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IN THE SUPREME COURT OFJUDICATURE OF JAMAICA
IN HIGH COURT CIVIL DIVISION
CLAIM NO. HCV 03544 OF 2007

BETWEEN	NARINE MARLENE LEWIS	CLAIMANT
AND	ANTHONY PATRICK LEWIS	RESPONDENT

Mr. Gordon Steer and Ms. Deborah Dowding instructed by Chambers Bunny and Steer for the Claimant; Mrs. Jacqueline Samuels-Brown, Ms. Nicolene Nelson and Ms. Tameka Jordan instructed by Jacqueline Samuels-Brown and Co for the Respondent.

Heard: October 14, and December 9 and 17, 2008; January 23, and October 29, 2009

CORAM: ANDERSON J.

This is an application by the Claimant under the provisions of the Property (Rights of Spouses) Act. By a Fixed Date Claim Form dated October 2008, the Narine Marlene Lewis (The Claimant"" seeks the following:

1. The Claimant is entitled to the half interest in the following :
    a. Lot 518 Long Mountain Country Club, Kingston 6 in the Parish of St. Andrew, registered at Volume 1385 Folio 701 of the Register Book of Titles
    b. Lot 6 Duncan Bay in the Parish of Trelawny, registered at Volume 1070 Folio 68 of the Register Book of Titles;
    c. Lot 42 Norbrook Estates Kingston 8 in the Parish of St. Andrew, registered at Volume 1107 Folio 280 of the Register Book of Titles;
    d. The business trading as "The Phone center;
    e. Vehicles in the names of the parties , more particularly a 1999 Toyota Land Cruiser and 1999 Mitsubishi Galant;
    f. Joint investments at various financial institutions.

2. That a report on and valuation of the said property be taken or alternatively that a valuation agreed upon by the Claimant and the Defendant (sic) be taken and that costs of the said valuation of the property be shared equally by the parties.
3. That an accounting be done to determine the Claimant's one-half interest in the business. That the said accounting is to be done by an agreed accountant who is to be agreed upon by the Claimant and the Defendant (sic) and that the costs of the said accounting be shared equally by the parties.
4. That if no valuator or accountant can be agreed then one shall be appointed by the Registrar of the Supreme Court.
5. That in the event that the Respondent is unable to purchase the said property and be put for sale on the open market or by public auction or by private treaty.
6. The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect any and all orders of this Honourable Court if either party is unwilling to do so.

The claim being asserted by the Claimant is strongly resisted by her husband, Anthony Patrick Lewis, (the "Respondent"). The evidence in respect of the claim and the resistance thereto, is provided mainly by the affidavit of the Claimant dated September 5, 2007, the affidavit of the Respondent dated March 20, 2008, the Claimant's affidavit in response dated April 25, 2008 and a further affidavit of the Respondent dated July 28, 2008. According to the evidence of the Claimant which is not denied by the Respondent, the couple commenced a relationship in the early 1990s and got married on October 6, 1996. Prior to the marriage the couple had cohabited at premises at 24 Carnation Way in Mona Heights. Sometime around 1997 to 1998, the couple who both were employed to commercial banks, decided to purchase residential property and they used their National Housing Trust benefits and amounts from their joint savings to acquire property at Apartment 32c, 71 Barbican Road.

It is the evidence of the Claimant that in 1998 the Respondent was made redundant by his employer, the National Commercial Bank Limited, and in 1998/1999, he became a full-

time student. She further stated that from 1999 to 2001 the Respondent was not "formally employed", but would do some "hustling".

According to the Claimant, the couple took a decision that "the Respondent would go into business fulltime and a shop was acquired at Pavilion Mall and we sold cellular telephones and accessories and small appliances in about September 2001". This business, the Phone Centre, is still a going concern and is one of the main items of contention between the parties. She then goes on to detail her own involvement in the business saying that she would work after her own work day was complete and most Saturdays and holidays. She also said that she worked at the business while she studied for a degree at university. It is also not in dispute that during a period of about three (3) months when the Claimant was between jobs, she worked consistently at the business. The Claimant further says that the money to start the business came from the redundancy payment the Respondent had received as well as the couple's joint savings. That business is still being maintained at the Pavilion Mall but the Claimant says she has been excluded from the business since the marriage went into difficulties in about November 2006.

