

NMCP

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 141 OF 2000

**BEFORE: THE HON MR. JUSTICE BINGHAM, JA
THE HON MR. JUSTICE WALKER, JA
THE HON MR. JUSTICE SMITH, JA (Ag)**

BETWEEN: DAVID LOGAN APPELLANT
AND HYACINTH VIVienne LOGAN RESPONDENT

**Walter Scott and Karene Stanley
instructed by Lawton Heywood for Appellant**

**Carol Davis instructed by Davis, Bennett
and Beecher-Bravo for Respondent**

Bingham, J.A.

I have read in draft the judgment of Smith, J.A. (Ag.) and I am fully in agreement with the reasoning and the conclusions reached. I agree that the appeal should be dismissed.

Walker, J.A.

I too agree.

May 9, 10 and October 25, 2001

SMITH, JA (Ag):

This is a case of some procedural importance. It has its genesis in an Originating Summons brought by the respondent under the Married Women's Property Act for a determination of the respective interests of the parties in Richfield and Pace Investments Ltd. (The "Company").

The parties met in 1976, and were married on the 4th day of September 1982. According to the respondent, in or about the year 1984, the parties jointly set up the Company which is a consulting firm providing services in Financial Analysis. The appellant does not agree with this. He said that he set up the Company in March 1987. However it is not disputed that the parties are the subscribers of the Memorandum and Articles of Association and that the appellant owns 51% of the shares in the Company and the respondent owns 49%. The parties are also directors of the Company.

The respondent claims that since 1995 when she and the appellant separated, she has been excluded from the Company which has since been run by the appellant.

On the 7th May 1998, the respondent filed the aforementioned Originating Summons. By this Summons the respondent applied for an Order:

- (1) As to the respective interests of the applicant and respondent in the Company, Richfield and Pace Investments Ltd.
- (2) As to the respective interests of the applicant and the respondent in all bank accounts, whether savings, current or otherwise operated by them through the said Company ...
- (3) That the Respondent account to the Applicant for all proceeds for bank accounts, whether savings, current or otherwise operated by them through the said Company ... and for the payment of such sum or sums found due and owing by the Respondent to the Applicant upon the taking of such account.
- (4) That an auditor be agreed by the Applicant and Respondent to prepare audited reports on the said

Company ... and in the absence of such agreement that the Registrar of the Supreme Court appoint an auditor.

(5) to (9) ...

In her affidavit in support of the summons the respondent/applicant swore that she believed that the appellant had been diverting funds from the Company. She claimed that the appellant had been making payments from the Company's funds to his girlfriends, ex-wife and generally for his own benefit. She had been completely excluded from the Company and had received no income therefrom since about March 1995. Of course these allegations were denied by the appellant.

Upon the hearing of the Originating Summons, Courtenay Orr J. ordered:

- "(1)** That Ms R. Maureen Woodham is hereby appointed to conduct an audit investigation into the financial statements and or accounts of the company Richfield and Pace Investments Ltd. From the period 1993-1997 and an audit of the same account and or statements for 1998-1999.
- (2)** That both parties supply to the said auditor all information as the said auditor shall require.
- (3)** That the fees are to be paid by the company failing this by the directors on record as of the date of this order.
- (4)** That in the event the company cannot pay for the services of the auditor each party shall be at liberty to withdraw an amount not exceeding half the costs of the auditor's services from funds jointly held by the Attorneys-at-Law for the parties herein.
- (5)** No order as to costs."

From this order of Orr J. the appellant has now appealed to this Court.

The grounds of appeal are:

1. The Honourable Mr. Justice Courtenay Orr (deceased) had no jurisdiction under either the Companies Act or the Married Women's Property Act to make the said Order.
2. The said Order of the Hon. Justice Courtenay Orr (deceased) is ultra vires the Companies Act and is therefore null and void.
3. The Hon. Mr. Justice Courtenay Orr (deceased) had no power under the provisions of the Married Women's Property Act to bind Richfield and Pace Investments Ltd. (a Third Party) in the manner ordered by him.

The prayer of the appellant is for an Order that the Order of Orr J. appointing the auditor be set aside.

The Submissions

The submissions of Mr. Scott for the appellant are along the following lines:

1. There is no dispute that the respondent has 49% of the shares in the Company.
2. As there was no dispute before trial judge as to title to respective shareholdings in the company, the trial judge lacked jurisdiction to deal with the matter under section 16 of the Married Women's Property Act. Reliance is placed on ***Petit v Petit*** (1969) 2 WLR 966. ***Cowcher v Cowcher*** (1972) 1 All ER 943 and ***Ramjohn v Mary Ramjohn*** (1973) 22 WIR 498.
3. Ownership of shares in a company does not entitle the shareholder to claim the property

of the Company whether property be realty, chattels, choses in action or whatever.

