



[2013] JMSC Civ. 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 05173

BETWEEN	GEORGIA MARGARET HOGG	CLAIMANT
A N D	DENNIS ATHLONE HOGG	DEFENDANT

Mr. Michael Howell and Mrs. Roxann Mars instructed by Knight Junor & Samuels for the Claimant.

Mr. Gordon Steer instructed by Chambers Bunny & Steer for the Defendant.

DIVISION OF MATRIMONIAL PROPERTY – FAMILY HOME DETERIORATING AND DESTROYED AFTER SEPARATION – NEW STRUCTURE BUILT ON LAND – LAND APPURTENANT TO STILL EXISTING – NO APPLICATION TO VARY EQUAL SHARE RULE – DIVISION OF OTHER MATRIMONIAL ASSETS – PRINCIPLES APPLICABLE – PROPERTY (RIGHTS OF SPOUSES) ACT 2006, SS. 6, 12, 13 AND 14.

Heard: May 14 and 28, 2012 and January 15, 2013

EDWARDS J

BACKGROUND

[1] The parties were husband and wife. They were married in 1990 but began living separate and apart in 1998. The husband (the defendant) filed for a divorce some years later. The absolute was granted in 2010. The wife (the claimant) brought this claim after the dissolution of the marriage. The application was brought under the Property (Rights of Spouses) Act 2004 (hereinafter referred to as PROSA). Section 13 of PROSA allows a spouse to make such a claim within a year of the dissolution of the marriage. The practical effect of this is that either spouse may make such a claim for property rights even if they have been separated for thirty years. The blatant possibility of injustice this state of affairs

may cause to one or both sides, in a case where they have sat upon their laurels for lengthy periods whilst the status quo may have changed several times over, seemed to have escaped the legislators. Be that as it may. The claim was made by virtue of the statutory provisions and therefore, unlike equity and the Statute of Limitations, delay does not defeat it.

[2] Prior to their marriage, the parties co-habited as spouses at premises owned by the defendant located at Orange Hill, in the parish of Westmoreland. The defendant built a three (3) bedroom house on the property shortly before meeting the claimant. It later became the matrimonial home after the marriage. The land at Orange Hill was a gift to the defendant from his father and is unregistered land. At the time of the marriage, the defendant was a businessman and the claimant was an entertainer on the cabaret circuit.

[3] The exact date when the parties began co-habiting was unclear but I accept the defendant's evidence that it was sometime in 1983. Shortly thereafter they had two (2) children born 1984 and 1987 respectively. The defendant had two (2) other children from a previous relationship. At some point these two (2) children came to live with them.

[4] Shortly before the separation, whilst the parties were having serious matrimonial problems, an additional bedroom, a bathroom, walk in closet and office was added to the existing structure. This was said to have been used exclusively by the defendant. There was no serious contradiction to this assertion.

[5] After the claimant's departure from the family home, the entire original three (3) bedroom structure was demolished due its deterioration caused by the use of sea sand in its construction. There is now on the premises a completely new structure incorporating the addition, which was the only remainder after the demolition. Needless to say the claimant made no contribution to the construction

of the new house, had never lived in it and failed to identify or recognize it in photographs shown to her during the hearing.

[6] During the marriage the defendant managed a band in which the claimant was the lead singer. He also built a hotel on a property situated at Wedderburn Mountain which was property he purchased from his father. This hotel was called Secret Paradise Resorts. Secret Paradise Company Limited was incorporated accordingly. The land and buildings on which the hotel operated was sold by the defendant after the parties separated.

[7] In this claim filed in 2010, more than ten years after the separation, the claimant asserted that she was entitled to a 50% share in the property at Orange Hill, alleging that it was the family home. She also claimed a 50% interest in land located in Llandilo, in the parish of Westmoreland registered in the sole name of the defendant as well as a 50% interest in the hotel.

THE FAMILY HOME

[8] Any consideration of the family home must begin with section 6 of PROSA. Section 6 states in part:-

- (1) *Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home –*
 - (a) *On the grant of a decree of dissolution of a marriage or the termination of cohabitation;*
 - (b).....
 - (c).....

