[2015] JMSC Civ. 236

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013/HCV 00627

BETWEEN	**SOPHIA HENRY-FAIRWEATHER**	**CLAIMANT**
AND	**LINCOLN FAIRWEATHER**	**DEFENDANT**
AND	**IN THE MATTER OF ALL THAT PARCEL OF LAND PART OF CLAREMONT IN THE PARISH OF ST. CATHERINE BEING LOT NUMBERRED SIX HUNDRED AND NINETY-FIVE (695) BLOCK NUMBER THIRTY-TWO (32) ON THE PLAN PART OF CLAREMONT AND REGISTERED AT VOLUME 1314 FOLIO 977 IN THE REGISTER BOOK OF TITLES.**	
AND	**IN THE MATTER OF THE PROPERTY (RIGHTS OF SPOUSES) ACT 2004.**	

Miss Audrey Clarke instructed by Judith M. Clarke and Company for the Claimant.

Philmore Scott and Mrs. Camille Scott instructed by Philmore H. Scott and Associates for the Defendant.

HEARD: 13 AND 23 January and 8 October, 2015

HIBBERT, J.

[1] Mrs. Sophia Henry-Fairweather, the claimant, seeks against Lincoln Fairweather, her former husband and the defendant herein, the following orders and/or declarations:

1) A Declaration that the property at Lot 695 Claremont in the parish of St. Catherine, registered at volume 1314 folio 977 of the Register Book of Titles previously (between 10th December, 2001 to 20th September, 2012 in the sole name of the Defendant is the family home of the parties.

2) A Declaration that the parties are each entitled to fifty percent (50%) interest in the said family home at Lot 695 Claremont, Old Harbour in the parish of St. Catherine.

3) A Declaration that in the event that the said family home has been sold or otherwise disposed of by the Defendant, without the consent and or knowledge of the Claimant, the Defendant is obliged to pay to the Claimant the sum equivalent to her 50% interest in the said property.

4) IN THE ALTERNATIVE a Declaration that the Claimant is entitled to an equitable interest in the property at Lot 695 Claremont Old Harbour in the parish of St. Catherine by virtue of her contribution to its upkeep and maintenance, and the course of dealings between the parties relative to the said property.

5) A Declaration that the property known as all that parcel of land at Lot No. 323 Royal Palm Drive, McGill Palms, Spanish Town, St. Catherine registered at volume 1389 Folio 831 in the names of the parties as joint tenants in now to be vested solely in the Claimant in consideration of her 50% interest in the property at Lot 695 Claremont, Old Harbour in the parish of St. Catherine having been sold/transferred by the Defendant on or about 21st September, 2012 for the total sum of about six million nine hundred thousand dollars ($6,900,000.000).

6) An Order that within forty-five (45) days of determination of the matter, the Defendant transfers to the Claimant his 50% interest in the property jointly owned by them at McGill Palms, Spanish town, St. Catherine.

7) An Order that the Registrar of the Supreme Court is empowered to sign all relevant transfer documents to give effect to the orders of the Court in respect of the Claim herein.

8) An Order that the Defendant pays the costs incurred by the Claimant.

9) Such further orders as seen just to this Honourable Court.

[2] The parties met in 2001 and later that year the claimant moved in and resided with the defendant at Lot 695 Block 32, Claremont, Old Harbour in the parish of Saint Catherine. This property was acquired in 1997 by the defendant and it was registered in his name solely. They got married on 25 May, 2001 and continued to live at the same premises.

[3] In 2005 the parties left Claremont and took up residence at premises owned by the Claimant's grandmother at Bois Content in Saint Catherine. The premises at Claremont was thereafter rented at a rate of fifteen thousand dollars per month.

[4] Later in 2005 the parties purchased property in their joint names at Lot 323 McGill Palms, Sydenham, in the parish of Saint Catherine. They, however, continued to live at Bois Content. The property at McGill Palms was also rented.

[5] In 2010 the relationship between the parties broke down and the defendant who was a member of the Jamaica Defence Force left the home at Bois Content and took up residence at Up Park Camp in Saint Andrew. The claimant remained at Bois Content for a while and subsequently moved into the premises at McGill Palms where she still resides.

[6] On 30 April 2012 the defendant filed a petition for the dissolution of the marriage and the decree nisi which was granted was subsequently made absolute.

