

Before the Court were two applications.

**Firstly, the wife's Amended Fixed Date Claim Form in which she claimed against her husband**

- 1) That the respective interest of the Claimant and the Defendants in property known as "Rockaille" 2 Seaview Road, and being all that parcel of land registered at Volume 970, Folio 133 of the Register Book of Titles (hereinafter the matrimonial home) be determined to be 50% to the Claimant and 50% to the Defendant.
- 2) That the respective interest of the Claimant and the 1<sup>st</sup> Defendant in office on Shortwood (hereinafter the office) be determined to be 50% to the 1<sup>st</sup> Defendant and 50% to the Claimant or such other proportion as this Honourable Court may determine.
- 3) That a report and valuations of the matrimonial home and the office be done by C. D. Alexander Realty Co. Limited, or such other Valuator as agreed by the parties and the cost of the valuation be paid for by the parties equally.
- 4) That the 1<sup>st</sup> Defendant purchase the Claimant's share of the matrimonial home and the office within 90 days of the Order herein.
- 4a) That the 1<sup>st</sup> Defendant pay to the Claimant mesne profits in the sum of \$75,000.00 per month from January 1999 to present for his continued occupation of the Claimant's half ( $\frac{1}{2}$ ) of the property at 2 Seaview Road aforesaid at the rate of \$75, 000.00 or such other rate as this Honourable Court may determine.
- 5) In the alternative that the office and the property known as 2 Seaview Road, ...be sold by private treaty and the net proceeds of sale be divided equally between the Claimant and the 1<sup>st</sup> Defendant. And the consequential orders.

**Secondly, the 1<sup>st</sup> Defendant Amended Notice of application for Court Orders (Amended Notice) seeks the following:**

- 1) A declaration, that the parties are beneficially entitled to the shareholdings of the 2<sup>nd</sup> Defendant's company, a limited liability company in the following proportions, namely:
  - 48 shares, representing a 48% interest in the 2<sup>nd</sup> Defendant's company to the 1<sup>st</sup> Defendant/Applicant, and 47% interest in the 2<sup>nd</sup> Defendant's company to the Claimant/Respondent.

- 2) An Order that the shares in the 2<sup>nd</sup> Defendant's company be valued by a reputable accounting firm to be agreed between the parties: if no agreement, the Registrar of the Supreme Court shall appoint an accounting firm.
- 3) An order that the 1<sup>st</sup> Defendant/Applicant's contribution in the form of loans made by him to the 2<sup>nd</sup> Defendant's company be refunded to him prior to arriving at a valuation of the shares of the 2<sup>nd</sup> Defendant's company.
- 4) An Order that the value of the shares be determined using the "net assets" taking into account the 2<sup>nd</sup> Defendants assets and liabilities as at the date of valuation.
- 5) An Order that, following the valuation of the shares, the 1<sup>st</sup> Defendant/Applicant do pay to the Claimant/Respondent 47% of the amount of the said valuation in return for an executed transfer to him or his nominee of the shares in the 2<sup>nd</sup> Defendant's company registered in the name of the Claimant/Respondent.

Counsel for the Claimant objected to the Amended Notice being heard. The Defendant's original notice, which was dated the 17<sup>th</sup> November 2005, had sought the following Orders:

- 1) A declaration that the Applicant has a beneficial interest in all that parcel of land known as "Rocaille" and registered at Volume 970 Folio 133 of the Register Book of Titles (hereinafter referred to as "the matrimonial home") and that by virtue of the substantial monetary contributions made by the Applicant to the improvement of the matrimonial home, he is entitled to an enlarged share in that beneficial interest;
- OR
- 2) Alternatively,
    - a. an Order that the aforementioned improvements made to the matrimonial home be valued by a valuator agreed by the parties or appointed by the court, and
    - b. a Declaration that the Respondent is only entitled to a 50% share in the matrimonial home after the value of the improvements made thereon is deducted;
  - 3) a. a Declaration that the Applicant is beneficially entitled to a half share or

such other interest as the Court may determine, in the proceeds of the sale of the land in Grenada purchased by the Respondent (hereinafter referred to as "the Grenada property"), and