4. The Court has no power under the Married Women's Property Act to vary or confer rights in a company which are contractual and governed by the Companies Act - **Cowcher v Cowcher** and the ordinary principles of Company law - **Ramjohn v Ramjohn**.
5. The Court did not have the jurisdiction to make order appointing the auditor to conduct an audit investigation into the company which was not a party to the proceedings.

Miss Carol Davis for the respondent posited the following propositions:

1. The respondent is saying that her husband the appellant, has fraudulently taken to himself the lion's share of the profits of the company and therefore that he has money in his possession being the proceeds from her beneficial interest in the Company and she is entitled to that money.
2. By virtue of section 17 (an extension of s. 16) of the Married Women's Property Act, the Court has jurisdiction to make an order where there is a dispute between husband and wife as to the wife's interest in or entitlement to money which she claims is in the possession or under the control of her husband - she relied on **Chin v Chin**.
3. Further information with regards to the company's accounts was required for the judge to make the order sought by the Originating Summons.
4. Section 17 (6) of the Married Women's Property Act specifically provides that the Court may make an order directing enquiries.

5. The Order that Orr, J. made was in fact an Order for discovery – to find out what the profits were - **B v B** (1979) 1 All ER 801.
6. The Court has power to order production of a Company's document where the company is the alter ego of the husband even though the company is not a party to the suit.
7. The Companies Act is not relevant; the appropriate Act is the Married Women's Property Act sections 16 and 17 - **Letford v Letford** (1988) 25 JLR 433.

Analysis of the Submissions, and the Law

Both counsel in their full and helpful submissions at least agree on one point viz that this appeal turns essentially on the construction of sections 16 and 17 of the Married Women's Property Act. Section 16 reads:

"16 In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society, as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or (at the option of the applicant irrespectively of the value of the property in dispute) to the Resident Magistrate of the parish in which either party resides; and the Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit:

Provided always that any order of a Judge of the Supreme Court to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same Judge in a suit pending, or on an equitable proceeding in the said Court, would be; and any order of a Resident Magistrate under the provisions of this section shall

be subject to appeal in the same way as any other order made by the same Resident Magistrate would be:

Provided also that the Judge of the Supreme Court or the Resident Magistrate, if either party so require, may hear any such application in Chambers:

Provided also that any such bank, corporation, company, public body or society as aforesaid, shall, in the matter of any such application, for the purposes of costs or otherwise be treated as a stakeholder only."

It is interesting to note that a Company may apply under this section to the court for an order as to respective rights of a husband and wife over disputed property. Section 17 which is an extension of section 16 provides:

"17-(1) Any right of a wife, under section 16, to apply to a Judge of the Supreme Court or to a Resident Magistrate, in any question between husband and wife as to the title to or possession of property, shall include the right to make such an application where it is claimed by the wife that her husband has had in his possession or under his control -

- (a) money to which, or to a share of which, she was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, she was beneficially entitled, or for any other reason); or
- (b) property (other than money) to which or to an interest in which, she was beneficially entitled, and that either that money or other property has ceased to be in possession or under his control or that she does not know whether it is still in his possession or under his control.

(2) Where, on an application made to a Judge of the Supreme Court or to a Resident Magistrate under section 16, as extended by subsection (1), the Judge or, as the case may be, the Resident Magistrate is satisfied -

- (a)** that the husband has had in his possession or under his control money or other property as mentioned in paragraph (a) or paragraph (b) of subsection (1); and
- (b)** that he has not made to the wife, in respect of that money or other property, such payment or disposition as would have been appropriate in the circumstances, the power to make orders under that section shall be extended in accordance with subsection (3).

(3) Where subsection (2) applies, the power to make orders under section 16 shall include power for the Judge or, as the case may be, the Resident Magistrate, to order the husband to pay to the wife -

- (a)** in a case falling within paragraph (a) of subsection (1), such sum in respect of the value of the property to which the application relates, or the wife's share thereof, as the case may be; or
- (b)** in a case falling within paragraph (b) of that subsection, such sum in respect of the value of the property to which the application relates, or the wife's interest therein, as the case may be as the Judge or, as the case may be, the Resident Magistrate may consider appropriate.

