[2013] JMSC Civ. 109

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 02099

BETWEEN	**GLADSTONE HENDRICKS**	**CLAIMANT**
AND	**DOREEN HENDRICKS**	**DEFENDANT**

Ms. Opal Lee: for the Claimant.

Ms. Vivienne Washington: for the Defendant

CORAM: G. FRASER, J (Ag.)

Heard on 15th, 16th 18th and 31st July 2013
(In Chambers NO. 2)

FACTUAL BACKGROUND

[1] The parties are divorced from each other but before the final dissolution was made by a Court in the State of Florida, USA; this claim was brought by Mr. Hendricks pursuant to The Property (Rights of Spouses) Act (herein after PROSA). The suit was initiated by way of Fixed Date Claim Form filed on 16th April 2012. The claim concerns the purchase of two lots of land at Rose Hill District in the parish of Manchester. The purchase and improvements were completed sometime around 2006 while the marriage was still a going concern and the parties were still co-habiting as man and wife. During the course of the marriage the parties had migrated to the United States of America in Florida. They raised their three (3) children and purchased land in the USA including the matrimonial home located at 20011NW 14 Place, Miami Florida 33169. They had also operated a small business, namely a beauty parlour. The business was registered in the name of Mrs. Hendricks who managed the day to day operations and who was at all

material times a self-employed cosmetologist. Mr. Hendricks was employed at all material times in a full time capacity and earned a consistent salary.

[2] Long before the marriage was terminated, the land owned by the parties in Florida were all sold, save and except the matrimonial home where they both resided until Mrs. Hendricks removed thereby initiating separation and divorce proceedings. The family business had ceased operation since 2007 and according to the evidence of both parties it had never yet made a profit. On final separation the Claimant was awarded the matrimonial home in Florida at the insistence of the Defendant who was awarded the family car and a sizable award of Mr. Hendricks 401K savings. No mention was made of the properties in Jamaica and understandably so since the Florida Courts could not exercise jurisdiction over land located in Jamaica.

THE CLAIM

[3] These two parcels of land in Jamaica; a one half (1/2) acre and a one quarter (1/4) acre respectively; were both acquired in the sole name of the Defendant, Mrs. Doreen Hendricks sometime between the years 2002 – 2005. It is not in dispute that at the time of acquisition the marriage was still a going concern and the parties were still co-habiting as man and wife. Subsequent to the acquisition of the land two houses were built one on each property referred to as the big property and the small property for convenience as the lands are yet unregistered.

[4] The Claimant contends that he is entitled to 80% share and interest in both properties because he was the main contributor to the acquisition and improvement thereof; notwithstanding his name does not appear on the sales agreement. He contends that whereas the Defendant holds the legal ownership of the properties, she does so subject to his equitable interests. The Defendant on the other hand contends that Mr. Hendricks has no interest in these properties that she is sole owner legally and beneficially subject to a half share interest owned by their daughter Marsha Hendricks in the small property. She further contends that it was never the intention of the parties that Mr. Hendricks should obtain a benefit from the Jamaican properties and that is why he was awarded the sole interest in the matrimonial home in Florida.

THE COURTS RELEVANT JURISDICTION

[5] While it is not disputed that a Judge of the Supreme Court would be seized of jurisdiction to hear and determine the issues in the instant case, there is a disagreement between the parties as to whether the provisions of The Property (Rights of Spouses) Act (PROSA for short) apply or whether the Court's jurisdiction lies in the realm of Equity and Trusts. The Defendant contends that "the law of Trust is the applicable law where a person who does not have legal title is asking the Court to make a determination on the beneficial interest in property". The Defendant further contends that the Claimant must establish by evidence that there was a common intention between the parties as to the purpose for which the Rose Hill properties were acquired; and cites as supporting their position the case **of Gissing v Gissing** [1970] 2 All E R 783.

[6] The Claimant, contrary to what the Defendant asserts; contends that the law of trust is not the applicable law in these proceedings and PROSA is in fact relevant as per the provisions of section 4 which states that the provisions of the Act "shall have effect in place of the presumptions of the common law and of equity to the extent that they apply to transactions between spouses". There can be no question that the issues to be determined by this Court; falls within the ambit of this provision of law and this interpretation is further buttressed by the Court of Appeal's decision in **Brown v Brown** [2010] JMCA civ. 12. The issues are accurately and succinctly identified by the Claimant's Attorney at Law as follows:

- Whether the Claimant has a share and interest in the two (2) properties located at Rose Hill district, Manchester which were both acquired in the sole name of the Defendant during the marriage
- If so what is the extent of that share and interest.