- c. an Order that such share as is determined, be paid to the Applicant

### **Background**

The wife's claim was filed on the 28<sup>th</sup> April 2005, and was contented to seek a division along the lines of 50% entitlement of the matrimonial property. The husband's Notice for Court Orders filed on 17<sup>th</sup> November 2005, recognized the wife's entitlement of 50%, but applied that, her entitlement would only come after the husband had recouped the equivalent of the almost \$1.2M, he had expended on improvements to the matrimonial home. The improvements, some of which had started in 1982, were continuing. The wife's response was swift. Her claim increased dramatically. An amendment to the claims filed on the 29<sup>th</sup> November 2005, sought mesne profits, calculated at the rate of \$75,000.00 per month, for the husband's continued sole occupation of the home from 1999, when the wife exited. The parties were squarely facing each other, when the husband amended his notice seeking "an order that the shares in Molotov Limited, be valued and loans made by the husband be refunded prior to arriving at a valuation of the shares of Molotov Limited"

### **Defendants Amended Notice**

A Preliminary Objection was taken to the Amended Notice. Ms. Carol Davis' attack on the Amended Notice was launched from the platform of Rule 20.4 (2) of Civil Procedure Rules 2002, which provide that:

**"The court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change**

**in the circumstances which became known after the date of that case management conference.”**

She took aim at the leisurely manner in which the Defendants had conducted their cases. The Acknowledgment of Service had not been filed until the 17<sup>th</sup> November 2005, the same day the Notice for Court Orders had been filed, approximately six months after the service of the Fixed Date Claim form. The matter came for case management on the 1<sup>st</sup> December 2005. She submitted that the “reformulated notice” was only filed on the 5<sup>th</sup> May 2006. She argued that “the reformulated notice” was entirely new, and was contrary to Rule 20.4(2). She referred the Court to the case of **Paulette Bailey and Other v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** SCCA 103/2004 delivered 25<sup>th</sup> May 2005. She submitted that, in a claim commenced by Fixed Date Claim form, the defence is in the form of an affidavit. She further submitted that in this case the defence and counterclaim, was in the application. The Court was referred to **Rule 8.9**.

She submitted that the notice constituted a defence and counterclaim, and represented his claim of his interest in the property.

#### **Claimant’s submission**

Ms. Phillips submitted that the Amended Notice did not constitute a “Statement of Case.” She relied on the definition section Rule 2.4:

- (a) a claim form, particulars of claim, defence, counterclaim, ancillary claim form or defence and a reply; and
- (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court:

She submitted that claim forms are dealt with under Part 8, Defence is dealt with under Part 10, Counter Claim by Part 1, and Part 18, Reply in Part 10. She further

submitted that the amended application filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants falls under Part 11, which deals with the general rules about application for Court Orders.

She contended that an application, because it does not fall within definition of Statement of Case, is not captured under rule 20.4 (2).

Ms. Phillips further submitted that it is not disputed that the property subject of the application is owned by the 2<sup>nd</sup> Defendant and the parties claim ownership of shares in Molotov Limited. The earlier application was misconceived and was procedurally impermissible and that the Court ought not to make any orders on the original Fixed Date Claim Form.

### **Analysis**

The preliminary issue before the Court is whether the Defendants' Notice of Application for Court Orders constitute a Statement of Case for the purpose of Rule 20.4.(2). It was accepted that the amendment was made after the first Case Management Conference was held. The Defendants did not attempt to say that the amendment was necessary because of some change in the circumstances which became known after the date of that Case Management Conference. Ms. Phillips' submission was to the effect that the notice was not a Statement of Case as defined by Rule 2.4 of the Civil Procedure Rules 2002.

**Rule 8.9 CPR 2002** provides that:

- (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.
- (2) Such statement must be as short as practicable.

The Defendants' Notice of Application, sought an enlarged share that would recognise his input in the improvement of the property, he is stating his claim, which is in

effect, a counter claim to the Fixed Date Claim Form. One can therefore identify the location of his claim by asking a question consistent with Rule 8.9 (1), where is the 'statement of the facts on which the claimant relies.' Rule 8.9(1) gives an abridged definition of the Statement of Case. The failure of a Claimant to provide such a Statement of Case would expose the claim to being struck for not showing any reasonable cause of action.