(4) Where on an application under section 16, as extended by this section, it appears to the Judge or, as the case may be, the Resident Magistrate that there is any property which -

- (a)** represents the whole or part of the money or property in question; and
- (b)** is property in respect of which an order could have been made under that section if an application has been made by the wife thereunder in a question as to the title to or possession of that property,

The Judge or, as the case may be, the Resident Magistrate (either in substitution for or in addition to the making of an order in accordance with subsection (3) of this section) may make any order under that section in respect of that property which he could have made on such an application as is mentioned in paragraph (b) of this subsection.

(5) The preceding provisions of this section shall have effect in relation to a husband as they have effect in relation to a wife, as if any reference to the husband were a reference to the wife and any reference to the wife were a reference to the husband.

(6) Any power of a Judge or Resident Magistrate under section 16 to direct inquiries or give any other directions in relation to an application under that section shall be exercisable in relation to an application made under that section as extended by this section, and the provisos to that section shall apply in relation to any order made under that section, as extended by this section, as they apply in relation to an order made under that section apart from this section.

(7) For the avoidance of doubt it is hereby declared that any power conferred by section 16 to make orders with respect to any property includes power to order a sale of the property."

This section extends the right given under section 16 to include the right to make such an application where a spouse claims that the money or other property to which he or she is beneficially interested has ceased to be

in the possession or under the control of the other spouse or he/she does not know whether it is still in the other spouse's possession or control.

The Company in question has 100 shares of which the appellant has 51% and the respondent 49%. The Company has two directors – the appellant and the respondent. Both parties are the subscribers to the memorandum and are, therefore, the members.

As Mr. Scott submitted, in my view correctly, there can be no dispute as to title in the shares – there is no dispute as to the beneficial ownership of the shares. His submission that section 16 of the Married Women's Property Act is not applicable where title is not in dispute is also correct: See **Ramjohn v Ramjohn** (supra). However Ms Davis' contention is that what is in dispute is the profits of the Company. The evidence of the respondent as contained in her affidavit dated 7th May 1998 is:

"20. That to my knowledge while I was involved in the operation of the said company, the company's overseas work totalled at least 20 weeks per year and earned the said company an income in the region of U.S.\$1,800.00 per week.

21. That from smaller local projects the said company earned an income of approximately \$3,000,000.00 per annum and from the larger local projects approximately, \$4,000,000.00 per annum."

She further testified that since their separation in March 1995, she has been completely excluded from the Company. She claimed that although the Company was set up by their joint efforts and intended to be for their joint benefit she had received no income therefrom since March 1995. The appellant, she said, has reaped all the benefits from the Company's

operation. Further she alleged that the appellant had diverted funds from the Company in order to preclude her from benefitting from such earnings. The appellant, she swore, had "withdrawn and depleted in the region of \$5,000,000.00" contained in their local and overseas joint bank accounts. He had not accounted to her for these sums. Importantly, in paragraph 28 of the affidavit she said:

"I am claiming to be entitled to one half of all the sums withdrawn by him from our joint bank accounts and the accounts of the said Company both local and overseas."

The appellant in his affidavit dated the 18th January 1999, categorically denied the claims and allegations of the respondent describing them as "untrue and utterly ludicrous" [paragraph 23]. For the purposes of this appeal it is not necessary to go into the details of these claims and denials, assertions and counter-assertions, the charges and counter charges etc. What is as clear as can be is that there is a dispute as to the extent of the Company's profits over the relevant period, and as to whether the appellant has money in his possession which belongs to the respondent being her share from her beneficial interest in the Company.

Mr Scott's contention is that the Company is a creature of the Companies Act. This Act sets out methods of regulating the affairs of the companies incorporated under its provisions and sets out the procedure for achieving the relief sought by the respondent. He contends that the proper remedies for the respondent lay in the application of the Companies Act (see sections 22, 28, 153, 157 and 196 of the Companies Act). There are no

common law remedies for disputes between shareholders, he urged. He cited **Hickman v Kent** (1915) 1 Ch. 881 at 900 where Astbury J. said:

" ... articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively."

I do not think this case is helpful in determining whether or not Orr, J. had the power to make the order he made pursuant to sections 16 and 17 of the Married Women's Property Act. With due respect to Mr. Scott I do not find **Cowcher v Cowcher** (supra) and **Petit v Petit** (supra) very helpful. These cases involve disputes concerning the parties' respective shares in matrimonial properties. They have nothing whatsoever to do with a situation, such as obtains in the instant case, where the shares in a Company are jointly owned by husband and wife and the latter is claiming an entitlement to a share of the profits. What is clear from these cases is that sections 16 and 17 are procedural dealing with the relative rights of the parties, and that the function of the Court is to decide the existing rights in property. The Court has no power to vary or to confer any such rights.

