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IN (space) THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 03094

BETWEEN VERONICA LEADER CLAIMANT

AND MOSES HEZEKIAH LEADER DEFENDANT

Lord Anthony Gifford, Q.C., instructed by Gifford, Thompson & Bright for the claimant.

Mr. Debayo Adedipe for the defendant.

Property (Rights of Spouses) Act – "Family Home"- "Appurtenant To"- Time for Making an Application for Division of Property under the Act.

IN CHAMBERS

Heard February 23, March 12 and April 30, 2010.

Coram: F. Williams, J (ag).

Issues

There are, in this matter, two main issues that fall for the court's determination: -

(i) Whether the Property (Rights of Spouses) Act ("the Act") applies to the circumstances of this case, where the parties separated and ceased to live in the matrimonial home before the passing of the Act; but were granted a decree nisi after the Act came into force.

(ii) Whether, if the matrimonial home is found to be the "family home" within the meaning of the Act, that family home would comprise only the principal dwelling (known as Tan y Bryn) in which the parties resided together as husband and wife,

or would include another premises (known as "The Tower") as being "appurtenant to" the said dwelling within the meaning of the Act.

Background

The parties were married in 1976. They lived together between 1976 and 1998 at Tan y Bryn – a seven-bedroom, four-bathroom dwelling-house- in Walderston, Manchester. There was an adjoining property known as "The Tower", which the claimant says that she stayed in for a short while prior to her migration. The marriage produced three children. The parties separated in 1998, when the claimant removed from the matrimonial home and went to live in the United Kingdom, where she still resides.

A decree nisi of dissolution of marriage was granted in the Bath County Court, United Kingdom on the 26th day of July, 2005 on the claimant's application. The decree absolute was made on the 12th July, 2007.

The Property

A copy of an advertisement from Sangster's Realty (exhibit VL4 of the affidavit of the claimant) indicates that Tan y Bryn sits on some 23 acres. It is described in the said advertisement as being constructed in the style of an old great house, as having a six-acre orange grove and "various outhouses".

Copies of four certificates of title have been disclosed. They all show transfers registered in the name of the defendant alone on the 25th April, 1985. They all bear this notation: "Consideration money Two Hundred and Twenty Thousand Dollars for this and several others". The certificates of title and corresponding land areas are as follows : (i) Volume 1184/Folio 397 – 20 acres and 20 perches; (ii) Volume 478/Folio 95 – 4,290 square feet; (iii) Volume1077/Folio 661 - one acre, two perches and three-tenths of a perch; (iv) Volume 1077/Folio 662 – nineteen perches and four-tenths of a perch.
It appears (and I say "appears" as there is no clear evidence) that Tan y Bryn would be comprised in that certificate of title registered at Volume 1184/Folio 397 – at the very

least. The claimant says that it stands on some 22 acres, whilst the Tower stands on about 7 acres (see paragraph 6 of her first affidavit). The claimant also states: "Tan y Bryn consists of a main house and a tower house....However, during the marriage it was used as one property. We lived in the main house and the tower house was used from time to time by our friends" (see paragraph 6 of her first affidavit). She also says in paragraph 8 of that same affidavit, "I stayed in the tower for a few months until 21st September, 1998 when I travelled to the United Kingdom..."

The defendant had advanced a different contention where the use of The Tower is concerned. However, as he absented himself from the hearing of this matter (having attended court only in the very early stages of the matter), the matter proceeded in his absence and his affidavit could not be relied on.

The Applications

By way of a fixed-date claim form dated the 18th July, 2007 (and filed on the 31st), the claimant seeks the following:

> "1. A declaration that the Claimant is entitled to a one-half share in the family home known as Tan y Bryn in Walderston, Manchester, comprising a Great House and an adjoining building known as the Tower".

She also seeks other declarations consequential to the grant of that, the main one.

The defendant, as well, seeks certain orders. His application is contained in a Notice of Application for Court Orders dated the 9th January, 2009 and filed on the 12th. In essence, his application is for the claimant's claim to be struck out and for judgment to be entered in his favour. His grounds for this application? – that, on the facts, there was not at the time the Act was enacted, or subsequently, a "family home" as defined in the Act. Further, for the claimant's claim to be granted, retrospective effect would have to be given to the Act, which does not have and should not be given such effect.

The Law

The Property (Rights of Spouses) Act came into effect on the 1st April, 2006. As is well known, the Act (vide s. 11) empowers the court to make various orders in respect of property rights between spouses.

In section 2 of the Act, the "family home" is defined as follows: -

> "... 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 together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit".

So far as is material to this application, section 6 of the Act states as follows:-

> "...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..."

Section 7 of the Act empowers the court to vary this equal-share rule where it is of the opinion that it would be unreasonable or unjust to order a division in equal shares.

Section 13 is of especial significance to this matter. It reads (so far as is material) as follows:-

> "13. - (1) A spouse shall be entitled to apply to the Court for a division of property-

(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation;...

(2) An application under subsection (1) (a)... shall be made within twelve months of the dissolution of a marriage,... or such longer period as the Court may allow after hearing the applicant".