The prescribed notes for the Defendants' Fixed Date Claim Form (see form 2a) (Rule 8. 16(1) (c), advises that if the claim is being disputed, the defence or affidavit must set out briefly all the facts relied on to dispute the claim. If a claim is being made against the Claimant, it is advised that:

"You must file a Particulars of Claim (a counterclaim) setting out the full details of what you claim against the Claimant and the facts on which you will rely."

The Defendant cannot, by entitling what is essentially a counterclaim an application, avoid the strictures of Rule 20.4 (2). It is not being suggested that the instant Defendant so did.

I find that the document entitled "An Application for Court Orders" constitutes a Statement of Case for the purposes of Rule 20.4(2). The first Case Management Conference was held on the 1<sup>st</sup> December 2005 the "Amended Notice" with the Statement of Case was filed on 5<sup>th</sup> May 2006. The Defendant did not attempt to satisfy this Court that the amendment is necessary because of some change in the circumstances which had become known after the 1<sup>st</sup> December 2005. The Court cannot, therefore, allow the Amended Notice to stand. In **Paulette Bailey and Edward Bailey v Incorporated Lay**

**Body etc.** (supra) the Court of Appeal in examining the Judge's discretion in an application pursuant to Rule 20.4(2) of the Civil Procedure Rule 2002 said at para 32 of the judgment:

"The learned judge in the circumstances refuse to grant the amendment sought for reasons stated by him. I am of the view that he was correct in so doing as section 20.4(2) clearly states that he may not do so except in the circumstances mandated by this section. Those conditions were not satisfied. I am prepared to say that even if section 20.4(2) confers a discretion, the learned judge was correct in refusing to exercise his discretion in favour of granting the amendment sought, as Paulette Bailey's witness statement had been filed before the pre-trial review."

### **The Claimant's Fixed Date Claim Form**

A preliminary objection was taken on the hearing of the Fixed Date Claim form,

### **The Defendants' Preliminary Objections**

It was submitted that the Fix Date Claim Form is misconceived, bad in law, and the Court ought not to make any orders based on that Fixed Date Claim Form. The purpose of the Married Women's Property Act, was to enable married women to be capable of holding property and being liable in tort and contract. It was further submitted that, the Claimant and the 1<sup>st</sup> Defendant are shareholders of Molotov Limited, and do not have an interest in property owned by the Molotov Limited, which is a separate legal entity and recognised in law as entirely distinct from its members and the assets of the company. See **Solomon v Solomon** (1897) AC 22, HL. The claimant and the 1st defendant have a right to their shares which they own which are transferable subject to Companies Articles and Memorandum. The member does not own the assets of the company. **Short and Another v Thessery Commissioners** (1947) 2 All E.R pg 298. It was contended that there is no basis on which the Claimant can seek an interest in the property. Shares held by the Claimant and 1<sup>st</sup> Defendant in the 2<sup>nd</sup> Defendant give the Claimant and the 1<sup>st</sup> Defendant a right to a specified amount of the company which also carries certain rights and liabilities

whilst the company is a going concern and in a winding-up. Ms. Phillips argued that the claim must be misconceived because the property owned by Molotov Limited cannot be the subject of a declaration to the particular interest of the Claimant and 1<sup>st</sup> Defendant as neither has proprietary rights in the subject property

### **Claimant's submission**

On behalf of the Claimant, it was contended that pursuant to S 16 and S 17 of the Married Women Property Act the parties were entitled to make an application to the Court for any question between husband and wife as to title or possession of property. Once there is any question as to property between the parties, then the Court is empowered to hear it. The Defendant accepts that both own the premises, but by virtue of making improvements he is entitled to an enlarged share. Both parties have maintained their respective claims up to the Case Management Conference, despite the property being registered in the name of Molotov Limited. The parties are the beneficial owners of the property. Molotov Limited was served with the claim and have never raised objection to the contention before the Court. The question before the Court is the beneficial ownership of the property.

