



[2017] JMSC Civ 138

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV01588

BETWEEN	CAROLYN ANTOINETTE TOMLINSON	CLAIMANT
AND	RICHARD ANTHONY TOMLINSON	DEFENDANT

IN CHAMBERS

Mrs. Judith Cooper Bachelor for Applicant instructed by Chambers, Bunny and Steer.

Kevin Page instructed by Haisley and Page for Defendant/Respondent.

Heard: 25th May, 8th June, 2012 and October 6th, 2017

**Application for Declaration of Share in home by spouse –
Second home – Not Family Home - The Property (Right of
Spouses) Act, 2004 – sections 6, 7, 9, 11, 13 and 14**

DAYE, J.

[1] The Claimant Mrs. Carolyn Tomlinson, commenced proceedings by a Fix Date Claim Form on the 12th March, 2011 against the defendant, her husband, Richard Tomlinson. She request the court to make a determination under **The Property (Rights of Spouses) Act 2004** of the ownership as also the respective shares in a home which is a “quad” situated at Lot 486 Silverstone, Greater Portmore, St. Catherine. She claims that this home is owned in equal shares between herself and her husband.

[2] At the time of this application the Claimant and her husband were separated. This was from July 2009 and it appears there is no reasonable likelihood of reconciliation. The other feature is that since the time of the separation the defendant has occupied and took control of Lot 486 Silverstone, Greater Portmore where he now resides.

[3] Previously the defendant resided at 161 42 Central Place, Silverstone, Greater Portmore, St. Catherine. He resided there with the Claimant and a daughter of the marriage and a step daughter as a family for some (10) years to the date of separation. The parties cohabited from 1998 for one (1) year at this house before their marriage in April 1999.

[4] The defendant in his Affidavit of 13th October, 2011 asserted that the home at 161, 42 Central Place, Silverstone was the matrimonial house (paragraph 12)

[5] Further he deponed that he contributed to the maintenance, improvement and addition to this property and he is entitled to 50% share in the property (paragraph 14). The claimant Mrs. Tomlinson accepts in cross-examination the home at 161, 42 Central Place, Silverstone was the matrimonial home. Her explanation, in cross examination, was that matrimonial home means "my husband and I lived together at this property during the marriage." Earlier on she testified she lived there with the daughter of the marriage and her daughter of a previous marriage.

[6] She also explains that the home which was originally a quad was in 2009 improved and extended to a 2 bedroom home with kitchen, washroom and car port during the marriage.

[7] Although Mrs. Tomlinson seeks only a 50 per cent share in the Lot 486 Silverstone Greater Portmore home and makes no reference to the matrimonial home, which under our law is the 'family home' the defendant Mr. Tomlinson has. He is claiming 50% share in the "family home" and the entire interest in lot 486 Silverstone, Greater Portmore on the basis of an agreement.

THE LAW

[8] Section 13(1) of **The Property (Rights of Spouses) Act 2004** provides that a spouse shall be entitled to apply to the Court for a division of property where, among other grounds, the husband and wife are separated. No issue was taken that this application was not brought within 12 months of the separation. Counsel for the Claimant submitted the application was brought under section 11 and presumably it did not face that limitation period.

[9] The orders a Court is empowered to make under section 13 application are listed in Section 14(1) They are:-

- a) on order for the division of the family home in accordance with sections 6 and 7, as the case may require.
- b) subject to Section 7(2) divide such property, other than the family home, as it thinks fit, taking into account the factors specified in Section 14(2); or where a circumstance so warrant make orders under both (a) and (b).

[10] On the Affidavit evidence there are two properties concerning the parties: the family home at Lot 161 42 Central Place, Silverstone, Greater Portmore, St. Catherine of Lot 486 Silverstone, Greater Portmore, St. Catherine, a home apart from the 'family home'. The case of the defendant has put into issue 'the family' home. Consequently, the Court has to consider orders in relation to both paragraphs (a) and (b) of the above section.

[11] The factors that a court ought to consider in an application under section 13 are enumerated in section 14(2) as follows:

- 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 the property of the spouse 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 the property;
- e) such other fact or circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.”

[12] Then Section 14(3) defines “contribution” as –

- a) the acquisition or creation of property including the payment of money for that purpose;
- b) the care of any relevant child or any aged infirm relative or dependant of a spouse.
- c) the giving up of a higher standard of living than would otherwise have been available;
- d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –
 - i. enables the other spouse to acquire qualifications; or
 - ii. aids the other spouse in the carrying on of that spouse’s occupation or business;
- (e) the management of the household and the performance of household duties;
- (f) the payment of money to maintain and increase the value of the property or parts thereof;
- (g) the performance of work on service in respect of the property or part thereof;
- (h) the provision of money, including the earnings of income for the purposes of the marriage and cohabitation;
- (i) The effect of any proposed order upon the earning capacity of either spouse.”