It was the further evidence of the Claimant that during the course of cohabitation, the couple had purchased pieces of real property including the following:

a) Lot 42 Norbrook Estates Volume 1107 Folio 280, in joint names;

b) Lot 588, Long Mountain, Volume 1365, Folio 701, in joint names;

c) Lot 6, Silver Sands, Duncan Bay, Trelawny, in the Respondent's name.

She also claimed to be entitled to a half interest in motor vehicles registered in their joint names, in particular a Toyota Prado SUV and a Mitsubishi Galant motor car. She further claimed a half interest in various accounts which were maintained by them either individually or jointly on the basis that, notwithstanding any account being in only one name, the intention of the parties at all relevant times was that the accounts and/or investments were always intended to be joint.

Among other things, the Claimant complains that she had been the subject of abuse by her husband and that, as a result of his treatment of her, she had to seek the protection of the Family Court which made a Protection Order on her behalf in 2007. From her affidavit it also emerges that the Family Court had in or around August 2007, ordered the Respondent to return to her the Toyota Prado which he had taken from her residence on July 19, 2007.

The Respondent, on the other hand, acknowledges that the Long Mountain property was indeed purchased in both their names but avers that he has contributed the bulk of the money towards the purchase and improvement of the property. In particular, he claims that he paid the deposit and the closing costs, while the balance of the mortgage financing was obtained from the Victoria Mutual Building Society. He also asserts that before the couple moved into what clearly became, in my view, the family home, he had extended it from a two-bedroom to a three-bedroom residence with an additional bathroom and a den, extended the kitchen and washroom with further improvements to other rooms. Thereafter, he had also added a patio and deck and an outdoor jacuzzi.

With respect to the other real estate purchased, he concedes that they had together purchased the apartment in Barbican as well as the property in Norbrook. However, he said that the property in Duncan's Bay, Trelawny had been purchased by him after the couple had separated and they had written to the vendor to indicate that they no longer had any interest in purchasing. However, he had subsequently decided to purchase the property by himself and therefore there was no legitimate claim that the Claimant could assert in relation to that property. The Respondent in his first affidavit also points out that with respect to the property at Norbrook Estate, both parties had contributed to the deposit and closing costs while the balance of the purchase price had been secured by way of a mortgage loan from CIBC. The interest rate on the CIBC loan had been extremely high the loan was eventually re-financed with Jamaica National Building Society.

In so far as the motor vehicles are concerned, the Respondent has indicated that he is prepared to allow the Claimant to keep the Toyota Prado while he would keep the Mitsubishi Galant which he presently holds. In light of that concession and the apparent fairness in terms of the motor vehicles, I believe that it is unnecessary for the court to make any ruling except to confirm that the Claimant is to have the Toyota conveyed into her name solely while the Respondent is to have the Mitsubishi is to have the Galant conveyed into his sole name.

The Respondent also specifically replied to certain averments made in the first affidavit of the Claimant in his own affidavit of March 20, 2008. For example, he concedes that even while he was employed he was a "hustler" carrying on the business of selling appliances. He also concedes that at the start of the relationship the couple shared expenses but he was always the main contributor. In fact, he claims that after he had been made redundant he had more time to devote to his business activities and he even became involved in buying and selling of motor vehicles. He specifically denies that the Claimant was in any way instrumental in the organization or carrying on of the business at pavilion Mall. He alleges that the Claimant was risk averse and preferred the relative security of the corporate world rather than going into her own business. He also states that, far from helping in the business, she was generally employed full time as well as studying part time in order to secure an undergraduate degree in Management Studies (2004) and commenced reading for a law degree in 2005.

The Respondent states in his affidavit that with respect to the various bank accounts that the couple had, there were individual accounts in each name as well as there were joint accounts. It was his evidence that the account at JMMB had both names; the Jamaica National Building Society account was opened in order that the couple could access cheaper financing and therefore had both names; both names were also on the accounts at CIBC/First Caribbean and the Capital and Credit account. Similarly, the account at Bank of Nova Scotia also had both names although the Respondent stated that it was really the Claimant's account but his name was added "in the event anything happened to her". The Respondent also said in his initial affidavit that apart from the accounts held in their

joint names each individual also had individual accounts, although there is no evidence as to what those accounts were.