[7] During the marriage the claimant who was a teacher obtained two loans from the Jamaica Teachers' Association Co-operative Credit Union using as collateral, with the defendant's consent, the title to the property at Claremont. The first loan in 2003 was for the sum of four hundred and ninety nine thousand, forty five dollars and thirty seven cents ($499,045.37). This was used to purchase a Toyota Hiace bus which was intended to be used by the parties. The bus was, however, stolen within two days after it was bought.

[8] The second loan was obtained in 2007 for the amount of four hundred and twenty seven thousand, five hundred and ninety one dollars and seventy cents ($427,591.70). This sum was used to purchase a Toyota Caldena motor car which was used by the parties. This motor car was purchased and registered in the name of the claimant's stepmother whose duty concession was used in the acquisition of the vehicle. The claimant asserts that the motor car was subsequently transferred to her and that she alone, with the assistance of other family members repaid the loans. The defendant on the other hand claims that the loans were repaid by the claimant from sums which he provided to her on a monthly basis.

[9] The parties also differed with regards to the reason for residing at Claremont and the arrangement for the rental of that property when they took up residence at Bois Content. The claimant stated that there was an agreement with the defendant that the

proceeds from the rental of the Claremont property would be shared equally between them.

The defendant stated that the reason for the claimant and himself residing at Claremont and then at Bois Content was for them to b able to purchase a home for them. He stated that he had always made it clear that the property at Claremont was his solely.

[10] The reason for the purchase of the property at McGill Palms was also the subject of dispute. The claimant asserted that it was never the intention of the parties that the property at McGill Palms should become the family home. She stated: "It was merely an investment to facilitate our desire to purchase our dream home in the future."
With this the defendant, however, disagreed and stated that the purchase of the McGill Palms property was intended for use as the family home.

[11] Another area of dispute between the parties concerned the assertion by the claimant that subsequent to their separation there was an agreement between them that in exchange for the claimant giving up her right to a portion of the proceeds of sale of the property in Claremont the defendant would transfer his interest in the property at McGill Palms to the claimant.

[12] The claimant asserted that after the parties separated they still retained cordial relations and that during discussions about the properties at Claremont and McGill Palms an oral agreement, as claimed, was reached. Consequent upon this, she stated, her legal representative prepared a draft agreement which was sent to the defendant for his signature. He, however, refused to sign it and caused his legal representative to respond saying that the claimant had no interest in the property at Claremont.

[13] The defendant, on the other hand denied that there was ever any discussion of an arrangement to transfer his interest in the property at McGill Palms in exchange for the claimant relinquishing her interest in the proceeds of sale of the property at

Claremont. He continued to assert that he had always exercised all rights as the sole owner of that property.

[14] At the commencement of the hearing the Attorneys-at-Law representing the parties informed the court that, as it concerned the property at McGill Palms, the parties were taking no issue and have agreed that each party is entitled to a fifty percent (50%) share in that property. What remained, therefore, concerned the proceeds of the sale of the property at Claremont.

[15] In paragraph 1, 2 and 3 of the claim the claimant asserted that the property at Claremont was the family home and accordingly she was entitled to fifty percent (50%) of the proceeds of sale.

[16] Section 6. - (i) of the Property (Rights of Spouses) Act (PROSA) states:

"6. - (i) Subject to subsection (2) of this section and section 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 the husband and wife have separated and there is no likelihood of reconciliation.

[17] The definition of the term "family home" is to be found in section 2. - (i) of the Act. It states:

> "family home" mans 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."

[18] It seems quite clear to me that an entitlement under section 6. – (i) of PROSA takes effect at the time of the grant of a decree of dissolution of marriage or nullity of marriage or on the termination of cohabitation. What therefore, if any, was the "family home" at the time when the parties separated in 2010 or when the marriage was dissolved in 2012?

[19] The definition of "family home" was analysed by Sykes, J. in his judgment which was delivered on 6 November 2007 in **Claim No. 2007 HCV 0327, Peaches Annette Shirley-Stewart v. Rupert Agustus Stewart.** In paragraphs 22 and 23 he stated:

"22. It is well known that when words are used in a statute and those words are ordinary words used in every day discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended. A harsh result does not necessarily mean that such a result was not intended. The Act was not conferring a general power to reorder property rights in all kinds of property owned by the spouses. The Act confines itself to the family home.

