



[2018] JMSC Civ. 120

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 03020

BETWEEN	ERROL GORDON	CLAIMANT
AND	LORNA JUNE GORDON	DEFENDANT
	(nee FORSYTHE)	

IN CHAMBERS

Mrs. Yualande Christopher-Walker instructed by Yualande Christopher & Associate for the Claimant.

Mr. Orane Nelson instructed by Forsythe & Forsyth for Defendant.

Heard: 20th March & 18th May, 2018.

Division of matrimonial property - Family home - Other property -Proceeds of sale of family home used to purchase other property- Other property registered solely to one spouse – Beneficial interest of spouse - Rent

CALYS WILTSHIRE J. (AG.)

Introduction

[1] On the 12th June, 2015, Errol Gordon filed a Fixed Date Claim Form seeking the following orders, among others:

- (1) A Declaration that the Claimant is beneficially entitled to fifty percent 50% interest in the property located at 6A College Crescent, Kingston 19, in the parish of Saint Andrew. (hereafter referred to as the subject property).

- (2) An order that the Defendant account for the rent received from the subject property from the date of purchase of the property to the date of this order and declare details of the tenancy including the names of tenants, the period of the tenancy and the rent.
- (3) An Order that the Claimant is beneficially entitled to fifty percent (50%) of the rent proceeds and the Defendant pays that sum to the Claimant within fourteen (14) days of the date of this Order.

[2] Affidavits filed on 12th June, 2015 and 13th June 2017 were permitted to stand as Mr. Gordon's evidence-in-chief. Mrs. Gordon's affidavits filed on 11th April, 2016 and 12th July, 2017 were permitted to stand as her evidence-in-chief.

Claimant's Case

[3] Mr. Gordon's evidence is that he and Mrs. Gordon decided to sell their home at Buckingham Avenue, in England and relocate to Jamaica. Prior to the sale they both searched for properties in Jamaica to purchase. Mr. Gordon searched online using real estate websites and Mrs. Gordon visited Jamaica to inspect properties.

[4] He stated that during one of those visits the subject property was identified and he agreed to its purchase using monies which included the proceeds of the sale of the Buckingham Avenue property. Mr. Gordon said that the proceeds were being held in Mrs. Gordon's account at HSCB Bank and then at Victoria Mutual Society.

[5] In the period before the purchase of the subject property they resided in rented premises in England. He said they agreed that Mrs. Gordon would first migrate to Jamaica and settle and then he would follow.

[6] Mr. Gordon visited Jamaica in January/February and October 2012 and discovered that his name was not endorsed on the title as a registered owner. He said the Defendant assured him that convenience was the reason for her name

alone being placed on the title, and his name could be added at a later time. Consequently, they continued to plan for their lives together in Jamaica and renovated the property.

- [7] He said therefore that he was shocked when divorce proceedings were initiated. He claims to be financially disadvantaged as all the proceeds of the sale of the family home in England went into the purchase of what would have been the parties' family home in Jamaica.
- [8] Regarding his ownership of land in Thatchwalk, Bull Savannah, in the parish of St. Elizabeth, Mr. Gordon said that it was left to him by his grandmother. He denied that Mrs. Gordon is entitled to half of said property.
- [9] Mr. Gordon agreed under cross examination that Mrs. Gordon had previously raised in 2006 that she wanted to separate. He conceded that there were problems with the marriage. However, he insisted that there was an agreement to sell their Buckingham Avenue home and relocate to Jamaica, and that was the only reason why he agreed to the sale of the house.

Defendant's Case

- [10] Mrs. Gordon denied that Mr. Gordon is entitled to fifty percent (50%) of the subject property. She confirmed that they together had bought and sold three homes, the last being the Buckingham Avenue, family home, in England. They both shared the mortgage responsibilities over the duration of their ownership of these properties.
- [11] Mrs. Gordon stated that from the net proceeds of the sale of the last family home in England she made payments for storage of their furniture and rent for their interim accommodation. She admitted transferring £100,000.00 of the net proceeds to Jamaica.

