



JUDGMENT

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
SUIT NO. FD 02188 OF 2005**

BETWEEN DORRETT MAUD RICHARDSON APPLICANT/RESPONDENT

AND ERNEST BERESFORD RICHARDSON APPLICANT/RESPONDENT

Heard : 18th May 2011, 9th February 2012.

Ms. Kemilee Mclymont instructed by Petermc and Associates for Mr. Richardson.

Ms. Marlene Uter, instructed by Alton Morgan & Co for Mrs. Richardson.

**MATRIMONIAL PROPERTY-CONSENT ORDER- WHETHER CONSENT ORDER
CONSTITUTES A CONTRACT BETWEEN THE PARTIES, IF SO IN WHAT TERMS-
PARTITION ACT-WHERE CONSENT ORDER PROVIDES REMEDY UPON DEFAULT OF
ONE PARTY'S OBLIGATION, WHETHER COURT ENABLED TO REOPEN THE
QUESTION OF SHARE OF ENTITLEMENT IN PROPERTY**

IN CHAMBERS

Mangatal J:

[1] The applications before me concern Mrs. Dorrett Richardson and Mr. Ernest Richardson who married each other on the 9th of November 1988. The property which is involved in the dispute is Lot 67 Cedar Gardens, Mandeville P.O in the Parish of Manchester, being the land comprised in Certificate of Title registered at Volume 1010 Folio 700 of the Register Book of Titles. The property was transferred to the parties as joint tenants on the 9th of September 1988, prior to the marriage. The parties commenced construction of a house on the land in 1989.

[2] Prior to the marriage, the parties had resided in England and in 1988 both moved to Jamaica. Mrs. Richardson is a Jamaican and Mr. Richardson is from Saint Vincent.

[3] The parties separated in 1995 and have been occupying different sections of the house since 1999.

[4] Mr. Richardson filed a Petition for Divorce on November 16, 2005 and on October 2, 2006, a Decree Nisi was granted. On November 28, 2006, Mrs. Richardson filed an application for maintenance against Mr. Richardson.

[5] On the 15th of June 2007, Mr. Richardson represented himself and Mrs. Richardson was represented by Mrs. Arlene Mcleod instructed by the firm of Alton E. Morgan & Co. A Consent order was entered as follows:

...by and with the CONSENT OF THE PARTIES IT IS HEREBY ORDERED :

- 1. That in contemplation of a maintenance order, Ernest Richardson hereby offers subject to provisions of paragraph 3 hereafter to transfer all his interest in the matrimonial home, situate at and being all that parcel of land part of Cedar Grove in the Parish of Manchester being the Lot numbered SIXTY-SEVEN on the plan of Cedar Grove aforesaid deposited in the Office of Titles on the 9th day of November 1961 of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and being part of the land comprised in the Certificate of Title registered at Volume 1010 Folio 700, to the Applicant/Respondent Dorett Richardson in satisfaction of all his present and future maintenance obligations and division of property rights entitlements.*
- 2. That the form of Instrument of Transfer shall be in accordance with the provisions of the Registration of Titles Act, in the form affixed hereto, and shall be deemed to be pursuant to section 9 of the Property (Rights of Spouses) Act.*
- 3. Upon the perfecting of the instrument of Transfer and prior to its registration the Respondent/Petitioner shall be paid by the Applicant/Respondent the net residue of all jointly owned matrimonial property assets agreed to be Five Million Dollars (\$5,000,000.00).*
- 4. The perfected instrument of Transfer shall not be delivered to the Applicant/Respondent until payment is made or sufficiently made or sufficiently and satisfactorily guaranteed by the Respondent.*
- 5. The Respondent/Petitioner shall be entitled to remain in the matrimonial home undisturbed for no more than three(3) years or until paid the agreed net residue of the matrimonial property assets in full.*

