



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV02568

BETWEEN	CELESTINE HARRIS	APPLICANT
AND	HENRY HARRIS	RESPONDENT

Matrimonial Property – Relationship Commenced When Parties Were 16 and 18 Years Old Respectively- Both Participated In Development of a Pharmaceutical Business – Company – Unequal Number of Shares- Property Purchased In Husband’s Sole Name- Funds From Company Used to Purchase Property- Common Intention- Whether Property Beneficially Owned Jointly in Equal Shares.

Linda Wright and Angel Haynes for the Applicant

Keith Bishop, Andrew Graham instructed by Bishop and Partners for the Respondent.

In Chambers

Heard: 29th & 30th November 2017; 1st December, 2017 & 26th January 2018

BATTS J

1. On the first date fixed for the hearing, Mr. Keith Bishop applied for an adjournment. He asserted that he was not ready and that, as the Respondent was his uncle, efforts were being made to obtain alternate legal representation. Mr. Bishop also indicated that he had a matter in the Court of Appeal. Mrs. Linda

Wright vigorously opposed the application alleging, among other things, that her client would suffer severe hardship.

2. I refused the application because : the matter was of some vintage having been filed in June 2016, all relevant affidavits had been filed, Mr. Bishop had until now elected to act on his uncle's behalf, and an adjournment would further exacerbate the hardship which Miss Wright complained of. I therefore adjourned to the 30th November 2017 and indicated to the parties that, having read the affidavits, it did appear to be a matter which really ought to be settled.
3. On the 30th November 2017 Mr. Bishop arrived at 11:00 a.m. and the hearing commenced. He indicated that no settlement had been arrived at. His client however was not contesting the claim to 50% of the matrimonial home. Only the claim to an interest in the other properties would be disputed.
4. The Amended Fixed Date Claim is in respect of:
 - a. 50% interest in the family home at 7 Musgrave Close Kingston 10 being land registered at Volume 1200 Folio 302 of the Registrar Book of Titles.
 - b. The Respondent is to be solely responsible for the discharge of mortgages obtained from the National Commercial Bank on the 21 July 2003, 19th July 2004 and 26th October 2006.
 - c. An Order for Sale with the usual directions is sought with respect to the matrimonial home.
 - d. A claim to joint ownership in property at Lot 38 West Bay Portmore being land registered at Volume 1208 Folio 319 of the Register Book of Titles.
 - e. A claim to joint ownership of property at Lot 1306 Braeton New Town, St. Catherine being land registered at Volume 1146 Folio 15 of the Register Book of Titles.

- f. Orders for Sale with the usual directions are also sought with respect to these 2 properties.
 - g. A Claim for an account and/or an enquiry in respect of rental from apartments at Lot 38 West Bay.
 - h. A claim to 50% of the net proceeds of sale from property jointly owned situated at Lot 290 Ensom Acres registered at Volume 1189 Folio 900 of the Register Book of Titles.
 - i. An Order that the time to apply for Orders be extended pursuant to section 13 (2) of the Property (Rights of Spouses) Act.
5. The Applicant and the Respondent were the only two affiants in the matter. Each was extensively cross-examined on their respective affidavits. At the end of the day, and predictably so, the factual matrix was not difficult to decipher. Indeed, it is fair to say that notwithstanding many denials in his affidavit, the Respondent's oral evidence often times coincided with the Applicant's.
6. The Applicant's evidence paints a picture of a relationship that commenced when both parties were very young. It is a story of her going abroad and working whilst assisting her partner financially. This enabled him to complete his degree. Later he pursued further studies also with her assistance. They both commenced a business venture. Mr. Harris (the Respondent) produced and sold pharmaceutical products. Mrs. Harris (the Applicant) assisted with purchasing raw materials. At some stage, the business was registered as a company. The Respondent had 30% of the shares and the Applicant had 25%. There were 3 other shareholders owning 15% each.
7. The parties eventually married and the union produced 3 children. The first child was born while the Applicant was still residing in the United States. Eventually she returned home to work in the pharmacy alongside her husband. She maintains that the Respondent had no other

employment or source of income but the family business – a pharmacy. He denied this on affidavit. There was at some point in time, around 2001, a change in the business name. This was due to issues with the public health department. All the properties, the Applicant alleges, were purchased with earnings from their jointly owned business. There was one occasion also when the Applicant's mother assisted financially.