DISCUSSION AND ANALYSIS

PARTIES AND MEANS

[13] It is relevant to look at the position of the parties at the time of their marriage in April 1999. The claimant was a pharmacist, a mother of a daughter from a previous

marriage. She was a fix income earner, her income the defendant admits was higher than his earnings. She acquired Lot 161 42 Central Place, Silverstone, Greater Portmore, St. Catherine. She paid down the deposit; obtain a mortgage loan which she serviced. She improved and extended the quad over the time of the marriage to a two bedroom house. The title of the house was in her sole name.

[14] The defendant was a stevedore working with the Jamaica Shipping Association in 1999. This job is manual, loading and unloading ships. He got a basic pay but overtime increased his weekly income. His income was \$14,000.00 per week in 2002.

[15] At the time of the application and hearing he was unemployed. But he says in cross-examination he was on medical retirement due to an injury he received to his back sustained during his employment. He received \$25,000.00 per month from 2006. He also received a lump sum of \$200,000.00 to \$300,000.00 severance from his job.

[16] He owns a motor car which he purchased for \$400,000.00 - \$500,000.00. He spent \$5,000.00 per week for purchase of gas. He sometimes contributes \$2,500 per month for the maintenance of his daughter. He claims he contributed to the improvement and expansion of the quad at 161 42 Central Place, Silverstone, Greater Portmore to its present two bedroom with living, dining, kitchen washroom and garage over the ten (10) years of his marriage.

[17] In 2006 he and his wife purchased Lot 486 Silverstone, Greater Portmore which is also a quad. He agrees in cross-examination that the house was purchased as an investment to generate extra income for his daughters.

[18] He paid the deposit of \$800,000.00 of this house of which the selling price was \$1,350,000 from his National Housing Trust benefits. He claims he paid in excess of 50% of the balance of purchase price of \$590,000.00. He pays the mortgage of this house, the maintenance from 2009. He now lives at the house. He had rented out this house and collected rent of \$10,000.00 per month. He used half of the rent to pay the mortgage on the house and gave the claimant the other half to pay for her mortgage at

Lot 161 42 Central Place, Silverstone, Greater Portmore. He was not given the claimant any benefit for her investment.

[19] Lot 486 Silverstone is held by the claimant and the defendant as joint tenants. He insisted that there was an agreement between himself and his wife that he should have the sole benefit of Lot 486 Silver Stone and she should have Lot 161 42 Central Place, Silverstone. But in reality is claiming 50% of Lot 161 42 Central Place, Silver stone, Greater Portmore

FAMILY HOME/EQUAL SHARE RULE

[20] Both parties accept that Lot 161 Central Place, Silverstone is the “family home”. It satisfies the definition of a dwelling house that is owned by one of the spouses and is used as the principal family residence and used mainly for the purpose of the household. (Sec. 2 (1) of the Act). Section 6 of the Act provides each spouse shall be entitled one half share of the family home. This rule is subject to section 7. In other words there is a statutory presumption of one half share in the family home (**Brown v. Brown [2010]** per Cooke J.A. paragraph 13, Morrison J.A. paragraphs 40-46 and paragraph 80 and per Brooks J.A. **Stewart v Stewart [2013]** J.M.C.A. Civ. 47 paragraph 25) In **Brown** (Supra paragraph 76) Morrison J.A. said the family home:

“.....is arguably the cornerstone of the ameliorative architecture of the new regime, to cases in which the parties divorce or separation accrued after an effective date of the Act.”

[21] Therefore claimant Mrs. Tomlinson and the defendant her husband have one half share in Lot 161, 542 Central Place, Silverstone, Greater Portmore, St. Catherine.

[22] Is this statutory presumption or equal share displaced? Brooks J.A showed that there are grounds in section 7 that gives a gate way to consider the displacement or variation of the equal share rule. (Stewart, supra paragraphs 26-28) One of the ground is that:-

*“the family house was already owned by one spouse at the time of the marriage at the beginning of cohabitation”
(Section 7 (1) (b))*

[23] The court must be satisfied that it would be “unreasonable or unjust” for each spouse to be entitled to one-half share in family home. The party who is challenging the equal share rule should apply to court to vary the rule.