6. *That within twelve(12) months from the date of this Consent Order a commitment letter shall be provided to the Petitioner for the payment of the agreed net residue failing which the Respondent/Petitioner may apply under the Partition Act for a sale of the property to any third party.*
7. *The parties shall examine and determine the condition of the two(2), 1 bedroom flats located on the said property in the following manner:*
 - a. *To be inspected and examined by an independent third party Captain Barrington Smith or as agreed by the parties who will determine the repairs required and quantify the cost on or before the 1st of July 2007.*
 - b. *Both flats are to be repaired, refurbished and rented by the 1st of August 2007.*
8. *The expenses of furnishing or repairing both flats are to be borne by the parties equally, and the cost reimbursed to each from the rental income.*
9. *That the rental income from the flats are to be used; one to offset the expenses of the matrimonial home and the other to be used exclusively by the Applicant/Respondent for her maintenance.*
10. *In the event of the fulfilment of all the requirements by the Applicant/Respondent and/or by the Respondent/Petitioner, but there is failure, neglect, reluctance and/or refusal by either party to execute the Instrument of Transfer of the Matrimonial home, the Registrar of the Supreme Court shall be authorized to sign the said Instrument of Transfer and or all such documents necessary to effect the transfer of the said property.*
11. *That there be liberty to apply.*
12. *That there be no order as to costs.*

[6] Mrs. Richardson in her Affidavit evidence has stated that she was unable to raise a lump sum cash amount of \$5,000,000.00 and proposed to Mr. Richardson that she would transfer to him her interest in property owned by them both jointly in Saint Vincent in order that the value of her interest therein could be applied towards the satisfaction of the \$5,000,000.00 payment. Mr. Richardson did not find this proposal acceptable and has rejected it.

[7] On May 6 2009, Mr. Richardson filed a Notice of Application for Court Orders, which has since been amended, and supported by Affidavits. In the Amended Notice filed on April 26 2011, Mr. Richardson seeks, amongst other relief the following:

1. *That the property located at 67 Cedar Grove, Mandeville,....be sold pursuant to the Partition Act.(See Item 6 of the Consent Order).;*
2. *A declaration, pursuant to section 6 of the Property (Rights of Spouses) Act, 2004 that each party is entitled to one-half interest in 67 Cedar Grove...(the matrimonial home) and a severance of the joint tenancy proprietorship of the said property;*
3. *In the alternative, that the Respondent transfer her interest in 67 Cedar Grove....to the Applicant at a price to be agreed by the parties in court;*
- ...
5. *In addition to, or in the alternative, or in the interim that item 5 of the Consent Order is varied herein to allow the Applicant to permanently occupy and bear all the expenses associated therewith of the entire portion of the bottom half of the house located at 67 Cedar Grove..... to the exclusion of the Respondent, with the exception of the garage which is to be shared equally between both parties.....*

[8] Mrs. Richardson filed a cross-application on July 8 2009 contending that Mr. Richardson is not entitled to any such interest as claimed under the Property(Rights of Spouses) Act. Mrs. Richardson's application is pursuant to the Partition Act, and she claims that she is entitled to no less than a 75% interest, or alternatively, that she is entitled to at least a 90% interest in the property. She subsequently filed an application for variation of the Consent Order, but abandoned that application at the hearing before me. As I understand the position, Mrs.Richardson is now seeking to enforce the terms of the Consent Order, or alternatively, she seeks the relief which she claimed in the alternative to a variation of the Consent Order, as set out in her Amended Notice of Application for Court Orders, filed April 21 2011. The application seeks, amongst other matters, as follows:

IN THE ALTERNATIVE, THE APPLICANT DORRETT MAUD RICHARDSON seeks the following Orders:

1. *That the determination of the proportion of the ownership of the parties in the property situate at 67 Cedar Grove....be made pursuant to the Partition Act.*

2. *That pursuant to the Partition Act and the common law principles of equitable accounting, the interest of the Applicant herein in the property at 67 Cedar Grove....is not less than ...75% in the said property.*
3. *That the joint tenancy be severed and the parties shall hold their interest in the said property as tenants-in-common in such proportion as this Honourable Court deems just;*
4. *That upon the determination of the proportion of the respective interests in the said property, that the Consent Order entered on the 15th day of June 2007 be varied to allow either party herein 90 days within which to acquire the other's share of property_;*
5. *That in the absence of either party purchasing the other's share the Court makes an order for sale of the said property, pursuant to Clause 6 of the Consent Order entered on the 15th day of June 2007*
6. *That the Respondent is not entitled to exercise any proprietary rights over the said property including leasing and renting the said property, without the consent of the Applicant herein....*