Analysis

The issue as to the event that gives rise to jurisdiction under the Act has received some judicial consideration before in a number of (several?) (cases that were cited in submissions by counsel for the claimant. Happily, therefore, it is not necessary to attempt to, as it were, "re-invent the wheel". For instance, there is **Graham v Graham**, HCV 03158 of 2006, a decision of McDonald-Bishop, J., delivered in April of 2008. In that case, the parties had separated in 2003 and the decree nisi had not been pronounced until July 2006 – that is, some three months after the Act came into force. The claim was brought in the same year. The learned judge there found: "The claimant's claim is properly made pursuant to section 13 of the Act".

In **Sterling v Sterling**, HCV 00069 of 2007, a decision of Anderson, J, one of the issues that arose for the court's consideration was whether a decree nisi was an appropriate trigger for the purposes of section 13. The learned judge there expressed himself thus:

> "I have come to the view that the property, the subject of this claim, is in fact the family home and using the date of the decree nisi as being an appropriate trigger for the running of time to file a claim under the Act, the matter is properly before me".

Another relevant case is that of **Boswell v Boswell** HCV 2463 of 2006, a decision of N. McIntosh, J. In that case the decree absolute was granted on June 3, 2005. The application under the act was filed on July 11, 2006. The learned judge expressed the

view that, since the marriage had been dissolved before the Act came into force, the Act could not apply retroactively to confer an automatic right to an equal-shares division of the matrimonial home. However, she granted an extension of time for the bringing of the action by twelve months from the date of the grant of the decree absolute.

It appears that, of these three cases, **Boswell v Boswell**, which, on the face of it, points in the opposite direction from the other two, is distinguishable in this respect: in that case the decree absolute was granted more than the twelve months allowed in the Act, before the Act came into force. That is not the situation here. It further appears, therefore, that the weight of the authorities is to the effect that where, as in this case, the application is made within twelve months of a decree nisi being granted, that will amount to a sufficient trigger for bringing an application under the Act, and such a claim will have been properly brought.

Is the Act Retrospective.

In relation to the alleged retroactive/retrospective nature of the allegation, counsel for the defendant submitted that: (i) the Act is retrospective in that it affects the claimant's vested rights, the contention being that prior to the statute coming into force, he was the sole owner of the property and there was no presumption, as there now is in section 6, of spouses being equally entitled. Reliance for this submission came largely from the case **Re Athlumney** [1898] 2 Q.B. 551, cited in **Maxwell on the Interpretation of Statutes**, 12th edition, page 216. In that case, R.S. Wright, J declared:

> "Perhaps no rule of construction is more firmly established than this -- that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

On the other hand, counsel for the claimant urged the court to have regard to the subject matter of the Act, which is the rights of spouses to division of property on divorce. They have always had this right. All that this Act does is to alter the rules, and provide a different scheme for such division. If the Act is retrospective, then it is more in the nature of addressing procedural matters and does not have the retrospective effect of the kind reflected in the dictum in the **Re Athlumney** case. In support of this argument, counsel cited a passage from **Maxwell** (op cit), at page 216 which reads as follows:-

> "the rule against the retrospective effect of statutes is not a rigid or inflexible rule but is one to be applied always in light of the language of the statute and the subject-matter with which the statute is dealing." (citing **Carson v Carson** [1964] 1 W.L.R., 511, per Lindley L.J., at page 421).

The guidance offered by Maxwell in matters of this nature is that:-

> "[b]efore the presumption against retrospectivity is applied, a court must be satisfied that the statute is in fact retrospective" (op cit., p. 216).

A retrospective statute, within the meaning of the **Re Athlumney** rule, is said to be one:-

> "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past". (**Craies on Statute Law**, 6th ed., p. 386).

Having given the matter my most careful consideration, I am not convinced that the fact

of the defendant's sole ownership and the introduction of the equal-share presumption amount (i) to a "vested right" at all or (ii) to any right that the Act operates to take away or impair. Neither am I of the view that the Act attaches to the defendant any new disability in respect to past matters.

I am in agreement with the submission that especial regard should be had to the subject matter of this particular piece of legislation: - it deals with division of the property of spouses. Such division will be sought on dissolution of marriage or termination of cohabitation. What it will be sought to divide is property acquired usually during the course of the marriage or the period of cohabitation. Under the previous regime of the Married Woman's Property Act, there was, it is agreed, no presumption of an equal-share division. However, under that regime sole registered ownership was not conclusive or the sole determinant of how property would be divided between the parties. The principles enunciated in cases such as **Pettit v Pettit** [1969] 2 All ER 385, and **Gissing v Gissing** [1970] 3 W.L.R., 255, were frequently applied in such applications, the result of which was usually to effect a division between the parties in such shares as the court deemed fit in all the circumstances. So, at the end of the day, when all the circumstances were considered, the proportions of any division were left to the discretion of the court. Similarly under the present Act, although there is a presumption of division in equal shares as set out in section 6, that is balanced by the provisions of sections 7. Section 7, it will be recalled, empowers the court to vary the equal-share rule where the circumstances require such a variation.