The Claimant further submits that in the above circumstances; the Court's jurisdiction would be specifically grounded pursuant to section 11 of PROSA

[7] I agree with the Claimant that PROSA was enacted to not only give the Court jurisdiction to make provisions for the family home to be equally divided where the

circumstances warranted a 50/50 division; but also provides for the Court to have the power to divide property owned by either or both spouses in addition to the family home as mentioned in sections 6 – 8. I agree that the Court pursuant to sections 11 - 15 also has jurisdiction in respect of any relevant property to:

i. Make declarations of property rights
ii. Determine the value and share of property
iii. Determine the manner in which the property is to be divided
iv. And to examine and determine cases where the disposition or mismanagement of property is made to defeat the claim of a spouse; and
v. Alter property interests.

Significantly section 14 provides that –

> (I) Where under section 13 a spouse applies to the Court for a division of property the Court may-
> (b) subject to section 17 (2), divide such property, **other than the family home**, as it thinks fit, taking into account the factors specified in subsection (2), or, where the circumstances so warrant, take action under both paragraphs (a) and (b).

[8] I agree that the properties in question are not to be regarded as family home because the parties have never cohabited there as man and wife. Nonetheless It is patently clear to me that the provisions of PROSA are not restricted to property that is "family home" but any other property that form part of matrimonial assets. I find therefore that the PROSA legislation is appropriate for the determination of this matter. The guiding principles of determination as provided in the Act itself at section 14 (2) are as follows:

> (2) The factors referred to in subsection (1) are-
> (a) the contribution, financial or otherwise, directly or in-directly made by or on behalf of a spouse to the acquisition, conservation or improvement of any

property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) that there is no family home;

(c) the duration of the marriage or the period of co-habitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

[9] While attempting to resolve the issues herein, I have no intention of reciting every single iota of evidence led in this case. However as is appropriate and relevant I will allude to such aspects as I find necessary that supports any conclusion I arrive at and or reasons for any findings made. I observed that the Claimant as also the Defendant were not necessarily paragons of truthfulness and the evidence on both side was beset by vagueness, half answers, prevarications and prone to exaggerations. Additionally in some instances no explanation was offered for inconsistencies and discrepancies. I however bear in mind that proof of the claim lies upon the Claimant; albeit the standard of proof is on a balance of probabilities

MARSHA HENDRICKS CLAIM

[10] Miss Marsha Hendricks is not a party to the suit, which I would expect if she is making a claim of interest. Nonetheless she contends through the Defendant; her mother that she has an equitable interest in the small property thereby supporting the contention of the Defendant that the Claimant has no interests in either of the two properties in issue. I will firstly deal with the issue of Marsha Hendricks as being a part owner of the small property. Marsha claims that her mother had made the initial part payment on this lot whereby she completed the payment and erected a structure thereon. The funds used for this enterprise was obtained she said from a refinancing of her Florida home in 2005. I recall her affidavit evidence and the ensuing cross-

examination and I agree with the Claimant's written submission at paragraph 15 to the extent that, there is no evidence besides the say so of Marsha Hendricks, that the wire transfer at exhibit 28 regarding the refinancing of her home in the USA is in any way related to the purchase price of the small property located at Rose Hill district in Manchester. I also make the observations that the evidence in this case does not support the following:

i. That any of this refinancing money was given by Marsha to the Vendor of the two lots of land as part of the purchase price of that small property

ii. That Marsha Hendricks has contributed monetarily or otherwise to the acquisition of the small property.

iii. Further Miss Hendricks did not submit or exhibit even one receipt or other documentary evidence to support that she had financed any construction of a house on the small lot of land.

iv. The evidence of Mrs. Hendricks versus that of Marsha is discrepant as to Marsha's source of funding. On the one Hand Marsha says it came from a refinancing of her home. On the other hand Mrs. Hendricks says it was a tax refund that Marsha obtained in the sum of US$4,500 which she augmented with other savings thereby procuring the sum of $5000 which she contributed towards the purchase price of the small lot.

v. Whereas both women speak of Marsha's contribution towards the purchase price of the land neither have spoken of her funding of the construction of the house thereon or provided any documentary evidence to buttress their claim.

[11] I make no pronouncements on the allegation made by the Claimant; that the refinancing money that Marsha obtained was used for the assistance of Marsha's boyfriend as this is immaterial to the issues at Bar and not proven. I have take into account the terms of the sale agreement (exhibit 24), this document is dated 27th October 2002 and recites that the full purchase price is payable on the execution thereof. According to the date, this agreement was executed some three (3) years

before the refinancing and the Defendant is asking me to say that this therefore logically in conflict with Mrs. Hendricks's and Marsha's contention of her part ownership.