8. The Respondent, in an affidavit dated the 8th February 2017, says that he could not recall any financial support from the Applicant while he was studying. He does however admit she was working in a bank in the United States. He admits the division of shares in the company. He denies that the Applicant did all the initial purchases overseas and stated that he also did purchases using his credit card. He admits that upon her return the Applicant worked in their pharmaceutical business. Importantly he asserts that he bought property (the West Bay property Volume 1208 Folio 319) from his own funds and not from any income from the pharmaceutical business. He admits there was a change of name of the business but says it was in the year 2000. He denied the Applicant's assertion that she worked for a long time in the business without remuneration. She enjoyed, he said, debit, credit cards and chequing accounts to pay her personal bills and expenses. With regard to the Ensom Acres property he stated that the Applicant's name was added based on advice given at the time. Upon the premises being sold she was given US \$5,000. Some of the proceeds of sale were used to assist with their daughter's university education and travel.

9. As indicated earlier, both parties were extensively cross-examined. It is however the cross examination of the Respondent which has been most revealing. I will demonstrate with some detailed extracts from the evidence:

“Q: when you met Mrs. Harris [you] attended Utech/Cast.

A: yes

Q: 18 years old

A: yes

.....

Q: You were boarding on the same road she was living

A: yes

Q: she was 16

A: not sure of her age.”

Later,

“Q: While you at CAST. She worked at CIBC.

A: Yes

Q: How many years at CAST.

A: 3 years

Q: While at CAST relationship started

A: Yes

Later,

Q: Where did the money come from to service that loan from BNS.

A: The rental income from Braeton and Garveymeade we were living at Musgrave Mews by 1990. I worked with different places as counsel member of Pharmaceutical Society. I got a stipend. As President, I also got an honorarium from time to time.

Q: What is that?

A: up to \$20,000 per month for honorarium

Q: How long you president

A: 6 years.

Q: would you receive that for 6 years

A: some of the years

Q: same amount

A: I set it at \$20,000

Q: I also had a sound system play from time to time. I also did part time work in pharmacies.”

Later,

“Q: where did money come from to repay that \$800,000

A: I have passbooks which show I had savings accounts. Drawings from pharmacy. These sources could well pay for those loans.

Q: The salary you spoke about is re business

A: the business I was the pharmacist.

Q: what was the salary you get as pharmacist

A: on one occasion I employed a pharmacist. We paid her market rate. However my drawings was in region of \$100,000. That was well below market rate. Business could not pay more.

Q: This salary remained there or increased.

A: That was a base rate. My wife get \$50,000. We kept it at that. If we had to do other things it came out of the business account.”

Later:

“Q: You did say that after the business was formed Mrs. Harris did purchases in New York.

A: Yes

Q: from her pocket

A: no, she ordered stuff, or if she paid she would be refunded.

Q: she did not use any of her money that she was not reimbursed.

A: it is possible she did sometimes. I could recall that I did try to get foreign exchange from Jamaica to pay the bills. She bought a bottling machine for US\$1,200.”

Later,

Q: You mention mortgages on the title (Musgrave Property), 3 mortgages to NCB

A: Yes

Q: where did money come from to pay 3 loans

A: the business.”

Later:

“Q: so you made arrangements to pay

A: yes and come up with single payment offer
Q: Paid from business
A: yes, I did say that'

Later,

Q: Are you saying none of the mortgages company funds paid for them

A: Don't remember. Garveymeade I don't recall. Company funds were not used to pay mortgages. My drawings or salary could sufficiently pay those amounts.

Finally in answer to the Court:

"J: There is evidence of Mrs. Harris working physically when apartments being built at West Bay.

A: I employed the appropriate people to do construction work. 3 floor entity. Thousands of blocks, tons of steel. Her brother worked on it. As a family we go on there and do work. But is not labour. We might move 100 blocks. But not there regularly. We went there as a family, 2 weekends. Mrs. Harris does work. If we have cleaning to do she chip in and do that. Is no construction work. I supervise work crew for entire project."

