[2018] JMCA Civ 30

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 23/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**SEVELYN GRAY**	**APPELLANT**
AND	**GLENIS GRAY**	**RESPONDENT**

Ronald Paris instructed by Paris & Co for the appellant

Respondent not appearing or represented

1 December 2016 and 7 December 2018

MORRISON P

[1] At the conclusion of the hearing of this matter on 1 December 2016, the court made the following orders:

1. The appeal is allowed.
2. The judge's order is set aside and the court substitutes therefor an order that the appellant is entitled to 70% of the value of the concrete house on land at 137 Lilliput and the respondent is entitled to the remaining 30%.

3. The said concrete house structure is to be valued at the expense of both parties to be shared equally between them. The valuation is to be done by the agreed Valuator Roman's Real Estate Ltd.

4. Once the valuation is obtained, the matter is to be remitted to the Family Court for consequential orders to be made.

5. The valuation is to be done within 90 days of today's date.

6. No order as to costs of the appeal.

[2] At the time of making these orders, brief reasons were promised for our decision. However, due to an unfortunate administrative oversight, the reasons were not completed. Accordingly, with profuse apologies for the delay, these are the reasons for the decision.

[3] This is an appeal from a decision given by Her Honour Mrs Dionne Gallimore-Rose in the Family Court for the parishes of Saint James, Hanover and Westmoreland. For the purposes of this judgment, we will refer to Her Honour as 'the judge'.

[4] The appellant and the respondent were husband and wife at all material times.

[5] In a claim filed on 25 January 1999, the appellant claimed against the respondent to be entitled to a 100% share and interest in a concrete dwelling house located at Lot 137, Block 4, Lilliput in the parish of Saint James ('the house').

[6] The house is situated on land now registered in the appellant's sole name at Volume 1300 Folio 539 of the Register Book of Titles. However, nothing turns on this

for present purposes, since the respondent accepted in his evidence that he had contributed nothing to the acquisition of the land. But the respondent, who represented himself at the trial, denied that the appellant had any interest in the house. To the contrary, he asserted that it was solely his.

[7] The judge heard evidence from the appellant, the respondent and a witness called on the appellant's behalf. This witness was a commissioned land surveyor, but his evidence took the matter no further, as his only role was to determine whether the house encroached on any of the adjoining properties.

[8] On 8 October 2015, the judge gave judgment as follows:

> "Upon the evidence the Court finds that the Wife/Applicant is beneficially entitled to sixty percent (60%) share and interest in the concrete house structure located at Lot 137, Block Four, Lilliput in the parish of St. James and the Husband/Respondent is beneficially entitled to the remaining forty percent (40%) share and interest in the said concrete house structure which is to be valued at the expense of both equally by agreed valuator Romans Real Estate Ltd."

[9] In this appeal, Mr Paris, who also appeared for the appellant at the trial, pointed out that the judge found that, although the house was not the family home, it was nevertheless property within the meaning of the Property Rights of Spouses Act ('PROSA'). He contended that the judge was wrong to treat the house as a single house and thereafter to award the respondent a 40% interest in it. Rather, Mr Paris submitted, the judge ought to have made an order that the respondent be paid the value of the one room of the house which the judge accepted that he had constructed.

[10] The challenge on appeal was therefore more to the judge's assessment of the legal position based on the evidence than to her findings of fact. In these circumstances, we will gratefully base the following summary of the facts on the judge's reasons for judgment.

[11] The appellant's case was that she was the one who initiated the building of a concrete structure on land 'captured' by the respondent and herself. But she did so on her own because, by the time she started to build, the respondent had deserted her and gone to live with another woman. A few years later, the respondent sought to return to live on the property on which the house stood and, with the appellant's consent, constructed a one room extension to the house. There, he lived for some time with his son. But he was later excluded from the house by court order and went to live in the hills. In 2011, a section of the house, in particular the room constructed by the respondent, was damaged by fire. The judge noted, but ultimately rejected, the appellant's position that the fire was in fact set by the respondent and that he accordingly had no remaining interest in the house.