- [12] Mrs. Gordon denied the existence of any agreement to sell and relocate to Jamaica. She also denied that they both searched for properties to purchase in Jamaica and that Mr. Gordon approved her purchase of the subject property.
- [13] She had decided to migrate to Jamaica as their marriage was practically non-existent, she was under stress and in an abusive relationship and she needed time apart from Mr. Gordon. She also stated that additional funds were borrowed from the bank and friends to enable her to purchase the subject property. Further that she also put all her inheritance from her late mother into the property.
- [14] Mrs. Gordon bought the subject property in October, 2011. Both parties were in Jamaica in January/February, 2012 when the keys were handed over. Her evidence is that she decided to migrate to Jamaica in June 2012, and in July 2012, she told Mr. Gordon that she wanted a separation.
- [15] She further stated that Mr. Gordon knew from January 2012 that his name was not on the title. She said she neither gave an explanation for the omission nor discussed adding his name.
- [16] Mrs. Gordon stated that she alone stood the cost of refurbishing the kitchen at the subject property, and also bore sole financial responsibility for all other costs related to same.
- [17] Eventually under cross- examination Mrs. Gordon stated that Mr. Gordon was entitled to fifty percent (50%) of the proceeds of the sale of the Buckingham Avenue property.

Claimant's Submission

- [18] Mrs. Yualandre Christopher- Walker has relied on the following cases in making her submissions,
- (i) **Graham v. Graham** [2010] JMCA Civ 12
 - (ii) **Brown v. Brown** [2010] JMCA Civ 12

(iii) **Stewart v. Stewart** [2013] JMSC Civ 121

(iv) **Gissing v. Gissing** [1971] AC 886

(v) **McCormock v. Mc Cormock** [2017] JMSC Civ62

By virtue of Sec. 2(1) of Property (Rights of Spouses) Act, (PROSA) Counsel contended that the subject property is the family home as Mr. Gordon contributed all of his half shares of the proceeds of sale of the last family home to its purchase. It was submitted that the subject property was the new intended family home, so Mr. Gordon was entitled to 50% based on Sec. 6 of PROSA.

[19] In the alternative Counsel submitted that even if the subject property was not the family home, Mr. Gordon would still be entitled to a percentage of same based on Sec. 14 (1) (b) of PROSA. Mrs. Christopher-Walker referenced Mr. Gordon's evidence of his direct financial contribution to the acquisition of the property, and his financial and non-financial contribution to the family and household for the period of the 29 years of marriage.

[20] Regarding rental proceeds it was submitted that Mr. Gordon had been excluded from the possession of the subject property. Consequently, he had not had the benefit of shared rent proceeds from the lease of the subject property.

[21] Counsel asked the court to also take into consideration Mr. Gordon's advanced age and health and his need to protect his assets which were eroded by the use of his half of the proceeds of sale to acquire the subject property. Mrs. Christopher-Walker submitted that the justice of the case required these factors to be taken into account.

Defendant's Submissions

[22] Mr. Nelson relied on the following cases in his submissions:

(I) **Binger v. Ranger** [2017] JMSC Civ9

- (II) **Brown v. Brown** [2010] JMCA Civ.12
- (III) **Plummer v. Plummer** [Delivered on 15th June, 2009 per Anderson J. Claim No. HCV00846 of 2006.
- (IV) **Oxley v. Hiscock** (2004) 3WLR 715
- (V) **Stack v. Dowden** [2007] UKHL 17

[23] It was submitted that the Claimant had failed to satisfy the requirements of Sec. 2(1) of PROSA as the subject property was never “used habitually or from time to time by the spouses as the only or principal family residence”

[24] Mr. Nelson contended that the Claimant’s admission that Mrs. Gordon placed the sale proceeds into her personal account “so that she could use it how she wanted” was evidence that the purchase of the subject property was solely the Defendant’s.