10. It is apparent, and I so find, that the parties met as teenagers. He was 18 years old and she 16 years old or thereabouts. Their relationship continued until they became husband and wife. At all times, they worked with each other for their common good and joint benefit. I find as a fact that Mrs. Harris assisted financially with Mr. Harris' education. I find as a fact also that in the nascent and later stages of the business she assisted with procuring supplies and worked in and for the business. She purchased equipment to assist in the venture. She worked long and hard often without remuneration. So did he. They managed at the same time to raise 3 children. The Applicant was the primary caregiver. The Respondent on the other hand was the provider. He also took most major business decisions. The acquisitions, like the child rearing, was a joint endeavour. It was clearly the understating that the earnings from their business

venture was used for the benefit of the family. The acquisitions similarly were for their joint benefit. The Respondent for most of the period had no other income except their jointly owned and operated business enterprise. As with many privately owned companies, its revenue and expense were indistinguishable from the personal revenues and expenses of the shareholders. Although there were three minor shareholders, it was the evidence of both Applicant and Respondent that these persons played a very minor role in the operation of the company while it existed. The company was really the joint business venture of the Applicant and Respondent and its resources were treated accordingly. I find as a fact that each purchase of property by the Respondent was done with resources taken from the company/business and was done on behalf of himself and the Applicant jointly. This was their joint intention.

11. The Applicant put it best in the course of her cross-examination:

“Q: did you personally make any payment with respect to the 1st Company.

A: yes cash and kind

Q: How much cash

A: Over period of time it was. I give \$2000, \$1500. He wanted things in the States before it was registered. It was operating. I was not then married to him. I put Mr. Harris name on my account at Bank of Nova Scotia Baron Plaza. We were living together. I used to pay bills and left money in account. If he ask me to get raw materials I do that.

Business was operating before registered. Put in money. I was not counting. In 1984 I put in US \$3,000 cash. Gave him that. He did not have a US visa. He call and ask me to do research for raw materials. I go by taxi and buy things from American, Canadian. I did that before he ever came to the United States. We were planning to live together. I was not pencilling how much money I gave him.

Q: you give him money generally.

A: yes when business started just me and him. Only when registered he bring in these people. He told me needed several people to have registered company. We operated it as 50/50. Just two of us doing all the work.”

And Later,

“Q: were you aware he got loan from Bank of Nova Scotia of \$240,000 to assist with development of the premises

A: Mr. Harris took loans from all different places to do construction. He would just say to me he taking mortgage. I would sign. I not going remember everything that happened. The loans were paid back from the business we generated. He worked nowhere else in business. And we bought things and sold. I drove miles to sell stuff and I raise 3 children.”

And later on:

“Q: premises at Braeton paid solely by Mr. Harris

A: not all the time. We contributed living together. He had a car. We had to buy food. Not counting. Pool funds. From we live in Port Antonio we do things together.”

And,

“Q: did you ever ask to be placed on the title.

A: yes. My husband always assure me he say why am I going on like him going thief me. He going make a will because everybody know. When I realise he having children outside marriage and I want my name on property, he say I going on as if he going rob me. He say even his relatives know that I have interest.

Q: you acquire any property outside apart from these you claim

A: No. All my life from I was 16 it was Mr. Harris. I worked from I was 16 with him, had children, worked in the business, even when he disappoint me I stayed with him.”

12. In the course of the hearing, Mr. Bishop applied for an adjournment so as to produce certain company documents. These were documents he had not yet seen but they were with his client and would require time to collate and adduce. The application was opposed. I refused the application and promised to state my reasons in the course of my judgment. I also refused permission to appeal that ruling.
13. It is manifest that the documents had been in existence and accessible to the Respondent at all material times. Given the nature of the issues and the content of the Applicant's affidavit their relevance ought to have been apparent. It was therefore not fair to grant an adjournment for that purpose at that stage. However, and as is apparent from the evidence, the documentation was unlikely to assist in a resolution of the issues. This was a private family owned company. It was not operated on any formal basis. The Respondent, with the Applicant's general concurrence, pretty much did as he wished with its resources. In this regard his reference to his "drawings" is very telling. "Drawings" is to my mind a euphemism for "borrowing from the till". The same is true of the Respondent's reference to taking "from the business account". It is therefore irrelevant whether the company showed a profit or a loss or whether it had large balances on its books or in its account sufficient to pay for any of these properties. The evidence discloses no other sustained or sufficient source of income for the Respondent. The company documents are therefore unlikely to affect my findings of fact one way or the other.
14. On the 1st December 2017, the Respondent having closed his case, I adjourned to the 19th December 2017 for submissions to be made. I ordered that written submissions were to be filed and exchanged on or before the 15th December 2017. At the resumed hearing, on the 19th December 2017, the Applicant's counsel and her client attended. Neither the Respondent nor his counsel was present. At 10:35 a.m. I heard very brief oral submissions from the Applicant's

counsel. She had very little to add to the written submissions already filed. She also made a correction to page 8 of the submissions deleting the reference to “1985/1986” and inserting instead “1983.” She also confirmed that there was no Order being sought in relation to the Applicant’s interest in the company.