[9] The family home referred to in section 6 is defined in section 2 of the Act which provides:

"[Family home] means the dwelling-house that is wholly owned by either or both of the spouses and used habitually... by the spouses as the only... family residence together with any land, buildings or

improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household.”

[10] This was a long marriage. It was also a long separation. In the interim there have been changes made to the defendant's circumstances and assets. It is undisputed that the original house on the property was the family home. It is also undisputed that the original house on the property, which was the family home no longer exists. It was demolished due to its deterioration from sea salt. It was said to be valueless. All that remained of what was there before the parties separated was the addition referred to earlier.

[11] In those circumstances, the court is forced into one of two conclusions. Firstly, that there is no family home, or secondly, that the family home consists of one (1) bedroom and a bathroom, walk in closet and office to which the claimant is entitled to a half share.

[12] The attorney for the defendant argued that there was no family home existing within the meaning of PROSA. The evidence would seem to support that contention and was not and could not be disputed by the claimant. In fact upon being shown a photograph of the current house, it was plainly unfamiliar to the claimant who agreed that when she left the marriage that structure did not exist. It was undeniably a new house.

[13] Whilst the claimant did accept that the present structure on the premises was unknown to her and that she had never lived in it, there was no application to vary the equal share rule. Counsel for the defendant made no submission to the court regarding the treatment of the earlier extension, or the land upon which the matrimonial home once stood. The family home at the time of the parties' cohabitation within the marriage sat on lands owned by the defendant. The new house was built in the same spot. The demolition of the family home did not destroy the claimant's right to claim a share in the land which was appurtenant to

it. That right remains unless it is varied by the court. As stated before the defendant made no application to vary the equal share rule.

[14] The defendant failed to address the issue of the lands appurtenant to the family home to which the claimant was prima facie entitled to a half share under PROSA. I, therefore, find that the larger portion of the matrimonial home was demolished due to circumstances beyond the control of either of the parties, and both must share in that loss. The addition which was not destroyed was part of the family home and the claimant (on a strict reading of PROSA) is entitled to half the value of the one bedroom, one bathroom, walking closet and study, which was added to the matrimonial home prior to the destruction of the original portion. By virtue of section 12 subsection 2 of PROSA, spouses share in property is to be determined as at the date they ceased to cohabit as man and wife. At the time the parties stopped living together, with the exception of the addition, the rest of the structure had no value.

[15] This approach is not an entirely novel one. In **Johnson v Johnson** [2012] JMSC Civ. 155 a decision of Mr. D.O. McIntosh, decided after this case was heard, the property was a quad which had been destroyed by fire. The parties separated at or after the fire. The quad was then later renovated and the structure enlarged by the defendant. In that case the judge awarded the claimant half the value of the property as valued at the time of the fire.

[16] I also find that the claimant continued to maintain an interest in the lands appurtenant thereto and there being no application to vary, the court holds that the claimant is entitled to the value of a half share in the lands on which the original family home had been built.

LAND AT LLANDILO IN WESTMORELAND

[17] The evidence of the claimant was that this piece of land was bought by the defendant for approximately two hundred thousand dollars. Title was taken in

the name of her sister. The defendant's evidence was that he purchased the land at Llandilo by way of registration of the transfer on 4th July 1999. This was done after they separated. However, he explained to the court that he acquired the land using his sister-in-law as proxy. But the land was transferred to him by the sister-in-law in 1999. Although the defendant claimed that he acquired the land by way of transfer in 1999, he admitted that the land had been acquired on his behalf by the claimant's sister years before, due to the politics of the day and the fact that his family already owned lots of land in the area. This land was acquired by the sister-in-law in 1988 during the marriage and cohabitation of the parties.

[18] The title suggests that the date the plan was deposited to the Titles office was in 1996. It is clear therefore that when the property was purchased, it was purchased by him and that his sister-in-law held it on trust for him. The fact that it was bought so early in the marriage and the claimant's sister's participation in the purchase inevitably suggests to this court that it was intended to form part of the matrimonial assets. The defendant having made no submissions other than that the land was acquired after the separation, which was blatantly not true, the claimant is entitled to claim a fifty percent beneficial interest in the said property.