[9] The question of exactly what relief is being sought by the parties in their respective applications has, I must say, been very confusing. Both parties have filed Affidavits and have been cross-examined. It is really in her written closing submissions that Ms. Uter, on behalf of Mrs. Richardson, at paragraph 22 indicates that, Mrs. Richardson having abandoned her application to vary the Consent Order, the determination of this matter therefore rests upon the interpretation of the Consent Order entered into between the parties on the 27th day of June 2007. Ms. Uter has gone on to identify the issues as follows:

- (a) What interpretation is to be accorded to the terms of the Consent Order, in particular, Paragraphs 1, 3 and 6 of the said Order. Alternatively,
- (b) Whether it can be inferred from the conduct and the contribution of the parties that there was a common intention that they share equally in the property at 67 Cedar Grove;
- (c) Whether Mrs. Richardson is entitled to a significantly greater interest than Mr. Richardson in the said property.

ARGUMENTS ON BEHALF OF MRS. RICHARDSON

[10] Counsel referred to the decision of Justice Roy Anderson in **Stockhausen v. Willis** , Claim No. HCV 2920 OF 2004, which involved an application to vary a consent order. Anderson J. stated:

It is settled that, as a general rule, an order arrived at by and with the consent of the parties to an action, where in effect, it embodies the conclusion of negotiations between the parties, the court will give effect to it and will not vary it.

[11] At paragraphs 27-30 (inclusive) of her written submissions, having referred to the terms of the Consent Order, in particular paragraphs 1,3, and 6, Ms. Uter argues as follows:

“ 27. The parties entered into binding agreement by way of the Consent. The terms of the Order set out their intentions and the method by which their agreement should be realized. The agreement entails the following, *inter alia*:

- (i) That Mr. Richardson would accept \$5,000,000.00 from Mrs. Richardson in settlement of his obligations and their property rights;
- (ii) That Mr. Richardson would transfer the property to Mrs. Richardson upon payment of the \$5,000,000.00.
- (iii) That if Mrs. Richardson did not pay the \$5,000,000.00 within a year of the agreement, Mr. Richardson should apply under the Partition Act to sell the property.
- (iv) Though the Order does not outline specifically that Mr. Richardson should get the \$5,000,000.00 from the sale of the property, that is the clear implication, based on the agreement between the parties.

28. The Consent Order provides that the sale should be pursuant to the Partition Act. Section 2(2) of the Partition Act provides:

For the purposes of this Act, an action for partition shall include an action for sale and distribution of the proceeds; and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Section 3 of the Partition Act provides:

In a suit of partition, where, if this Act had not been passed, a decree of partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

29. It is submitted that the terms of the Consent Order are binding on the parties and Mr. Richardson not having made an application to vary the Consent Order ought to abide by its terms by accepting \$5,000,000.00 from the sale of the property in full and final settlement of the matter.

30. It is further submitted that the Order clearly provides a remedy in the event the money was not paid within the year. Any delay in applying for an order for sale would be the fault of Mr. Richardson and Mrs. Richardson ought not to be accorded any blame if he failed to act as the Order provided.”

ARGUMENTS ON BEHALF OF MR. RICHARDSON

[12] In her submissions in reply on behalf of Mr. Richardson, Ms. McClymont, in paragraphs 2-9 (inclusive) submits as follows:

Stockhausen v. Willis

“ 2. The Applicant has relied on this case to support the submission that Mr. Richardson is bound by the terms of the Consent Order and should therefore accept the \$5 Million mentioned therein.

3. We submit that Mrs. Richardson is equally bound by the terms of the Consent Order and ought not to seek to vary the parties’ interest in the matrimonial home as an afterthought.