[24] In the instant case the claimant solely acquired Lot 161 Silverstone, Greater Portmore before the marriage in 1998. The parties cohabiting at the time. They married in 1999. A child was born late 1999 and they lived at this home until 2009. Disparity in contribution to the family home taken in the sole name of one spouse did not displace the one half rule. The claimant acquired the house before the marriage but it was a short time before and it appears it was in contemplation of the marriage and a future family with the defendant. The house was improved from a “quad” to a 2 bedroom house. It is more probable that the claimant contributed a greater share to this house due to her income and steady earnings. But the law does not give her a greater share of the beneficial interest in the home. The circumstances of the parties during this ten (10) year marriage does in my opinion make it unjust and unreasonable for the defendant to have one half share in the family home. The claimant has not made an application to vary this presumption but this formality (**Graham**, supra) is not fatal.

[25] I find Mrs. Tomlinson’s evidence more reliable in each and in every respect on how the domestic and household duties were managed. Also I prefer her evidence as to her financial contribution in the home and the care of the children during the marriage.

[26] The parties agree that Lot 42 Central Place, 161 Silverstone is the ‘family home’. The parties are left to decide how they will apportion their beneficial interest in the respective share in the home.

PROPERTY OTHER THAN FAMILY HOME

[27] It is not disputed that Lot 486 Silverstone is not the family home. Neither is it disputed that it was purchased by the parties as an investment property to earn rental income to benefit the family. I find Mr. Tomlinson made the deposit of \$800,000.00 and the balance of the purchase was borne equally by the parties. As registered joint tenants each spouse is beneficially entitled to one half share in the home. This appears to be the intention of the parties at the time the home was bought in 2003.

[28] The home earned rental income of some \$10,000.00 per month while the mortgage was \$6,000.00 per month. The defendant lived at the premises and paid the maintenance. The claimant made a contribution in money worth to this house by occupation rent she did not receive by her one half contribution to the mortgage and the maintenance. Her one half beneficiary interest is not displaced.

[29] I find the defendant was not credible on material aspect of the claim. For instance he admitted in cross-examination that the claimant was a joint applicant of the application to N.H.T for the loan of \$800,000.00 and undertaken joint liability for the mortgage. He stated in his affidavit he was the sole applicant for the land.

[30] Further he said post separation the claimant agreed that he should own Lot 486 Central Place, Silverstone solely. Also he said he gave the claimant her one half share rental to pay her mortgage. Then he later said he physically went and pay the claimant's mortgage of 161 Silverstone from her one half share rental of Lot 486 Silverstone. I am constrained to find that there was no agreement by the claimant to give her beneficial interest in Lot 486 to the defendant.

[31] Lot 486 was purchased as an investment. The parties were partners in the investment and they were entitled equally to returns on the investment.

[32] Counsel for the defendant submitted that the court should take into account what is in effect the alleged conduct of the claimant that lead to the breakdown of the marriage and separation of the parties. He alleged the claimant was not supportive of

the defendant who was injured during his employment. He said she displaced the defendant from the family home and he had to seek accommodation at Lot 486 Silverstone. The authorities including **Watchel v. Watchel** [1973] 1 All E.R. 827 at 835 paragraph (h) **Samuels v. Samuels** (1992) 29 J.L.R 44 and 45 at paragraph (e), **Jarrett v. Jarrett RMCA 5/99** and **Meijerink v. Meijerink** delivered August 29, 2002, pp. 8 -11 established that under the new regime of legislation dealing with matrimonial home and property conduct leading to the breakdown of the marriage is not a factor to take into account in determining property rights of the parties. I do not agree with counsel submission that the defendant should be declared the sole owner of this house. On the contrary, I hold that the claimant and the defendant are joint beneficiary in equal share in the house at Lot 486 Silver Stone, Greater Portmore, Saint Catherine.

[33] The Orders hereunder are therefore granted:

- a) The parties owned the property located at Lot 486 Silver Stone, Greater Portmore in the parish of Saint Catherine in equal shares of 50% each.
- b) The said property is to be valued by a valuator to be agreed by the parties. If the parties do not agree to a valuator within fourteen (14) days of this order then the property shall be valued by Allison, Pitter and Company. The cost of the valuation to be borne equally.
- c) Property at Lot 486 Silver Stone, Greater Portmore, in the parish of St. Catherine shall be put on the open market and sold first by public auction and if not sold there then to be sold by private treaty.
- d) The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect the orders of the court if either party is unable or unwilling to do so.
- e) Costs to the claimant to be agreed or taxed.
- f) Liberty to apply.