Miss Davis relies on **Lascelles Chin v Audrey Chin** Privy Council Appeal No. 61 of 1999, delivered the 12th of February 2001 to support her submission that despite the fact that the property in question relates to ownership of a company, or the proceeds that flow from the ownership of the shares in a company where the parties are husband and wife, section 16 of the Married Women's Property Act as extended by section 17 provides the appropriate procedure for settling issues, questions or disputes between them.

In that case a breakdown in the marital relationship led to property disputes between Mr and Mrs Chin. The dispute related to the ownership of a company, Lasco Foods Limited. The Company had 250,000 issued shares of \$1.00 each. One of these shares stood in the name of Mrs Chin. The other 249,999 shares stood in the name of Mr Chin. Mrs Chin issued an Originating Summons under section 16 of the Married Women's Property Act asking the Court to decide what were the respective interests of herself and Mr Chin in Lasco Foods Limited. At paragraphs 9 and 10 Lord Scott of Foscote in delivering the judgment of the Board said:

"9. The affidavits showed clearly enough that the issue between the parties was whether they had intended that Mrs Chin would be joint owner of the company with her husband. But when the case came before Panton, J for trial he made no finding on that issue. He said simply:

'If there is an error in the allotment of the shares these proceedings that are before me cannot correct that error'.

10. He had in mind section 115 of the Companies Act which enables an application to be made to the Court for rectification of the share register. But that was not the issue. The issue was whether Mrs Chin was beneficially entitled to half the issued shares. If she was rectification of the share register would have constituted a form of consequential relief. Since Mr and Mrs Chin were the only persons with any claim to be shareholders, there would have been no difficulty in joining the company as a party and making the necessary rectification order. Perhaps that order could have been made without formally joining the company as party ... "

The above passage, in my view, supports the contention of Ms Davis that Orr J. had jurisdiction to make the order he made pursuant to section

16. It is important to note that their Lordships were of the view that a rectification order could have been made in the proceedings brought pursuant to section 16 even though relief is provided for this in section 115 of the Companies Act. In the instant case questions, issues and disputes arise between a husband (the appellant) and his wife (the respondent) as to the distribution of the profits of the Company. It is clear in my mind that sections 16 and 17 of the Married Women's Property Act provide the appropriate procedure in the instant case, where the respondent is claiming that proceeds of profits to which she is entitled are, or were, in the appellant's possession. I am also driven to the view that Orr J. was entitled to make the order appointing someone to conduct an audit investigation into the financial statements and accounts of the Company. Section 17(6) of the Married Women's Property Act specifically provides that the Court may make an order directing inquiries. The question is, can the Court make an order affecting the Company which is not a party? A case in point is **B v B** (1979) 1 All ER Fam. D. 801. In that case (see headnote) the husband had a controlling interest in, and was a director of, a private Company by virtue of his shareholding in another private, company a holding company. Members of his family held the majority of the remaining shares in the holding Company. There were six other directors of the company. The wife applied in a divorce suit pending between herself and the husband for financial provision for herself and the children of the marriage and for a transfer of property order. The wife alleged that there were discrepancies in the audited accounts of the company and wished to see company documents relating to

the husband's expenditure on entertainment and travel. The husband applied to the court for the right to occupy the matrimonial home and in those proceedings the registrar made an order for discovery against him requiring him to disclose and produce for inspection documents of the company relating to his personal expenditure on entertainment travel etc and expenditure on goods for his family whether incurred in his own name or in the name of the company. The husband appealed against the order on the ground that the registrar had no jurisdiction to make it because it involved discovery and production of documents of the company which was not a party to the proceedings between husband and wife. On appeal it was held that company documents which were relevant to the matters in issue although in legal possession of the company, might be required to be disclosed by a director of the company who was a party to the suit if they were or had been in his actual physical possession, even though he held them merely as servant or agent of the company since in that circumstance they were or had been in his custody. At p. 811 Dunn, J said:

"If a company is the alter ego of such a director so that he has unfettered control of the company's affairs, he must disclose and produce all relevant documents in the possession of the company."

In the instant case the Company is a private Company; the husband and wife are the only shareholders. According to the appellant husband it was set up by him as a vehicle for continuing his consultancy operations and he described it as a "one man operation." I agree with Miss Davis that the Company could be described as the appellant's alter ego. There is, in my view, merit in the respondent's submission that the order that Orr J made

was in the nature of an order for discovery to find out what the profits were. I accept the arguments that Orr J had the jurisdiction and correctly exercised his discretion to order an enquiry by means of an audit investigation into the financial statements and/or accounts of the Company.

For the reasons given I would dismiss this appeal and affirm the orders of Orr J with costs to the respondent.