[19] Under section 14(1) (b) of PROSA, the claimant is entitled to claim an interest in property other than the family home. Subsection 1(b) states, in effect, that the court may divide property other than the family home, as it thinks just, taking into account the factors listed in subsection 2. It might be more useful to set out the text of the section. Subsection 2, 3 and 4 of section 14 of PROSA states:

(2) The factors referred to in subsection (1) are-

- (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, 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 cohabitation;*
- (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.*

(3) *In subsection (2) (a), "contribution" means-*

- (a) *the acquisition or creation of property including the payment of money for that purpose;*
- (b) *the care of any relevant child or any infirm relative or dependant of a spouse;*
- (c) *the giving up of a higher standard of living than would otherwise have been available;*
- (d) *the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which-*
 - I. enables the other spouse to acquire qualifications; or*
 - II. aids the other spouse in the carrying on of that spouse's occupation or business;*

- (e) *the management of the household and the performance of household duties;*
- (f) *the payment of money to maintain or increase the value of the property or any part thereof;*
- (g) *the performance of work or services in respect of the property or part thereof;*
- (h) *the provision of money, including the earning of income for the purposes of the marriage or cohabitation;*
- (i) *the effect of any proposed order upon the earning capacity of either spouse.*

(4) *For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.*

[20] It can be seen therefore, that section 14, subsection 2, sets out the relevant factors to which the court must have regard in considering whether to divide property other than the family home. These factors surround the contributions made, whether financially or otherwise to the acquisition, conservation or improvement of any property. Other factors the court must have regard to is the fact that there is no family home for division; the duration of the marriage, any agreement with respect to ownership and division of property and any other fact or circumstances which the justice of the case requires to be taken

into account. The section also defines the meaning of contribution other than financial contribution.

[21] The property was sold in 2006. There is no evidence what became of the proceeds. The property was acquired when the parties were together and happily so. It was acquired in the name of the claimant's sister on trust for the defendant. There is no evidence he would have been able to use the claimant's sister in this way if he had not been her husband. During the period the claimant made the usual contributions and gave the usual support expected of a good partner as contemplated by the statute. Financial contributions bear no greater weight under PROSA than non-financial contributions.

[22] Furthermore, the family home in which the claimant would have had some share had been demolished. I have to consider that there is now essentially only a part of the family home left. Even though there is no evidence of what became of the proceeds of sale of the land at Llandilo, I hold the claimant is entitled to a 50% share of those funds.

SECRET PARADISE

[23] The claimant also claimed an interest in the hotel owned and operated by her former husband. She made no claims on the land and buildings on which the hotel operated. She was a minor shareholder in the hotel. I will therefore, consider the contributions identified by the claimant to support her claim for an equitable interest in the hotel.

[24] The hotel, Secret Paradise Resorts was a small hotel in the west-end Negril, in the parish of Westmoreland, Jamaica. The land on which the hotel was built was purchased by the defendant from his father in the nineteen seventies. It was subsequently sub-divided and title was issued to the defendant in his sole name in 1991. The claimant made no contribution to its acquisition. She made no financial contribution to the construction and outfitting of the hotel. It was

completed in 1985 and the company was incorporated in the same year. Both were present at its incorporation. The claimant was given four shares at the time of incorporation.

[25] The claimant claimed that she was an integral part of the running of the hotel and that despite what was on paper she was in fact entitled to a half share. This is what she had to say in her affidavit:

“That I was an integral part in the planning, naming and building of the hotel by giving ideas regarding naming and design of the hotel. Both of us discussed the plans for the property and decided on building a hotel there and we would call it “secret Paradise” and to this end we incorporated a company, Secret Paradise Limited”, in both our names in or about November 1985. We both travelled to Kingston to the Companies Office of Jamaica and it was there and then that we named the hotel. The first choice was “tropical Paradise”. However, after checks were made it was realized that that name was already incorporated and so we changed it to “Secret Paradise Resort Limited” as an alternative.”

[26] In support of her claim counsel for the claimant cited several cases. One of these was **Nixon v Nixon** (1969) 3 All ER 1133 where it was held that;

“where a wife helped her husband regularly and continuously in a business which prospered by their joint efforts, and received no wages, she was entitled to share in the property acquired as a result, or the proceeds thereof.”