[25] It was further submitted that if the court was of the view that the subject property was the family home, then Sec. 7 of PROSA should be applied and the 50% equal share rule be varied. Counsel has asked the court therefore to look at the factors set out in section 7(1) of PROSA, as well as the financial and non-financial contributions made by the Defendant in respect to residences of the parties throughout the period of their marriage.

[26] Mr. Nelson also submitted that the court should consider that Mr. Gordon had received a lump sum pension payment and award an interest of 20% to him. In the alternative, Mr. Nelson submitted that if the court found that the subject property was not the family home then the court should divide same on the basis of Sec. 14 (1) (b) & (2) of PROSA.

[27] Counsel contended however that Mr. Gordon’s contribution to the subject property was only in respect of its acquisition, not in respect of its conservation or

improvement. Consequently, any interest awarded to Mr. Gordon ought not to take into account the property in its improved state.

- [28]** On that view, Mr. Nelson argued that Mr. Gordon's interest should not be a percentage of the present value of the subject property as Mrs. Gordon improved same after the purchase, at her own expense.
- [29]** Counsel submitted that at the time of the purchase in January 2012, Mr. Gordon's half proceeds of sale, £50,000.00 equated to 42% of the purchase price of the subject property. The property had been purchased for J\$16,100,000.00 from the £100,000.00 proceeds of sale of the family home, a loan in the sum of J\$1,400,000.00 and monies from Mrs. Gordon's inheritance from her mother's estate. Counsel argued therefore that Mr. Gordon's contribution would only have been J\$6,762,000.00.
- [30]** Mr. Nelson asked the court to take judicial notice of the Bank of Jamaica's Historical Exchange Rate which showed that on the 31st January, 2012 the value of the pound to the Jamaican dollar was £135.9520 to J\$1.00.
- [31]** Mr. Nelson disagreed with the Claimant's assertion that his management of the household, performance of household duties and care of the children should be considered as "contribution" to acquiring, conserving or improving the subject property.
- [32]** On the issue of an account of the rents received and the payment thereof to Mr. Gordon, Mr. Nelson submitted that he was not so entitled. It was argued that where the subject property is not the family home, the Claimant would not be entitled to an account.
- [33]** It was further submitted that there was no agreement between the parties concerning this subject property and the rent collected by Mrs. Gordon was possible only because of the improvements she made at her expense. As

consequence it would be unreasonable to require Mrs. Gordon to account for the rent collected.

Facts not in dispute

[34] It is not being disputed that,

- (1) The parties got married in June 1983.
- (2) The Defendant migrated to England in February 1985.
- (3) The Claimant joined her in December, 1986.
- (4) Their first child was born in September, 1988.
- (5) In 1989 the first family home was purchased at Bostall Lane, South East London.
- (6) Their second child was born in 1998.
- (7) The first family home was sold and second one purchased at Broderick Grove, South East London.
- (8) The second family home was sold and third one purchase at 23 Buckingham Avenue, Welling, Kent DA162ly.
- (9) Both parties paid the mortgages for the various family homes over the duration of their marriage in England.
- (10) The third family home at Buckingham Avenue was sold for the sum of £117,224.97
- (11) In October 2011 the proceeds of the sale of the Buckingham Avenue family home were used in the purchase of the subject property.
- (12) Ownership of the subject property is registered solely in the name of the Defendant.

(13) The marriage has broken down and there is no likelihood of the parties reconciling.

(14) The subject property has been rented out by the Defendant.

(15) Improvements have been made to the subject property.

Matters in Dispute

[35] The parties do not agree that:

(1) They had an agreement to sell their family home in England, in order to purchase an intended family home in Jamaica and relocate together to Jamaica.

(2) They together searched for properties to buy in Jamaica.

(3) Mr. Gordon approved of the purchase of the subject property or even knew when Mrs. Gordon purchased same.

(4) Mrs. Gordon had discussions with Mr. Gordon about adding his name to the title for the subject property.