23. It should be noted that the adjective *only and principal* are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. *Only* means sole or one. *Principal* means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression *family residence.* Indeed, even

> the noun residence is qualified by the noun *family* which is functioning as an adjective in the expression *family residence*. Thus it is not any kind of residence but the property must be the *family residence*. The noun residence means one's permanent or usual abode. Thus *family residence* means the family's permanent or usual abode. Therefore the statutory definition of *family home* means the permanent or usual abode of the spouses.

These paragraphs were cited with approval by Phillips JA at paragraph 39 of her judgment in **SCCA No.37/2011 Delfil Weir v. Beverley Tree** delivered on 17 March 2014.

[20] Undoubtedly, between 2001 and 2005 the property at Claremont was the "family home" as it met all the requirements as pointed out by Sykes, J at paragraph 23. Upon the parties removal to Bois Content that home became their only family residence. Accordingly the property at Claremont ceased to be the only or principal family residence as they never returned to reside there. Based on the definition of "family home" the property at Claremont would also cease to be the "family home".

[21] Although the property at Bois Content became the parties' family residence it did not qualify as the "family home" as it was not owned by any of the parties. Similarly, the property at McGill Palms which I believe was initially intended to be the family home did not become the "family home" because, although it was owned jointly by the parties, they never together resided there.

[22] For the reasons stated, the property at Claremont could not have been the "family home" at the time of separation or dissolution of marriage; hence the provisions of section 6-(i) of PROSA could not apply to it.

[23] The claimant, in the alternative claimed an entitlement to an equitable interest in the property at Claremont by virtue of her contribution to its maintenance and upkeep and the course of dealings between the parties relative to the said property.

[24] Concerning her contribution to the upkeep and maintenance of the property at Claremont, the claimant made no mention of this in her first affidavit which was sworn to on 15 January 2013. In her second affidavit which was sworn to on 30 October 2013 she at paragraph 16 stated: "I regularly spent my own money to assist with the general maintenance of the home. I replaced a toilet and basin in the bathroom and made sure that the grounds were well kept among other things." At paragraph 17 of her first affidavit the claimant, however, stated that her financial means were "significantly less than those of the Defendant." Additionally, during cross examination she admitted that her "take home pay" per month was $18,555.76 and not $40,000 to $50,000 as she had previously claimed.

Having examined the affidavit evidence as well as the evidence elicited during cross-examination I find that the claimant was not in a position to, nor did she make any contribution to the upkeep and maintenance of the property at Claremont such as to give her an entitlement to an interest in the property.

[25] The course of dealings referred to in the alternative claim, from the evidence presented, would concern the alleged agreement to share the rent for the property, which is denied by the defendant. Even if her evidence was accepted, at paragraph 3 of her first affidavit she stated a reason for this. She said "It was agreed between the Defendant and me that the house at Claremont would be rented and we would share the proceeds equally between us since we were living at my grandmother's house without charge" (emphasis mine). This clearly could not give rise to the acquisition of an interest in the property.

[26] The other course of dealing mentioned in the evidence concerned the use of the title to obtain two loans. The first was to acquire a motor bus for their joint use. This was stolen shortly after purchase. The second loan was to purchase a motor car which

was used by both of them until 2012 when it was registered in the name of the claimant and used solely by her.

[27] The evidence disclosed that the claimant was permitted to use the title to the property to obtain the two loans because, as a member of the Jamaica Teachers' Association she was able to obtain the loans from Jamaica Teachers' Association Co-operative Credit Union Limited at concessionary rates. As stated before these loans were to provide funds for the purchase of two motor vehicles for their joint use. In my opinion this did not indicate, on the part of the claimant, an assertion of a right to an interest in the property, nor did it indicate a concession, on the part of the defendant, of the existence of such an interest. I find the evidence of the defendant to be, in all the circumstances, more credible and find that he had always asserted his sole interest in the property.

[28] I find therefore that neither the alleged contribution to upkeep and maintenance nor the course of dealings between the parties, whether singularly or collectively could create an interest in the property in favour of the claimant. This alternative claim must also fail. Accordingly the declarations and orders sought at paragraphs 1 to 4 of the Fixed Date Claim concerning the property at Claremont are refused. In keeping with the usual practice no order for costs is made.