[12] I however bear in mind the particulars of claim signed by Mr. Hendricks the claimant and filed on 16th April 2012 in support of his fixed date claim form that he is relying on. At paragraph 6 he states that "shortly thereafter on or about 2005 the parties became aware of the fact that an adjoining land was for sale and also bought it for approximately ten thousand united states dollars (US $10,000). A two bedroom house with the usual amenities was constructed on this second lot sometime between the years 2005 to 2006." This seems to clearly support the Defendant's insistence that there is an error in the agreement as to date of purchase of the small property. Whereas the Defendant in all the circumstances is not allowed to plead ***non est factum*** and is not allowed to ask this Court to look outside the four corners of a written contractual agreement, or accept an oral assertion to contradict the written document. So too the Claimant is not allowed to advance this evidence in support of his claim having regard to his own assertions, it lies ill in his mouth so to do; for one who seeks equity must do equity. I do not find that exhibit 24 and particularly the date of 2002, to be reliable evidence in respect of determining the issues and I therefore disregard it as being determinative of whether or not Marsha has an interest in the small property.

[13] Having assessed all the other evidence in this regard I am however satisfied on a balance of probabilities and so find that Marsha was not a contributor to the acquisition or improvement of any of the Rose Hill properties and holds no legal or beneficial interest therein.

THE CLAIMANT'S CASE

[14] There is no dispute that during the course of the marriage certain properties were owned by the parties in Florida, USA; separate and apart from the matrimonial home. Premises located at 18331 NW 2 Court Miami, Florida; was said to be jointly owned by the parties, the proceeds of the sale realized some US$23,000 in 2001 and the cheque was issued in both their names. Another property located at 138 Bayside Drive, Palm Coast, Florida; was also sold in about 2004 for the sum of US$33,000; the sole name

on that title appeared to be that of the Defendant. The proceeds of sale from both properties were all funnelled into the purchase and construction of the Rose Hill properties. Although both the Claimant and Defendant insisted that the properties sold belonged to "me" they eventually in evidence admitted that, in the jurisdiction of Florida; land owned by one party that was acquired during the marriage is deemed to be jointly owned by both spouses in equal shares. In the circumstances I find that the monies that were realized from sale of property in Florida and which were utilized in the purchase and improvement of the Rose Hill properties are joint funds.

[15] It is further agreed by both parties that an amount of $70,000,000 was obtained from the refinancing of the matrimonial home located at20011NW 14th Place Miami, Florida and those funds also channelled into the acquisition and construction of the Rose Hill properties. The parties disagree as to why this money was acquired. Mrs. Hendricks claim it is hush money given to her as representing her interest in the matrimonial property at a time when the marriage was is discord and she made demands which were met. I find these assertions rather curious for the following reasons:

1. Why did the Defendant remain and continued to live in the matrimonial home some nine (9) years after she was accorded satisfaction of her interest
2. why was she still retaining joint ownership of the matrimonial premises up to time of final dissolution of marriage
3. During a Court hearing in Florida (Exhibit 3), the Defendant gave evidence on oath on the 1st February 2012, that this Claimant had given her the $70,000 to start the family house and she had finished the family house. This was in answer as to why she had two houses built in Jamaica.
4. She also testified on the above occasion that while working in the parlour she never took a salary because, "I consider myself working to obtain what we need in the future".

In light of the above, I reject Mrs. Hendricks' claim that the $70,000 was her share of the matrimonial property. The only reasonable inference for it

being given to her was acquisition of and improvement of the Rose Hall property, and I find that the sum of US$70,000 funnelled into the disputed property was joint funds.

[16] So far there is evidence of joint money to the amount of US $126,000 funnelled into the purchase of the disputed properties. It is not clear thereafter as to how the balance of the funds were accumulated. Mrs. Hendricks claimed she had funded a portion of the balance through "throwing partner". The Defendant asserted that she threw partner from the $200 salary she paid herself weekly while operating the hairdressing parlour. She has however contradicted herself as to being able to earn money from this enterprise. She had jointly filed tax returns with the Claimant indicating that the parlour had never made money. They had jointly filed for bankruptcy and in sworn evidence before a Florida Court she had denied taking a salary. It therefore lies ill in the mouth of the Defendant at this late stage to claim otherwise. It behoves one who comes to equity to come with clean hands. Mr Hendricks on the other hand while not disputing that partner money was one of the sources of funding; he is claiming that he was the one who provided the partner money. I accept Mr. Hendricks evidence in this regard, since Mrs. Hendricks had no proven independent source of income. I am also however, inclined to conclude that he intended that both he and Mrs. Hendricks should benefit from the throwing of the partner. It might have been his money but it was her industry and thrift that ensured this savings. Why else did he give her this money religiously ever week, when he knew where the banker resided and that the partner money was paid by the Defendant on her way to Church every Sunday morning? If it was intended to benefit him solely he would have been making his own payments.