One of the allegations which the Respondent makes is with regard to the JMMB account. He says that although the Claimant had not had anything to do with that account, she had withdrawn $45,000.00 after the breakup of the marriage, and he exhibits a cheque drawn in the Claimant's name for that amount as evidence of that fact. It is beyond me how hat is supposed to be proof of an unauthorized withdrawal. He also says that she withdrew a sum of $500,000.00 without authority from an account at Capital and Credit. This is asserted without any formal or otherwise objective evidence to assist the court as to the veracity of the statement. It is perhaps not insignificant that in the course of his affidavit evidence, the only other mention of this specific figure by the Respondent was to the effect that this was the sum demanded by his wife as a settlement at the end of the marriage.

I pause here to note that this is but one of the numerous allegations and counter allegations which were made by either party against the other, in some cases totally unsubstantiated, and in most cases without any evidential value with regard to the issues that this court must decide. Thus whether the Claimant was self-indulgent and loved to go to the gym and do her nails is as irrelevant to the issues determinable under the Property (Rights of Spouses) Act, as whether the husband was a controlling individual who kept his wife on a tight financial leash. I shall later advert to some of these allegations.

Having received the Respondent's affidavit of March 2008, the Claimant responded with a further affidavit consisting of one hundred and forty three paragraphs and over two hundred pages including the exhibits thereto. Not surprisingly she took issue with numerous allegations made in the Respondent's first affidavit and asserted several allegations of her own. In some cases the responses were to relatively inconsequential averments. Thus, for example, the Claimant averred that the Respondent's allegation that she never contributed more than $2,000.00 per month to the couple's expenses is untrue

as she paid the utilities including electricity, water, telephone as well as the grocery expenses. Much of the affidavit was devoted to replying to specific averments about the payments made by either or both parties in respect of the purchase of various properties and the lodgment or withdrawal of funds from different accounts and what the purported to represent.

In one of the substantive challenges on a live issue in this case, the Claimant says that the decision to acquire the Duncan's Bay property had been taken by them together. However, the Respondent had then come back to her with information that the vendor was asking for more money for the purchase and so they had agreed to cancel the purchase. She said that subsequently, the Respondent then acquired the property for himself. Even in this regard, she does not assert that the purchase money was either from jointly held resources or that she contributed to its acquisition. Another matter to which she adverts and which is an issue for determination herein, is the question of the genesis of the business venture which is now the Phone Center at pavilion Mall. It is her evidence that they had considered going into a business and she had worked "tirelessly" in the business at weekends.

I might note here that the only evidence on this subject which came from other than a party hereto was from an employee of the shop who claimed that Mrs. Lewis was not regularly helping out at the shop. Interestingly, she was to change her testimony in cross examination and it is unclear that there should be any real, value attached to her testimony

The Claimant also uses the opportunity of her second affidavit to list what she claims were other investments made jointly by the couple, and which had not been previously set out. She lists these as:

a) First Global Bank Contract #1012141, involving a deposit of US$ 55,757.07, the proceeds of which were withdrawn and deposited with the now defunct Olint unauthorized investment scheme;

b) JNBS United States dollar account # 000010316232 and Jamaican Dollar account # FLX 000010460290, in respect of which she exhibits "NL7" and "NL8".
c) Capital and Credit account United States Dollar account #02/iDU/750060, exhibited as "NL9".
d) JMMB Tax Shelter account # 1238772, exhibited as "NL10".

The Claimant also explains that she had withdrawn the sum of $45,000.00 referred to by the Respondent with a view to purchasing a motor vehicle at a time when the Respondent had taken away from her possession the Toyota which the court had subsequently forced him to return to her. She says that when the vehicle was returned, she deposited the said amount to the C & W Credit Union Account which she said was to cover a motor vehicle loan. It is not at all clear what vehicle loan she is talking about. However, she further denies that she had withdrawn $500,000.00 from the Capital and Credit Account. In response to this she points to the details of that account as reflected in her exhibit NL15, which details the activity on that account from January 29, 2007 to April 6, 2007. It is clear from looking at that exhibit that, as the Claimant maintains, the average balance in the account never exceeded $100,000.00. It is therefore questionable whether the assertion of the Respondent can be substantiated.

Regretfully, much of the remainder of the affidavit is devoted the countering of allegations made by the Respondent as to his helping the Claimant's family including her mentally ill mother, helping to bury her father and lending her brother money. I say "regretfully" because it is not at all clear to me what legal effect those averments are intended to have on the question of the beneficial ownership of assets, the subject of this dispute.