15. The Applicant has applied for an extension of time in which to make the application (See Amended Fixed Date Claim and para 2 of her Affidavit dated the 23rd November 2017). Her reason for doing so is that more than 12 months elapsed after the parties separated on 24th September 2014 and, before the Fixed Date Claim was filed on 22nd June 2016. The Property (Rights of Spouses) Act (hereinafter referred to as the Act) provides:

Section 13,

“(1) a spouse shall be entitled to apply to the Court for a division of property.

- a. On the grant of a 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 wilful 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 period as the Court may allow after hearing the applicant.

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

16. There is no evidence before me that there has as yet been an annulment of the marriage or a dissolution/divorce. Therefore, the Applicant even if this

application is out of time may reapply within 12 months of the divorce. That being so it would be irrational to refuse permission to extend time. The Respondent has alleged no prejudice in consequence of the application being out of time. For these reasons, therefore I grant the application to extend time and do so to the date the Claim was filed.

17. In this matter, I accept the Applicant as a witness of truth. The Respondent's admissions, of his early difficulties obtaining a visa to visit the United States of America and that he had no regular alternate source of income, support the Applicant's assertions that while in the United States she assisted with the business in the early days and that it was jointly earned income that paid for the properties. Her oral evidence was mostly consistent with her affidavit. The Respondent on the other hand gave oral evidence which, unlike his affidavit tended to support the Applicant's assertions. The conclusion in law, given my factual findings, will not be difficult.

18. Section 14 (1) (b) of the Act provides:

“14 (1) Where under Section 13 a spouse applies to the court for a division of property the court may –

- (a) make an order for the division of the family home in accordance with section 6 or 7 ,as the case may require, or
- (b) subject to section 17 (2) divide such property other than the family home as it thinks fit taking into account the factors specified in subsection (2), or where the circumstances so warrant, take action under both paragraphs (a) and (b).”

Section 14 (2) provides,

“(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 circumstances which, in the opinion of the court, the justice of the case requires to be taken into account.”

Section 14 (3) provides,

“(3) 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
 - enables the other spouse to acquire qualification, or
 - 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.”

Section 14 (4) provides,

“(4) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.”

19. In the matter before me, the application of the law occasions no difficulty or embarrassment. The Applicant is entitled to the declarations claimed. In the first place, it was at all times the understanding between, and the agreement of the parties implied and expressed, that the properties the Respondent acquired were for their joint benefit. Secondly, the Applicant has contributed in many of the ways “contribution” is defined in the Act. She worked in and/or contributed to the business since its inception. She contributed to the Respondent’s acquisition of qualifications which enabled him to succeed in the business. She contributed also by raising the family and doing household duties. The Applicant even did physical work related to the improvement and/or maintenance of the properties.
20. When the Respondent used money he earned or appropriated from the business to purchase assets he was, in accordance with the joint intent of the parties, purchasing on behalf of himself and the Applicant. If, on the other hand, he was using company funds directly to do the purchase, then he was using jointly owned funds as the company was, *de facto* (if not *de jure*), owned jointly by the Applicant and Respondent.

21. In the final analysis therefore, and for the reasons stated, I propose to make an Order for a 50:50 division of the properties. I will also make Orders for Sale. I will make no order with respect to proceeds of sale of the property already sold. These proceeds were used, at least in part, to assist with the education of the children and at that time the Applicant acceded to the Respondent's handling of the proceeds. I will order an account of rental income collected subsequent to the date the parties separated. The parties will jointly bear any outstanding mortgages and costs related to the sale. Costs of the claim go to the Applicant, such costs to be taxed or agreed. I invite the parties to prepare a Minute of Order for my consideration a week from today.

David Batts
Puisne Judge
28th January, 2018