[17] Mr. Hendricks spoke about money being contributed by him, being proceeds of profit from his money lending or "loan shark business". He also said he funnelled money from his 401K savings account. There is no dispute that he had these two sources of income and although there was no direct evidence that linked withdrawals from these funds to the funding of the Rose Hill properties, I accept his evidence in this regard. I accept his evidence because there is no evidence which contradicts him and I find in all the circumstances that this assertion is more probably true than not.

[18] I agree with the claimant that a relevant factor in the division of property is the duration of the marriage. In this case the parties had been married for some thirty (30) years and I regard this as a long time, this supports the claimant's position as being entitled to a share of property acquired during the course of the marriage. There is authority to the effect that this is so even where the claiming spouse had made no direct financial contribution to same.

THE DEFENDANT'S CLAIM

[19] The Defendant's claim of the 100 percent (100%) interest in the disputed properties is not substantiated by the evidence. The Defendant's assertion that there was an understanding and agreement by the parties that the Claimant would own and control the former matrimonial home and she would own and control the Rose Hill properties in Manchester is not supported by the evidence either directly or inferentially, so that the court can take cognizance of it pursuant to section 14 (2) (d).

[20] There is no evidence that the Defendant would have been able to acquire the disputed properties from funds generated solely or substantially from her own labour or enterprise. On the contrary; all the evidence clearly demonstrate that the properties at Rose Hill District were acquired; at a period when the parties were together and cohabiting, happily as man and wife, according to the Claimant the parties had then been married for over twenty (20) years. The evidence clearly shows that a significant portion of the funding was joint funds as acquired from the sale of several properties that they owned jointly either legally or beneficially. In all the circumstances the inescapable inference is that the interests acquired in Rose Hill must be a joint interest and the intention was that Rose Hill properties were marital properties. The properties were acquired in the Defendant's sole name and so the legal interest is vested in the Defendant; but I find that she holds the beneficial interest on trust for the claimant and herself

THE CLAIM FOR DISPROPORTINATE INTEREST

[21] The Claimant is contending that he is entitled to 80% interest of the value of the property, because of his greater financial contributions to their acquisition and

improvement. At this point I recall the provisions of section 14 (4) of PROSA; that a monetary contribution is not presumed to be of greater value than a non-monetary contribution. The evidence of the Claimant himself is that it was the Defendant who did the following:

- Engaged the Vendor and negotiated and completed the sale process
- Frequently flew to Jamaica to oversee the construction process
- Transported funds from abroad in furtherance of the construction process
- Made decisions as to the size and style of the construction
- Was left to make all necessary decisions as she saw fit and with little or no input from himself.
- She applied for and obtained landing status as a returning resident enabling the benefits of the tax advantages that accommodated the clearance of the container load of items he helped her to pack and ship to Jamaica.

[22] The arguments raised by the Claimant as to duration of the marriage being a relevant factor also avails the Defendant. The arguments raised by the Claimant as to rearing and nurturing of the children also avails the Defendant. The arguments raised by the Claimant of his assistance in the business of the parlour also avails the Defendant. It is a clear demonstration on her part to contribute to the welfare and funding of the family and clearly in all the circumstances the actions of Mr. Hendricks demonstrates that the hair dressing parlour was meant to be a family enterprise and that both himself and the Defendant should mutually benefit.

[23] I appreciate that whereas section 6 of PROSA presumes a 50/50 allocation of the family home, there is not that presumption as it relates to section 14 and "other property". Conversely there is nothing within the act that precludes a court from making such a determination if the interests of justice so demands it. I am of the view and so find that the evidence does not support the assertion that the Claimant is the main contributor in the acquisition of and improvement of the disputed property.

[24] The land at Rose Hill was purchased in 2002 and two houses subsequently constructed and were treated as marital asset, this is my finding having regard to all the circumstances of the case. I accordingly find that the claimant is entitled to a share of that property. Due to the contributions of both parties, the claimant and Defendant; the long marriage and the circumstances of its acquisition, the only fair and just share to award the claimant is a one half share. Finally pursuant to section 12 (2) of ***PROSA*** a spouse's share of property is determined, in the case of married couples, as at the date of separation. At the date of the parties' separation in 2011 the construction of the both houses was completed and I have heard no evidence that there has been any improvement made to either property by the Defendant since then.

DECLARATIONS AND ORDERS

[25] Based on the law and my findings of fact as outlined above, I hereby make the following declarations and orders:

1. The claimant is entitled to a fifty percent share in the two parcels of land at Rose Hill District, Manchester; inclusive of the buildings thereon.
2. The properties are to be valued by a reputable valuator agreed to by the parties and each party to bear a half and equal cost of such valuation
3. The monetary amount of half the value of the land and structure is to be paid to the claimant within 120 days of the valuation.
4. If the parties fail to agree on a valuator within 30 days of this judgment, the Registrar of the Supreme Court is empowered to appoint a valuator.
5. Each party to bear their own legal costs.

Georgiana Fraser, J (Ag.)