Notwithstanding that, the Respondent filed a further one hundred and nineteen (119) paragraph affidavit dated July 28, 2008 in response to the Claimant's April 2008 affidavit. Again, I note that most of the affidavit was again taken up in responding to the personal allegations made by the Claimant, in some cases in response to those initially

made by the Respondent. I do not propose to go through the affidavit except where the averments contain evidence which I will need to consider in order to determine the legal issues arising in this case. Thus, for example, in relation to the assertion of the Claimant that the First Global account to which reference was made (in the context of it being one of their joint United States dollar accounts and the proceeds of which had been transferred to Olint), the Respondent avers that that specific account was not, in any event, beneficially owned by either of them but was held on behalf of a friend of the Respondent. I accept this piece of evidence.

But I also note from the Respondent's second affidavit that his own exhibit AL 7 has a copy of the agreement for the purchase of the Norbrook property which is signed by both Claimant and Respondent in late February 2007, some time after the Respondent claims that the marriage had been effectively ended. But I also accept that the Capital and Credit account which was referred to by the Claimant is, as the Respondent says, one which was closed out by the payment of US$2,000.00 to the Claimant. The admission by the Respondent with respect to the Tax Shelter JMMB account is also relevant to the decision which this court must make.

Before looking at the law which is applicable to the claim being made by the Claimant herein, I wish to advert to the submissions made by the attorneys for the parties.

The Claimant's attorneys at law submit that the summary of her case is that the resources of the parties were pooled and used for their collective benefit, and that she is entitled to an appropriate share of the assets which have been generated thereby. It is the understanding of the Claimant's attorney that the Respondent, on the other hand, is saying that it was essentially through his sole efforts, unaided to any significant degree by the Claimant, that he has acquired what he has. The Respondent, accordingly, wants the court to make a division of property consistent with his view of his entitlement.

I do not propose to review the evidence led before me through the affidavits and the cross examination as it is being asserted by each side, in any greater detail than has been set out

hitherto. The Claimant's attorney submits that the Respondent himself has conceded that the Claimant did contribute to household expenses. Indeed, his evidence when asked whether his wife would contribute to household expenses, was: "Not all the time. It was ad hoc. She would make small contributions throughout the marriage. I would pay more of the expenses because of the relative incomes". Further, he agreed that he was not saying that his wife never made any contribution to the household expenses. The Claimant's attorney's main submission was that since the Claimant was prepared to say that even where an account in her name alone existed it really was for the joint benefit for both, the court should accept that as the basis for treating all accounts or investments as equally shared.

It was submitted on behalf of the Claimant that the evidence is clear that the parties had together purchased property at 71 Barbican Road which was jointly owned. After living at the Salisbury Place address, they purchased a property at Lot 518 Long Mountain Country Club. That property is also in their joint names and this property became the family home. As a consequence of this characterization it is submitted for the Claimant that, pursuant to section 6 of the Act, the parties should be regarded as being beneficially entitled equally to the ownership thereof.

Section 6 provides as follows:

1) Subject to sub-section (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. On the grant of a decree of nullity of marriage;
    c. Where a husband and wife have separated and there is no likelihood of reconciliation.
2) Except where the family home is held by the parties as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.

Section 7 is in the following terms:

(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following-

(a) that the family home was inherited by one spouse;

(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) that the marriage is of short duration.

(2) In subsection (1) "interested party" means-

(a) a spouse;

(b) a relevant child; or

(c) any other person within whom the Court is satisfied has sufficient interest in the matter.

It seems clear that section 7 has no relevance to the issues being litigated here to limit the application of section 6.

Section 10, so far as is relevant for the qualification set out in section 6 is as follows:

(1) Subject to Section 19-

(a) spouses or two persons in contemplation of their marriage to each other or of cohabiting may, for the purpose of contracting out of the provisions of this Act, make such agreement with respect of the ownership and division of their property (including future property) as they think fit;

(b) spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit.

Again, it is clear that the provisions of section 10 have no application as there has been no prior agreement by the parties hereto. The Claimant's attorney-at-law also submits that the property at Norbrook had been purchased by and is in the name of both parties

and was purchased from their joint resources. It is accordingly the view of the Claimant that she was entitled to a half interest in the Norbrook property as well.