[27] Counsel for the claimant also cited **Lambert v Lambert** (2003) 2 WLR 1571; **Lloyd v Pickering** (2004) EWHC 1513 and **Ulrich v Ulrich** [1968] 1 W.L.R 188. In response to these cases I would caution two things; firstly that in none of the cases cited was there a written agreement as to the claimant's interests and secondly, one should always be careful of comparisons with English cases as these are decided on statutory provisions wholly different from PROSA and where the starting point for matrimonial assets is inevitably equality. Counsel also cited **Beverly Crammer v Linford Campbell** Claim No. HCV 1261 of 2007. In that case the parties were long standing common law spouses and there was very little dispute in the face of clear evidence as to the work done by

the claimant in supporting and developing the defendants business interests and assets.

[28] In this case the evidence was that at the time of incorporation the defendant allotted 4 shares, from a total of 200 shares, to the claimant. Both parties' names were reflected in the incorporation documents. It was submitted on behalf of the claimant that this showed an express agreement that both should own the hotel business. It was argued further that the claimant had an equitable beneficial interest in the hotel based on her contribution and conduct directly and indirectly as provided by section 14 of PROSA. The defendant denied these claims.

THE CONTRIBUTIONS OF THE CLAIMANT

[29] The claimant averred that she was an integral part of the planning, naming and building of the hotel by giving her ideas regarding the name and design of the hotel. The defendant denied this. She said the concept for the hotel developed out of discussions by both of them as regards plans for the property. The defendant denied this. She said they decided to build a hotel and call it Secret Paradise. She said it was towards that end that the company Secret Paradise Resorts Limited was incorporated in both their names. She said the allotment of shares to her was as a consequence of that common intention. The defendant denied this. However, she said the allotment was done without her knowledge and she apparently was only given 4 shares. This of course is a contradiction, since there cannot be a common intention if one of the parties to the said common intention is ignorant of it. In any event her evidence was that she was present at the incorporation.

[30] Despite her claim of ignorance however, the claimant remained steadfast in her claim that the allotment was of no consequence to her as Secret Paradise was to be jointly owned by them both and what was on paper was irrelevant. I find this to be a remarkable statement in light of the fact that the expressed

allotment was 4 shares. So what was the basis of this intention to own jointly? Since there was no expressed intention that she should own any interest in the land or buildings (and she has made no such claim on the land or buildings) on which the hotel operated, the claimants case was for a share in the profits and assets of the hotel as a going concern.

[31] Her evidence is that during the construction of the hotel they jointly agreed the shape of the pool and the rooms so that the hotel would be unique. She claimed to have made trips to the hardware store to purchase building materials and sometimes cooked for the workmen. Her further evidence is that she worked in the hotel in all capacities and did everything she could to support its success. She said she helped to tidy rooms and cook when the cook was not available, as also filled in for the secretary/ receptionist, all without pay. She claimed to have sometimes acted as General Manager, working there 3-7 days per week generally. She also sang at the hotel as a professional entertainer.

[32] The decoration of the hotel she claimed was done by her; she chose the drapes, crockery and utensils for the kitchen as well as purchased towels and sheets for the rooms. She claimed to have organized wedding ceremonies and receptions at the hotel and was the purchasing agent and reservations officer. She also claimed to have travelled overseas to make purchases for the hotel, sometimes at her own expense sometimes with the defendant. If the evidence of the claimant is to be believed, she ran the hotel as a jack of all trades. The defendant denied all this only agreeing that the claimant did accompany him on business trips and that she visited the hotel from time to time to use the facilities. To give lie to the claimant's assertion, the defendant pointed out that the hotel rooms did not use drapes so the claimant could not have chosen drapes for the hotel. Furthermore, he noted that the claimant was a cabaret singer and would not have wanted to be seen working in the hotel.