[12] The judge also largely rejected the respondent's contrary case that, with little help from the appellant, he was the one who was substantially responsible for the construction of the house. But she did say this:

> "13. The wife's evidence on the construction seemed to be glossed over and was not convincing. I formed the view that neither of them gave credible testimony in entirety and thus the version of neither of them is to be accepted in full. I concluded rather that both parties contributed directly and

> indirectly in significant ways towards the structure that eventually existed."

[13] Thus, although the judge accepted that the respondent "was integral in the start of, and the construction of the 'wall' house", she did not accept "that [the appellant's] assistance in the project was minimal at all". To demonstrate this point, the judge added this:

> "Indeed the significance of her contribution was clearly underscored by the evidence of the husband that he had to sleep in the car because the board house was full of the wife's material and tools."

[14] In her final assessment of the position based on the evidence, the judge concluded that, given the facts that (a) the parties both claim to have been separated from in the 1980's; (b) they never lived in the same bedroom together in that concrete dwelling as 'man and wife'; and (c) the definition of 'family home' in PROSA, "it would be a stretch to treat this dwelling as the 'family home' within the tenor and thrust of the legislation". However, the judge took the view that the house was "undeniably a marital asset", within the meaning of section 14 of PROSA which the court was obliged to divide as fairly as possible. This is the basis upon which the judge therefore ordered that the value of the house should be shared 60/40 in the appellant's favour.

[15] Section 2 of PROSA defines the 'family home' as "the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence…". And, as is well known,

section 6 provides, generally speaking, for equal sharing of the family home between spouses. There is no appeal in this case against the judge's finding that the house was not the family home, so nothing now turns on it, save to observe that the finding seems to have been fully in keeping with the evidence.

[16] However, in relation to property other than the family home, section 14(1) empowers the court to divide such property "as it thinks fit". In so doing, the court is directed to take into account the factors mentioned in section 14(2), which include, "(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property".

[17] This was the background to Mr Paris's submission that, having accepted that the house was not the family home, the judge ought not to have approached the question of compensation to the respondent on the basis that he was entitled to any share of the family home. Rather, Mr Paris submitted, the judge ought to have awarded the respondent no more than the value of the room actually built by him.

[18] As will have been seen, section 14 of PROSA gives the court a wide discretion to divide property other than the family home between spouses "as it thinks fit". In these circumstances, any appeal against a trial judge's exercise of a discretion must contend with the well-known principle of appellate restraint embodied in cases such as **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1. Thus, as was said in the former case (by Lord Diplock, at page 1046), the appellate court "must defer to the judge's exercise

of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently". So, as was explained in the latter case (at paragraph [20]), this court will only interfere in cases in which the decision of the judge below could be said to have been "demonstrably wrong".

[19] On this basis, despite Mr Paris's spirited submissions on behalf of the appellant, we found it impossible to interfere with the manner in which the judge chose to give effect to the respondent's interest in the house. Given her finding that both the appellant and the respondent did contribute in some measure to the construction of the house, it seemed to us that a proportionate division of its value, as ascertained by an independent valuator, was plainly a fair way of reflecting the respondent's interest.

[20] However, as regards the extent of that interest, we took a different view, albeit with some hesitation. Our hesitation stemmed from our clear sense that the case was very close to the margin of error which this court should ordinarily permit a judge in the exercise of her discretion. However, we were concerned by the fact that, given the judge's findings, the appellant did appear to be the prime – even if not the sole - mover in the construction of the house. On this basis, it seemed to us that, in awarding the respondent a 40% interest in the house, the judge did not attribute sufficient weight to this factor. It is in these circumstances that we considered that a 70/30 division in the appellant's favour represented a truer and more equitable reflection of the respective interests of the parties.

[21] Finally, it appears that the judge made no order as to costs in the court below. In our view, particularly in the light of the respondent's non-participation in the appeal, there was no reason to take a different approach in relation to the costs of the appeal.