The Claimant's attorney also asserts that there is evidence that the Phone Center to which the Respondent lays sole claim and which is registered in his name alone, ought to be treated as an asset owned by both parties beneficially. Much of the contentious issues about bank accounts and the extent of contributions by the respective parties to the domestic affairs, about who spent whose money and did or did not contribute work in the shop at Pavilion Mall, is directed to establishing ownership in the business, the Phone Center. The Claimant, for her part, submits that she was an equal partner with the Respondent in the establishment and operation of the business. In that regard, it was submitted on her behalf, based upon the evidence she had adduced, she had worked in the business on weekends, on holidays and during the period when she was between jobs. In her evidence, she had pointed out that when the business had been established she had been advised that it was placed in the Respondent's name alone because it was "cheaper" to do so. This is, of course, denied by the Respondent who states that it was registered in his name because it was his business. He also testified that the Claimant was not minded to take on the challenges of running a business, being content to work in the corporate world.

It is submitted that the Claimant is entitled to assert a claim to an interest in "property" under section 13 of the Act, which permits a claim to be made in the circumstances of that section. "Property" is widely defined in the definition section to mean:

> "any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled".

Section 13 of the Act is in the following terms:

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; or

(b) on the grant of a decree of nullity of marriage; or

(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by willful or reckless dissipation of property or earnings.

(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer as the Court may allow after hearing the applicant.

(3) For the purpose of subsection (1) (a) and (b) of this section and section 14 the definition of "spouse" shall include a former spouse.

Section 13 therefore seems to allow a claim to *any* property once the circumstances set out in the section apply. This section is very wide and accordingly, pursuant to that section, the Claimant claims an interest in the business known as the Phone Centre. The attorney for the Claimant purports to call in aid the provisions of Section 14,

It was submitted by the Claimant that under the Act, section 14 clearly contemplates that where there is property other than the family home, the Court has a discretion as to how it is to be divided and it must have regard to the matters set out in that section. The Act in that section states that the Court may divide such other property other than the family home, as it thinks fit, taking account of the factors specified in subsection 2. The factors to be considered are the contribution, whether financial or otherwise to the acquisition, conservation or improvement of any property. It was suggested that this is critical to the Claimant's case, as not only did she pool her income with the husband, which fact it is submitted, would allow her to cross the financial contribution threshold, but also she assisted by non-financial contribution by working in the business.

When one looks at section 14 however, there may be a real question whether that section can assist the Claimant. It is true that the section applies where there is a claim for division under section 13. Under section 14 (1) (a), the court may make an order for the

division of the family home in accordance with section 6 or 7. Under section 14 (1) (b), and subject to section 17(2), the court is authorized to divide "such property", (that must mean property as widely defined in the definition section and for the purposes of section 13) "*other than the family home*". However, according to the terms of 14 (1) (b) the court must take account of subsection (2). Among the factors listed in subsection (2) are the following:

14. (1)

(a)

(b)

(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 the purpose;

(b) the care of any relevant child or any aged or 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 the 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 party 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 no presumption that a monetary contribution is of greater value than a non-monetary contribution.

In subsection 2 (b) one of the conditions seems to be that "there is no family home". If that is understood to mean that the non-existence of a family home is a pre-condition of this section being applicable, then there could be no claim hereunder. The better view is, however, that all that the paragraph means that whether or not there is a family home, is a factor to be considered by the court in determining how the property under consideration is to be divided.

In light of those sections, Mr. Steer also submits that the Claimant is entitled to a share in the Duncan's Bay property. It was submitted that since the Respondent was saying that all his earnings were from the business called the Phone Centre, it must be clear that the money to purchase Duncan's Bay could only have come from that business. Since on the Claimant's case she was entitled to share in the Phone Centre business, it would stand to reason that she was also to be accorded a share in the Duncan's Bay property pursuant to the terms of the Act.

In further support for the Claimant's submission that she should be awarded a beneficial share in the business, the Phone Center, Mr. Steer cites the dictum of Lord Denning M.R. in the case **Nixon v Nixon (1969) 3 All ER 1133**.