It will be seen, therefore, that in that respect, the difference between the previous regime and the current one at the end of the day is more perceived than real, as it is ultimately left to the court in both regimes to do what is just and reasonable in the circumstances and based on the evidence in each particular case.

Additionally, in cases such as **Gissing v Gissing** and **Pettitt v Pettitt**, it was section 17 of the English Married Women's Property Act, 1882 that fell for consideration. That section, so far as material, read as follows:-

> "In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of "Justice . . . and the judge . . . may make such Order with respect to the property in dispute ... as he thinks fit."

Of this section, which is comparable to section 11 of the Property (Rights of Spouses) Act, Lord Diplock, in **Pettitt v Pettitt** (at p. 23) had this to say:-

> "The first question, therefore, is whether section 17 of the Married Women's Property Act, 1882, does give to the court any power to create or vary the proprietary rights of husband or wife in family assets as distinct from ascertaining and declaring their respective proprietary rights which already exist at the time of the court's determination. I agree with your Lordships that the section confers no such power upon the Court. It is, in my view, a procedural section."

From the foregoing analysis, I adhere to the view that the sections of the Act, read together, require the court to ascertain and declare between spouses, rights that already exist. The relevant sections of the Act are procedural.

Even if I am not correct in this conclusion, then it is best to consider (i) section 4 of the Act and (ii) the memorandum of objects and reasons of the bill which has now become the Act. They read as follows:-

> "4. The provisions of this Act shall have effect in place of the rules and pre-sumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provisions are made by this Act, between spouses and each of them, and third persons."

Memorandum of objects and reasons:-

The conclusion that can be drawn, therefore, is that, sections 6, 7 and 11 are really procedural sections. They are not truly retrospective in their operation in the meaning of the rule in **Re Athlumney**. However, even if the Act is retrospective, then section 4 and the memorandum of objects and reasons clearly show that the legislature intended it to be so, as the Act was meant to replace all the previously-existing rules of the common law and equity. It is therefore a watershed -- doing away with the old order and replacing it with a new regime.

Having said all this, the Court holds that the application has been properly brought and that Tan y Bryn is the "family home" within the meaning of section 2 of the Act.

Is the Tower part of the family home?

As it is agreed that Tan y Bryn was the principal family residence, the Tower could only be regarded to be a part of the family home if the court were to find that it falls within the definition in section 2 of the Act of:

> "..any land, buildings or improvements
> appurtenant to such dwelling-house
> and used wholly or mainly for the
> purposes of the household..."

It is to be remembered that the evidence from the claimant is that Tan y Bryn consisted of the main house and The Tower and that both were used as one property. The family lived in the main house and The Tower was used from time to time by friends of the family. She also stayed in The Tower for a few months after the separation (see paragraph 6 of her first affidavit). She also states that The Tower was rented for less than two years. For the rest of the time it was unoccupied and available for storage and other purposes "as an adjunct to the main house". (see paragraph 2 of her second affidavit).

Although the advertisement from Sangster's Realty speaks to Tan y Bryn having "other outhouses", there is no evidence as to the type of these and of the uses to which they were put.

This evidence (in the claimant's affidavit) is uncontroverted, inasmuch as the affidavit of the defendant was not relied on, owing to his absenting himself from the hearing.

This factual background given by the claimant does seem to bring the Tower's use within the definition of an "appurtenance" referred to by counsel for the claimant in **The Shorter Oxford English Dictionary on Historical Principles**, being:-

> "A thing that belongs to another, belonging;
> a minor property, right or privilege,
> belonging to another as principal,
> and passing with it; an appendage".

Being caught in this definition, The Tower forms part of the family home.

Orders

With these findings, the Court makes the following orders and declarations:-

It is hereby ordered and declared that:-

(i) The claimant is entitled to a one-half share of the property known as Tan y Bryn in Walderston in the parish of Manchester, comprising a great house and an adjoining building known as The Tower, and registered in the Register Book of Titles at Volume 478, Folio 95; Volume 1184, Folio 397; Volume 1077, Folio 661; and Volume 1077, Folio 662.

(ii) The said property be valued by a valuer to be agreed by the parties, with the cost of the valuation to be shared between the parties in equally. If the parties cannot agree to (on?) a valuer within thirty (30) days of the date hereof, the Registrar of the Supreme Court is empowered to appoint a competent valuer.

(iii) The claimant is given the first option to purchase the said property by

payment of one-half the market value of the said property as stated in the said valuation report, such option to be exercisable within sixty (60) days of receipt by both parties of the valuer's report.

(iv) Should the claimant fail to exercise the said option, the said property shall be sold on the open market by public auction or private treaty and the net proceeds of sale shall be distributed to the said parties in equal shares.

(v) The claimant's attorneys-at-law on the record shall have carriage of sale of the said property.

(vi) The Registrar of the Supreme Court is empowered to sign any document to give effect to any or all orders made herein if either of the parties is unable or unwilling to do so.

(vii) Liberty to apply.

Cost# 12

#(viii) Costs to the claimant to be agreed or taxed.