Issues

[36] It must be determined whether

(1) The property located at 6A College Green, Kingston 19 in the parish of Saint Andrew (the subject property), is the family home,

(2) Whether the Claimant is entitled to a fifty percent (50%) beneficial interest in the subject property.

(3) Whether the Defendant should account for the rent received from the subject property

(4) Whether the Claimant is entitled to fifty percent (50%) of the rent proceeds.

Law and Analysis of Evidence

[37] Section 2(1) of the Property (Rights of Spouses) Act defines the family home as follows:

“family home” means 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”

[38] If property satisfies the above criteria then each spouse by virtue of section 6 of PROSA, is entitled to one half of the beneficial interest in the family home, despite the manner in which the legal interest is held.

[39] The evidence on the Claimant’s case does not in my view, qualify the subject property as the family home. Mr. Gordon testified to visiting the property on three occasions. On the first occasion the keys were being handed over. There is no evidence that the parties actually used the property then as a residence.

[40] On the second visit, the evidence is that the Mr. Gordon actually stayed at the subject property. He said that he was visiting his family, Mrs. Gordon and their son. Mr. Nelson in cross examination asked “you have not lived in the premises in Jamaica? To which Mr. Gordon responded,” I spent vacation there, but not lived there.”

[41] Mr. Gordon further admitted that his third visit was his attempt to salvage his relationship with his wife. On that occasion, Mrs. Gordon’s undisputed evidence is that he did not stay at the subject property.

[42] The subject property was not the family home, and the evidence belies any common intention for it to become the family home. It is clear that Mrs. Gordon had other plans which did not include Mr. Gordon. It is however matrimonial property.

[43] On the sale of the Buckingham Avenue family home, Mr. Gordon was entitled to half of the proceeds thereof. That home could not have been sold without his permission. Yet with the intention to discontinue her marriage, Mrs. Gordon went ahead and used Mr. Gordon's one half portion of the sale proceeds in the purchase of the subject property.

[44] Under section 14 (1) (b) of PROSA the court is empowered to divide property other than the family home taking into account the factors outlined 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 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”.

[45] Undoubtedly Mr. Gordon's one half share of the proceeds of sale of the Buckingham Avenue property would be a direct financial contribution to the acquisition of the subject property. Mr. Gordon has also asserted that he contributed financially to the improvement of said property by way of his servicing a loan of £1,200.00 which Mrs. Gordon used to purchase kitchen cupboards, fixtures and fittings in England for the subject property.

[46] He also stated that he incurred £53.00 for the purchase of accessories for the kitchen cupboard at the subject property. Mr. Gordon claimed that he incurred living expenses over the years and continued to incur them for the benefit of the family. To this end he set out a list of expenses for items inclusive of water, electricity, gas, groceries, school expenses for the children, telephone, insurance loans and mortgages. He further stated that he gave Mrs. Gordon £3,500.00 for furniture for the subject property.

[47] In section 14 (3) of PROSA it states that in subsection (2) (a), “contribution” means

(a) the acquisition or creation of property including the payment of money for that purpose;

(b) the care of any relevant child or any aged or infirm relative or dependent of a spouse;

(c) the giving up of a higher standard of living than would otherwise have been available;

(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –

(i) enables the other spouse to acquire qualifications; or

(ii) aids the other spouse in the carrying on of that spouse’s occupation or business;

(e) the management of the household and the performance of household duties;

(f) the payment of money to maintain or increase the value of the property or any part thereof;

(g) the performance of work or services in respect of the property or part thereof;

(h) the provision of money, including the earning of income for the purposes of the marriage or cohabitation;

(i) the effect of any proposed order upon the earning capacity of either spouse.

[48] In cross examination Mr. Gordon agreed that Mrs. Gordon's niece was supposed to repay him the loan for the kitchen fixtures. He responded that she did repay him £600.00, which he eventually sent to Mrs. Gordon, and he did not receive the remainder from her.

[49] Mr. Gordon also confirmed that Mrs. Gordon was solely responsible for their son's private tuition fees in England and also between June 2012 to July 2014 when the child was in Jamaica. He also agreed that she had paid the mortgage on the Buckingham Avenue property for some years.