There his lordship stated:

> ".... The case raises the point of principle. What is the position of a wife who helps in the business? Up and down the country, a man's wife helps her husband in the business. She serves in the shop. He does the travelling around. If the shop and business belonged to him before they married, no doubt it will remain his after they marry. But she by her work afterwards should get some interest in it. Not perhaps an equal share but some share. IF they acquire the shop and business after they marry-and acquire it by their joint-efforts then it is their joint property, no matter that it is taken in the husband's name. In such a case, when she works in the business afterwards, she becomes virtually a partner in it- so far as the two of them are concerned-and she is entitled, prima facie, to an equal share in it."

Mr. Steer submits that all the bank or other accounts of the parties, whether or not in sole names, should be shared equally as they was still meant to be for the benefit of both. This, it was submitted, includes the accounts maintained by and in the name of the business.

Finally, Mr. Steer anticipates the complaint of the Respondent that in relation to the mortgage payments on the family home, the husband should be refunded the share of those payments for which the Claimant would have been responsible. On the case of the Respondent this should be from the time when the Respondent alleged that there had been a cessation of consortium. The case of **Forest v Forest** (see below) was later cited by the Respondent in this regard. Counsel for the Claimant submitted that the refund of mortgage payments to the Respondent, should it be considered proper, should be computed from the date of the separation, in relation to which it is said that the appropriate date is not October 2006 when the Claimant removed herself from the bedroom, but January 2007 when she physically removed from the family home. While it was conceded that the October 2006 date was when the Claimant had vacated the couple's bedroom, it was the view of Claimant's counsel that in view of the Respondent himself having excluded the Claimant from the matrimonial home by changing the locks,

he should not be entitled to have the funds refunded. In support of this proposition, Claimant's counsel cited the case of **Shinh v. Shinh [1977] 1 All ER 98.**

There the court held that in determining whether credit should be given for mortgage instalments made by the party who remained in the jointly-owned property, the reason the other party had left the home was relevant. It was suggested that here in this trial, the only evidence adduced as to behaviour as spouses was that the Respondent had excluded the Claimant from the matrimonial home by changing the locks on the property, and had also in his own words, excluded her from the Phone Centre. Based on that proposition, the Respondent should not be credited for any contribution for which the Claimant should have been responsible.

It may be useful to note at this juncture that there is little difficulty with accepting the submission advanced by the Claimant and indeed, not resisted by the Respondent that the Long Mountain Country Club property was the family home within the meaning of section 2 (1) of the Property (Rights of Spouses) Act. In that subsection "family home" is defined 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 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".

The Respondent's counsel on the other hand, focuses on the evidence given by the parties in their affidavits and under cross examination. She submitted that, based upon the court's observations of the demeanour of the parties during the course of the proceedings, the evidence of the Respondent should be accepted over that of the Claimant wherever there is a conflict between them. It was the submission for the Respondent that, based upon her answers in cross examination and her demeanour generally, the Claimant was not a credible witness. In particular, counsel for the Respondent refers as an example, to the Claimant's insistence that she had no account in her sole name, and maintaining that

insistence when confronted by evidence of such an account. Claimant's counsel had sought to explain this insistence on the basis that it was consistent with the Claimant's claim that all the accounts were for both parties notwithstanding what it was captioned. In that regard, counsel for the Respondent pointed to the account at Exhibit AL 11 of the Respondent's second affidavit. This was an account number 01KFG203189 which had the Claimant's name alone at the caption. She however continued to insist that this was not her account solely but rather was just for mailing address purposes.

In relation to that particular account, the Claimant later sought to say that it was like a suspense account in which transactions are passed through the account on their way to some more permanent destination. The Respondent's attorney submits that on account of the dissimulation of the Claimant, where there is any contradiction between her evidence and the Respondent's, it is his that should be accepted.

It was also submitted that given her training and experience, it was not credible that she had easily given up to her husband the total control of all the parties' alleged resources as she asserted. It was equally not credible that she would have allowed the Respondent to register the business in his own name when she claimed to be a party to the decision the start a business. On the other hand, Respondent's counsel submitted that the Court should accept the evidence of the Respondent when he averred that the Claimant was selfish as well as self-indulgent, and used her money for herself and not for the benefit of the couple. The effect of that behaviour was that the Claimant ought to be treated as neither being beneficially entitled to a fifty percent interest in the business nor in any account of the business or of the Respondent.

In response to the Claimant's submission that **Nixon v Nixon** (supra) provided assistance for Claimant's claim to an interest in the Phone Center, Respondent's counsel citing the same case, characterized the involvement of the Claimant as minimal. She contrasted that with Denning's description of Mrs. Nixon's role in her husband's business as being "significant". There, his lordship had stated:

> "The help she rendered was not casual but regular; not intermittent but continuous; for every hour of every day when business was being done, she was there ready and available to take part in it".