4. We further submit that the Consent Order must be read in its entirety and in the proper context to arrive at the correct interpretation. To this extent we submit that:

- a. Paragraph 1 of the Consent Order clearly states that “in contemplation of a maintenance order the Respondent/Petitioner, **Ernest Richardson hereby offers subject to provisions of paragraph 3** hereafter to transfer all his interest in the matrimonial home..... to the Applicant/ Respondent...” Consistent with his evidence Mr. Richardson offered to transfer his interest in satisfaction of any maintenance and division of property entitlements.
 - b. Paragraphs 3 and 4 provide that upon perfecting the Instrument of Transfer Mr. Richardson shall be paid the “ net residue of all jointly owned matrimonial property assets agreed to be \$5 Million and that the Transfer shall only be delivered after payment is made or guaranteed.
 - c. Paragraph 6 then gives Mrs. Richardson 12 months to provide a commitment letter for payment of the agreed net residue.
5. On a proper construction of the Order it is clear that the offer made by Mr. Richardson was **on condition** that Mrs. Richardson made or guaranteed payment of the agreed amount within 12 months. Mrs. Richardson having failed to meet the conditions necessary to trigger the offer ought not now to be able to benefit from her own default.
 6. Paragraph 8 of the Order also supports the presumption of equality as the expenses of furnishing and repairing both flats was to be borne equally by the parties. We invite the Court to find that the entire Order was so worded because at the time it was made there was no dispute between the parties as to their equal interests in the matrimonial home.
 7. We submit that Mr. Richardson ought not to be penalized for Mrs. Richardson’s inability to pay within the time given. Mr. Richardson also should not be required to apply to vary the Order when his offer was clearly conditional.
 8. We further submit that the contention by the Applicant at paragraph 15 of her submission that she is entitled to a 90% or no less than

75% interest in the matrimonial home is a blatant attempt to deceive the Court. The Consent Order states that the \$5 Million to be paid to Mr. Richardson was “the net residue” of his interest. At the time of the Order the property was valued at \$27 Million making his “net residue” an 18.5% interest in the property, without any consideration as to taxes and other outgoings payable on sale. This is a clear acknowledgement by both parties that Mr. Richardson’s interest was greater than 10% which Mrs. Richardson now seeks to have the Court award.

9. In the event that the Court is minded to find that Mr. Richardson is bound to accept \$5 Million we invite the Court to consider that interest would have accrued on those sums that remain unpaid.”

RESOLUTION OF THE ISSUES

[13] In my view, it is correct that the parties are bound by the terms of the consent order. It is clear that a judgment or order given or made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. This would be grounds such as where the judgment or order is obtained by fraud, misrepresentation, non-disclosure of material facts, and other such grounds upon which an agreement may be invalidated. In this case, the Consent Order represents a true binding contract between the parties commanded by and bearing the imprimatur of the Judge. The fact that the order contained the term “liberty to apply” does not provide the Court with carte-blanche to recreate or restructure what the parties have agreed, Those words inserted in this type of Consent Order do not enable the Court to deal with matters that do not arise in the course of the working out of the Judgment. They do not give the Court power to alter the agreement and to reopen the question of the parties’ respective entitlement to the property. The Consent Order was not rendered any less final because of the inclusion of the words “Liberty to Apply”- see S.C.C.A. No. 129 of 2002, **Causwell v. Clacken** , judgment delivered 18 February 2004.

[14] The terms of the Consent judgment embody the parties’ agreement as to not only how their property dispute would be dealt with, but also it represents a compromise of Mrs. Richardson’s application for maintenance. It was agreed that, in consideration of Mrs. Richardson paying to Mr. Richardson the sum of \$5M or providing a satisfactory undertaking covering payment within 12 months of the date of the Consent Order in respect of Mr.

Richardson's deemed net residue of all matrimonial property assets, Mr. Richardson would transfer to Mrs. Richardson all his interest in Lot 67 Cedar Grove. This transfer was to be in respect of both Mrs. Richardson's property entitlement, as well as any maintenance which she may have been entitled to claim. However, this is not all that the parties negotiated, contemplated and arrived at an agreement or compromise upon. They also agreed as stated in paragraph 6 of the Consent Order that:

“... within twelve (12) months from the date of the Consent Order a commitment letter shall be provided to the Petitioner for the **agreed net residue, failing which the Respondent/Petitioner may apply under the Partition Act for a sale of the property to any third party.**

(My emphasis).

[15] In my judgment, it is clear that what the parties agreed is that in default of Mrs. Richardson providing the commitment letter, Mr. Richardson was at liberty to apply to have the Court order the property sold pursuant to the Partition Act so that he could recover the \$5M which was agreed to be the net residue due to him.