### **Analysis**

The parties are shareholders in the 2<sup>nd</sup> Defendant, the husband holds 48 shares, the wife 47 shares, and a friend of the family the remaining 5 shares. They are both agreed that the friend seeks no interest in the family home. The parties are also agreed that they are both entitled to a 50% share in the beneficial interest of the properties. However, the matrimonial home is subject to the husband's claim that he is entitled to an enlarged share in the value of the matrimonial home due to improvement amounting to over \$1.2M, he claimed to have made throughout the years. The wife also claims an enlarged share for

mesne profits at the rate of \$75,000.00 per month due to the husband's sole occupation of the matrimonial home from the time she exited in 1999. The two properties are the only assets in this company. The issue is the respective beneficial entitlement of the parties in the properties. The husband's contention that there is no dispute between the parties is erroneous. The parties are agreed as to their shareholdings, but there is a divergence as to the entitlement of the husband due to improvements he has made and the wife's claim for mesne profits due to the occupation of the husband after the wife exited the matrimonial home.

Ms. Phillips contends that the shares in the 2<sup>nd</sup> Defendant give the husband and wife a right to a specified amount of the company. The Court was urged that the valuation of this amount was to be properly determined by the meeting of a willing buyer and a willing seller. It is clear that the summary procedure provided by S 16 and S 17 of the Married Women's Property Act allows the Court to make orders for the valuation of shares in companies where there is any question, issue or dispute between husband and wife in matters as to title or possession of property.

Mr. Justice Daye, therefore, had powers at case management, on an application under S 17 of the Married Women's Property Act, to seek a valuation of the assets of Molotov Limited, that entity being represented at the conference and taking no objection to the valuation. In **David Logan v Hyacinth Vivienne Logan SCCA 141/2002**, delivered 25<sup>th</sup> October 2001, where in the Court of Appeal, Counsel had argued that despite the fact that the property in question relates to ownership of a company or proceeds from the ownership of shares in a company, and the parties are husband and wife, Section 16 and Section 17 are the appropriate procedure to resolve disputes between them. The Court of

Appeal found the support for upholding those submissions in **Lascelles Chin v Audrey Chin** Privy Council Appeal No. 61 of 1999, where the dispute related to the ownership of a company, Lasco Foods Limited. The company had 250,000 issued shares of \$1.00 each. Mrs. Chin had one share, the husband the remainder. The wife applied under Section 16 of the Married Women's Act, seeking a determination of their respective shares. **Lord Scott of Foscote at paras. 9 and 10 said:**

"The affidavits showed clearly enough that the issue between the parties was whether they had intended that Mrs. Chin would be joint owner of the company with her husband. But when the case came before Panton, J for trial, he made no finding on that issue. He implies:

**'If there is an error in the allotment of the shares these proceedings that are before me cannot correct that error.'**

He had in mind Section 115 of the Companies Act which enables an application to be made to the Court for rectification of the share register. But that was not the issue. The issue was whether Mrs. Chin was beneficially entitled to half the issued shares. **If she was rectification of the share, register would have constituted a form of consequential relief. Since Mr. and Mrs. Chin were the only persons with any claim to be shareholders, there would have been no difficulty in joining the company as a party and making the necessary rectification order. Perhaps that order could have been made without formally joining the company.**" (emphasis mine)

Smith J A, who wrote the judgment of the Court of Appeal concluded that:

**"The above passage, in my view, supports the conclusion of Ms. Davies that Orr J. had jurisdiction to make the order he made pursuant to section 16."**

The judgment noted that the Privy Council was of the view that rectification could have been made pursuant to Section 16, even though relief is provided for by Section 115 of the Companies Act.

In all matters relating to husband and wife, therefore, as to title **or possession of** property, it is section 16 of the Married Women's Property Act which is applicable. See

**Wilbert Letford v Minnette Letford** (Court of Appeal (Carey, P (Ag.), Forte and Morgan JJ.A) 25 J.L.R 433. It is clear that the wife's claim for mesne profits from her husband is grounded in a contest for possession. She is claiming pursuant to her beneficial interest in the matrimonial home, a situation I understand he is refuting. The preliminary objection is overruled. The Court will proceed to hear arguments on the Amended Fixed Date Claim Form. Costs of the application to the Claimant.