As support for the proposition that the Claimant was not really involved in the Phone Centre, counsel pointed to the fact that she could not give precise figures for the amount of capital used to start up the business nor exact amounts in respect of the rent paid for the accommodation at the pavilion Mall. It was also suggested that it would not have been possible for the Claimant to make any financial contribution to the start up of the business because she had said that for some considerable period after her husband was made redundant she had carried the responsibility for the expenses. It was also suggested that based upon a salary of $24,000.00 to $30,000.00 per month that would not have been possible. The evidence however was not that she had earned at that level for three years and indeed even the Respondent's counsel's suggestion does not assert this. The evidence was that at some time in 1998 she earned that monthly sum and the information was provided in answer to a question by counsel in cross examination. In any event, Respondent's counsel submits that the case of **Nixon** was distinguishable given the extent of the purported involvement of Mrs. Nixon in her husband's business.

Not surprisingly, the Respondent having been prepared to concede that the Claimant had an interest in the property which was the family home, submitted that the Respondent was entitled to be refunded, or credited on any division, with a share of the mortgage payments made by him for the property after the date of the separation. According to the Respondent, this separation would have occurred on October 14, 2006 when the Claimant allegedly moved out of the matrimonial bedroom and ceased rendering any conjugal benefits to the Respondent. The case of **Forest v Forest (1995) 32 J.L.R. 128**, is cited as authority for the proposition that the Respondent should be so entitled. It will have been noted above that the case of **Shinh** was cited by the Claimant as a qualification on that proposition. The Claimant, in any event, disputes the October 14 2006 date, and says that "for the record", she left the matrimonial home on January 29, 2007.

Notwithstanding the submissions by the Respondent however, the Claimant in her final submissions asks the court to allocate the interests fifty percent (50%) each to each party in the Long Mountain and Norbrook properties as well as in the joint accounts.

Court's Holding

It is quite clear based on the overall view of the evidence that from their early involvement with each other, this couple had together aggressively pursued a course aimed at securing their material future. The joint acquisition of their first property at Barbican Road was followed by the further acquisition of the Long Mountain Country Club. Both of these properties were taken in joint names. There was subsequently the acquisition of property at Duncan's Bay by the Respondent after the couple had effectively separated. In 2001, there had been the establishment of the business known as the Phone Centre at Pavilion Mall in St. Andrew in the name of the Respondent alone. In addition, the evidence reveals that there were several bank accounts operated by the parties both in sole and in joint names.

Given the level of vitriol demonstrated by the affidavit evidence of both parties, it is instructive to recall the comments of Baroness Hale in **Stack v Dowden [2007] 2 A.C. 432, [2007] 2 All E.R. 929**:

> In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual.

I have found the sentiments expressed by her ladyship as being particularly apt given the suggested conclusion proffered by the Respondent in the division of the assets in dispute.

As set out by the House of Lords in Stack, and reinforced by the Judicial Committee of the Privy Council in **Abbott v Abbott**, a case out of Antigua and Barbuda, the starting

point of any discussion, subject to any confirmed agreement between the parties, is the issue of whether the title to the property in question is registered in a sole name or in the names of both parties laying claim to it. In the instant case, both the family home and the Norbrook property are in the joint names of the Claimant and the Respondent. In the Stack case Lady Hale also said:

> The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon.

At paragraph 56 of the said judgment in the House of Lords, Baroness Hale also said:

> Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

It is the view of this court that in relation to the family home which it is accepted the property at Long Mountain Country Club is, the parties should share the property equally. I would hold that the result is the same whether the claim is under section 6 of the Act or under the principle of **Stack v Dowden**. In so far as that property is concerned, the Respondent is to have the first option to purchase the property. I also hold that the Respondent is to be credited for the share of the mortgage payments for which the Claimant would have been responsible as a fifty per cent owner, from the 29th January 2007 which I hold is the date of separation for the purposes of that calculation.

Applying the same principle to the property at Norbrook, I also hold that the parties are beneficially entitled in equal shares to that property. Again, the Respondent is to be credited with the share of the mortgage payments which he has made and for which the Claimant would have been otherwise responsible to make as a beneficial joint owner. In relation to these two properties, the Respondent, according to the closing submissions of his counsel, accepts these as fair although there might be some disagreement as to the date from which the credit is to be calculated.