[50] Further regarding the purchase of the subject property, Mr. Gordon expressed awareness that £100,000.00 from the net proceeds of sale of the Buckingham Avenue home, was transferred to Jamaica. He however could not say whether or not the purchase price of the subject property was covered in it's entirety by the £100,000.00.

[51] I do not find that the loan of £1,200.00 which Mr. Gordon serviced was deliberately taken out by him with the intention to contribute to the improvement of the subject property. Clearly he was to be repaid those sums and the person with that responsibility reneged on same.

[52] On his contribution to living and household expenses, I do not find that the fulfilling of those obligations over the years count any more than Mrs. Gordon's. Everything that he said he did, he agreed that Mrs. Gordon also did. So there was nothing from that evidence that suggested that those contributions were

such that they enabled Mrs. Gordon's acquisition, conservation and improvement of the subject property.

- [53]** There is no relationship between the other contributions, financial and otherwise during the marriage, and the acquisition, conservation and improvement of the subject property. I am therefore of the view that I must only assess his contribution to the acquisition of the property and then calculate the percentage interest. This contribution would be limited to the actual direct financial contribution made of his £50,000.00.
- [54]** The subject property was purchased for the sum of J\$16,000,000.00. It has not been disputed that Mrs. Gordon, along with the proceeds of sale of Buckingham Avenue, got loans and used her inheritance from her mother's estate to enable the purchase.
- [55]** I have taken judicial notice of the exchange rate at the time of purchase, which was J\$4142.02 to £1.00. Mr. Gordon's £50,000.00 would therefore convert to J\$7,101,000.00 or 44% of the purchase price.
- [56]** I accept Mrs. Gordon's evidence that apart from the additional funds that she used to finance the purchase she also bore solely the cost of the improvements made to the subject property over the years. Taking that into consideration. I find therefore that Mr. Gordon is beneficially entitled to 44% interest in the subject property.

Rent

- [57]** Mrs. Gordon and the parties' son lived at the subject property for at least two years after its purchase. When their son returned to England, Mrs. Gordon moved between there and Jamaica and resided at the subject property when she was here. She subsequently rented out the said property when she went back to England.

[58] If I am to treat this as a claim for occupation rent, then the law does allow such a right when one party is actually or constructively excluded from his or her property. Occupation rent then may be due to the excluded party from the party that remains in the property.

[59] Such a claim however rightly arises where the party claiming has been denied possession or forced to vacate the family home and pay for alternate accommodation. I do not find that the evidence before me supports such a claim.

[60] I therefore order as follows:

- (1) The Claimant is beneficially entitled to 44% interest in the property located at 6A College Crescent, Kingston 19, in the parish of St. Andrew.
- (2) CD Alexander Company Limited is appointed Valuator and a valuation is to be done of the aforesaid property, the cost of which is to be borne equally by the parties.
- (3) The Defendant is given the first option to purchase the Claimant's interest in the property, the option to be exercised within thirty (30) days of the presentation of the valuation report.
- (4) In the alternative, if the Defendant fails to exercise the option within 30 days that, the property be sold on the open market, or by private treaty or auction at fair market value and the proceeds and costs of the transfer be shared equally between the parties.
- (5) If the property is sold on the open market, by way of private treaty, or auction, the Stamp Duty, Registration fees and costs associated with the transfer for sale are to be borne equally by the parties.
- (6) The Attorneys at Law with Carriage of Sale are Yualande Christopher & Associates for the Claimant herein. Further, that the parties are to pay their own Attorney's cost on transfer.

- (7) The transaction is exempt from transfer tax if transfer is between the spouses.
- (8) The Registrar of Supreme Court is empowered to sign any and all documents to effectuate the court's order herein in the event that either party refuses or neglects to do so within thirty (30) days of being requested to do so by the relevant Attorney-at-Law.
- (9) Each party shall bear their own costs.