[16] In paragraphs 215, 216 and 221 of the **Halsbury's Laws of England**, Volume 39(2) (Reissue) **Real Property**, the learned authors state that the term “partition” is applied to the division of land belonging to co-owners and the allotment among them of the parts so as to put an end to community of ownership. The Court can order a sale of land in lieu of partition under the Partition Act. Indeed, our sections 2 and 3 of the Partition Act expressly so state. At paragraph 221 of the **Halsbury's**, the terms of upon which partition can take place are discussed. The paragraph states that if one of the terms of a partition is a lump sum, then the rights and liabilities as to payment devolve as for unpaid purchase money on a sale.

[17] It may well be that with other types of division of proceeds of sale under the Partition Act , interest on any lump sum would attract interest at a commercial rate. However, in this case, although Counsel for Mr. Richardson did suggest that if the Court took the view that what Mr. Richardson is entitled to is the \$5 M, interest should be awarded, no evidence as to appropriate rates, commercial or otherwise, was led. Further, in light of the relationship between the parties, I think it is in all the circumstances appropriate to limit interest to the rate available on judgment debts over the relevant period. As regards the appropriate period, whilst Mrs. Richardson ought to have paid over the \$5 M within 12 months of 15 June 2007,

Mr. Richardson also delayed somewhat before making his application on the 6th of May 2009. I am minded to award interest from the date of Mr. Richardson's application.

[18] In light of the view which I have taken as to the true effect and purport of the Consent Order, I have not dealt with the alternative arguments to do with the parties' respective entitlements to a share in the property under the Property (Rights of Spouses) Act as sought on behalf of Mr. Richardson. Nor do I think it appropriate to reopen the question of Mrs. Richardson's percentage entitlement as sought by her in the alternative to enforcement of the Consent Order. The Consent Order was a final order and subsumed such earlier issues. I would add that although there has been some evidence that the property has not attracted many interested buyers and may therefore prove difficult to sell, this makes no difference to the fact that the parties had agreed to ask for an order for sale under the Partition Act.

[19] It is common ground that for many years the parties have occupied different sections of the house. Mrs Richardson has been in occupation of the upstairs section whilst Mr. Richardson has occupied the bottom half. The garage area was shared by the parties. Under paragraph 5 of the Consent Order the parties agreed that Mr. Richardson would be entitled to remain in the matrimonial home until paid the agreed net residue in full. However, in an Affidavit filed in May 2011, Mr. Richardson indicated that he had since moved out of the matrimonial home and back to Saint Vincent in order to be closer to his family. He however wishes to rent the portion of the property that he previously occupied but Mrs. Richardson will not consent to such a course. In my view Mr. Richardson's right to remain in occupation had a value. If he chooses not to occupy the premises but to instead rent them to a tenant, I think that it is fair to permit him to do so. Had Mrs. Richardson paid the sum of \$5M as agreed this right would have been extinguished. Additionally, the evidence is that the two portions of the house are quite self-contained and therefore the presence of a tenant on the bottom portion ought not to disturb Mrs. Richardson unduly.

[20] In my judgment, it is appropriate to make the following orders:

(a) That pursuant to the Consent Order made on the 15th day of June 2007, and to the Partition Act, it is hereby ordered that Lot 67 Cedar Grove, Mandeville, in the Parish of Manchester, being all that parcel of land registered at Volume 1010 Folio 700 of the Register Book of Titles, be sold.

- (b) The Respondent/Petitioner Mr. Richardson is entitled to a lump sum of \$5,000,000.00 to be distributed to him from the proceeds of sale. Further, Mr. Richardson is entitled to also have distributed to him from the said proceeds of sale, interest on the \$5,000,000.00 at the rate of 6% per annum from the 6th of May 2009, to the date of payment over.
- (c) All the rest and residue of the proceeds of sale are the entitlement of the Applicant/Respondent Mrs. Richardson and are to be distributed to her.
- (d) In the event that either party fails, neglects, or refuses to sign the requisite documents for effecting and completing the sale of Lot 67 Cedar Grove, the Registrar of the Supreme Court shall be authorized to sign all such necessary documents.
- (e) Mr. Richardson is at liberty either to occupy or to rent or lease the bottom portion of the house to a tenant until the sums referred to in sub-paragraph (b) above have been paid to, or distributed to him.
- (f) Liberty to apply.
- (g) No order as to costs.