With respect to the property at Duncan's Bay, I have formed the view that by the time that property was acquired, the marriage was effectively ended and the Respondent purchased the land for his own purposes. I accordingly hold that the Claimant has no interest in that property.

I have considered the evidence with respect to the Phone Centre and have concluded that there is sufficient evidence to hold that the Claimant has an interest. That business was formally registered in the name of the Respondent on September 1, 2001. I have no reservation however in holding that there is nothing in the evidence which suggests that up to the time of the formal registration of that business, the parties were other than a cooperating couple doing things to advance their future together. Certainly, no evidence has been led of any conflicts before 2003. I also accept that the parties co-operated in the Respondent's "hustling" which led to the setting up of the Phone Centre. I am particularly mindful of Lady Hale's observation about disputes within families leading persons to re-interpret the past in either vengeful or self-exculpatory terms. I think that it is extremely apt. The affairs of this couple were apparently carried on in such a manner as to allow them to make selective investments and the Phone Centre was one such.

The question is however, what interest should be appropriated to the Claimant? In that regard, I have adverted to the provisions in section 13 and 14 above. Section 14 sets out those matters which ought to be taken into account in making a determination with respect to interests in property, other than the family home, under the Act. I hold that there is, in addition to the evidence that the parties, certainly up to 2003 had been acting in a cooperative manner in providing for their future, evidence that the Claimant did in fact assist in the operation of the shop. Certainly, there is no evidence that prior to the disagreements giving rise to this suit, filed in 2007, that there had been any disputes over who first saw property, or whose contact it was that gave rise to the awareness of properties for purchase, and whether the property so acquired should be held in their joint names. I am, in that regard also cognizant of the evidence given by the witness called by the Respondent, Julia Walker-Henry. From her answers, while she did equivocate, I

conclude that the Claimant did, in fact, make some contribution to the operation of the store. But I am also equally satisfied that once it was established, it was the respondent who effectively ran the business as his own. Taking all the appropriate factors into account, I would allocate to the Claimant a 15% interest in the net value of the business as a going concern. For these purposes, I would order that a valuation of the business as a going concern be undertaken by a firm of chartered accountants agreed on by the parties within thirty (30) days of the date of the judgment and if none is agreed, then such firm is to be appointed by the Registrar of the Supreme Court.

In so far as the accounts, interests in which are being claimed by the Claimant, I am mindful of the fact that he who alleges must prove. In her later affidavit, the Claimant for the first and only time identified the accounts in which she was claiming an interest. It is not clear from her evidence how she purports to establish a claim in the specific accounts. Nor is her evidence very helpful in assisting the court to come to a decision on a balance of probabilities. In the circumstances I accept the evidence of the Respondent that with respect to the accounts identified by the Claimant in her second affidavit, and make the following determinations:

a) "First Global Bank Contract Account #1012141, involving a deposit of US$ 55,757.07, the proceeds of which were withdrawn and deposited with the now defunct Olint unauthorized investment scheme" ..... I accept the evidence of the Respondent in the absence of any evidence to the contrary that this account was held on trust for another individual and it has been closed.
b) "JNBS United States dollar account # 000010316232 and Jamaican Dollar account # FLX 000010460290, in respect of which she exhibits "NL7" and "NL8"..... The balance as at the close of business on January 29, 2007 to be shared equally. Any sums left over after the apportionment, are to be allocated to the party who has been using the account.
c) "Capital and Credit account United States Dollar account #02/iDU/750060 exhibited as "NL9"..... Again, I accept the evidence of the Respondent in the absence of any evidence to the contrary that this account was closed and a final payment of US$2,000.00 was made to the Claimant.
d) "JMMB Tax Shelter account # 1238772, exhibited as "NL10". With respect to this last account, I accept the Respondent's evidence in that he admits that this was a jointly-owned account and the parties are entitled to share the proceeds beneficially.

In the absence of any specific evidence with respect to other accounts which may have been held in individual names, I hold that those accounts belong to the person in whose name it has been maintained.

In light of my decisions set out above, I am of the view that it would be fair that each party bears his or her own costs.

ROY K. ANDERSON
PUISNE JUDGE
October 2 , 2009