[33] The claimant told the court that she was never paid a salary from the hotel. She said her interest in the hotel was recognized when the defendant printed business cards for the hotel and the CEO's were always described on the cards as D&G HOGG or D. G. HOGG. Copies of these cards were exhibited in her affidavit to the court. Their authenticity was not denied by the defendant. The property was eventually sold in 2002. It was not clear whether the hotel was closed down and the land and building alone was sold or if it was sold as a going concern with goodwill included. The claimant claimed to have received nothing from the proceeds of sale. There was no evidence from the defendant as to what was done with the proceeds of the sale except to say that the staff was paid off from it.

[34] The claimant's entitlement would be as to the value of the hotel exclusive of the land and buildings. The defendant denied that the hotel was ever a joint venture. He claimed that the hotel never made a profit and could not have paid dividends to shareholders. There was no indication as to the value and the sale price was stated by the claimant to have been \$700,000 United States dollars. This was neither confirmed nor denied by the defendant.

[35] I find that there was insufficient evidence to convince me that the claimant had an equitable half share in the hotel. I did not believe the claimant's exaggerated account of her role in the operation of the hotel. I find the business cards quite significant but not conclusive one way or the other in that respect. The claimant, having been a party to the incorporation and knowing what her share allotment was, must be taken to have done whatever she did (and I do not accept she did any of what she claimed to have done) with full knowledge of what her interest was.

[36] In any event the hotel was sold in 2002, a fact which came to the claimant's attention soon thereafter, but who made no claim on the defendant at the time. She claimed her marriage was an abusive one exhibiting medical

reports showing injuries she claimed she suffered at the hands of the defendant, which were reported to the police. This was in 1998. I give some regard to her claim that she was in fear of the defendant at the time of the sale. The defendant's account was that there was a fight over her infidelities soon after which they separated. It does not matter for these purposes whose version I believe. The hotel was sold long after she left the matrimonial home. She is entitled to a beneficial interest in the hotel or more correctly in the proceeds of the sale to the equivalent of four shares.

[37] Again, regard must be given to section 12 of PROSA by virtue of which the value of property to which applications under the Act relates is the value at the date of the court order, unless the court decides otherwise. However, 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 the hotel was still a going concern in which I declare she had a 2% interest. However, since the hotel is no longer operated by the defendant, it is the decision of the court that its value is to be determined as at the date it ceased to be operated by the defendant.

CONCLUSION

[38] Although the family home was partially destroyed, a part of it and the land appurtenant to it remained intact, and so too did the claimant's half share in it. The land at Landillo was purchased as a marital asset and in the circumstances as they existed at the time; I find that the claimant is entitled to a share of that property. Due to the contributions of the claimant to the long marriage and the circumstances of its acquisition using the claimant's sister as proxy, the only fair and just share to award the claimant in the proceeds from the sale of that land is a half share.

[39] It is clear from the parties conduct at the incorporation of the company that there was an expressed intention that the claimant was to have a share in the company settled at 4 shares or a 2% beneficial interest. I am also mindful of the

fact that the existence of an agreement as to ownership of property is one of the factors to be taken into account under section 14.

DECLARATIONS AND ORDERS

[40] 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 all that parcel of land at Orange Hill appurtenant to the former family home, exclusive of any buildings thereon. The land is to be valued by a reputable valuator agreed to by the parties and half the unimproved value of the land alone is to be paid to the claimant within 90 days of the valuation. 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.
2. The claimant is entitled to half the value of the one bedroom, bathroom, walk in closet and study which remained on all that parcel of land at Orange Hill after the family home was demolished. This portion only is to be valued by a reputable valuator agreed by the parties and the defendant is ordered to pay to the claimant the half cost of the value of the property, within 90 days of the valuation. 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.
3. The claimant is entitled to a fifty percent share in the proceeds of the sale of all that parcel of land at Llandilo in Westmoreland. The defendant is ordered to provide an account of the sums to the claimant within 30 days of this judgment and to pay the claimant the value of her half share within 60 days thereafter.

4. The claimant is entitled to the value of a 2% interest in the Hotel known as Secret Paradise Resort. The defendant is to provide the claimant with an accounting of the financial operations of the hotel up to 2002 and pay to the claimant the value of her interest within 180 days of this order.
5. Liberty to Apply
6. Each party to bear their own costs.