SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 OF 2004

BETWEEN:

CORNELIUS CHARLERY

Appellant

and

CELILIA FITZ CHARLERY

Respondent

Before:

The Hon. Mr. Brian Alleyne, S.C. — Justice of Appeal
The Hon. Mr. Michael Gordon, Q.C. — Justice of Appeal
The Hon. Madam Suzie d'Auvergne — Justice of Appeal [Ag.]

Appearances:

Mr. Alvin St.Clair for the Appellent
Mrs. Lydia Faisal and Mr. Richard Frederick for Respondent

2004: October 18;
November 23.

JUDGMENT

[1] d'AUVERGNE, J.A. [AG.]: The Appellant, Cornellius Charlery and Respondent Cecilia Fitz Charlery were married on the 4th October 1995 in Florida U.S.A .

[2] The Appellant was then an electrician employed with Sandals Halcyon, St. Lucia in the maintenance department. The Respondent was then and still is a Cosmetologist.

[3] The Respondent filed for dissolution of the marriage which was granted on the 16th of December 2002. Subsequently the Appellant filed for ancillary relief and judgment was given on 11th June 2004.

[4] The Appellant is dissatisfied with the decision and has filed this appeal. The portions of the judgment with which the Appellant disagrees [from which the Appellant appeals] read as follows:

[a] The land at Marigot known as Parcel 137 Block 0643 in the Land Registry is the separate property of Cecilia Fitz Charlery.

[b] The land at Monier, Gros Islet known as Parcel 325 Block 1450B in the Land Registry and the house thereon are the separate properties of Cecilia Fitz Charlery.

[c] The Respondent is entitled to 1/5 share in the profits of the firm Cecilias Hair design and Beauty Supplies for the period commencing 24th March 1999 to the 7th June 2000.

[d] The furniture items namely, a computer, 2 sets of sofas, a table and chairs, 2 large television sets, a refrigerator, a deep freezer, a stove, electrical oven, microwave, 4 beds and a chest of drawers are declared to be the property of the Respondent who must remove them from the matrimonial home within 3 weeks from the date of delivery of this judgment.

[e] The Respondent is to return the lap computer, that he removed from the matrimonial home, to the Petitioner within 3 weeks from the date of delivery of this Judgment.

[5] The grounds of Appeal are:

[a] That the learned Judge erred in finding that the whole of the evidence was such that the Marigot property and the Monier property including the house was that of Mrs. Charlery with little or no contribution from Mr. Charlery.

[b] That the learned Judge erred in finding that the whole of the evidence supported the conclusion that the Marigot and Monier properties should be awarded to Mrs. Charlery.

[c] That the learned Judge erred in finding that Mr. Charlery's contribution was not substantial enough to warrant a share in the Marigot and Monier properties and the business.

[d] The learned Judge erred in finding that Mr. Charlery was not a part of the business prior to 1999.

[e] That the decision is against the weight of the evidence.

Facts

[6] The parties lived together as man and wife prior to the marriage but there is conflicting evidence as to when cohabitation commenced. The Respondent states that it was from the year 1994 whereas the Appellant insists that it was from 1991.

[7] A solicitor's letter tendered as an exhibit shows that the Respondent had parted form her previous paramour in 1990. This being so, it is more likely that they met and started cohabitation in 1991. Moreover it is not disputed that the Respondent became gravid and miscarried in 1992. In my view this is another indication that cohabitation began in 1991/1992. I therefore affirm the trial Judge's finding of fact that cohabitation commenced in 1991/1992.

Land at Marigot

[8] Both parties agree that the vendors of the parcel of land known as Block 0643 B Parcel 37, had a policy to sell their land only to past employees and occupiers or their family members. It is significant to note that the Respondent's family lived and still lives on the land. Her grandmother qualified under the said vendor's policy for purchase of the land and commenced payment. She paid an initial deposit of $600.00 but because of her impecuniosity. The Respondent completed payment and the Deed of Sale was executed on the 10th of November 1992. A perusal of that Deed clearly shows the Respondent as the purchaser. She said that her grandmother was paid whatever monies she had expended towards the

purchase price yet the matter later became a subject of litigation. When the parties met the Appellant was unemployed. The only means of livelihood of the parties was the business known as Cecilia's Hair Design, which the Respondent had started in 1990. The land was bought for $1,647.37 and measures 8,236.86 sq ft.

[9] The Appellant claims that the purchase price was paid from their pooled resources and that it was their intention to build their home on that land but because of the attitude of Respondent's family they changed their minds about doing so. The Respondent contradicts this statement, she said that the Appellant "only became aware of it by virtue of his involvement until later".

The Monier Matrimonial Home

[10] The Monier property which was the Matrimonial Home is situated on Block 1450B Parcel 325 in the quarter of Gros Islet. The Deed of Sale dated 29th August 1995 records the Respondent, as the purchaser, Cosmetologist and single woman.

[11] There is also documentary evidence that the Respondent paid a deposit of $5000.00 cash on the 30th May 1994 another $5000.00 cash on the 20th of August 1995 and the balance of the purchase price namely $27,000.00 on the 24th August 1995. The land measured 7186sq ft. It is instructive to recall that the parties were married on 4th October 1995.

[12] The Appellant commenced working at Sandals on the 9th of May 1994 and his salary from that date was paid into an account at Royal Bank Account No.5001284 an account that both parties utilized. The Respondent states that it was for paying miscellaneous bills, whereas the Appellant states it was for financing the different properties bought during the period of cohabitation and eventually the marriage.

[13] The property was mortgaged and the loan obtained was used to build a home which was the matrimonial home. The Appellant agrees that the loan and mortgage were in the name of the Respondent but states that they were finalized at the time when he "was undergoing training" in Jamaica which was paid by his employer. The Respondent denies Appellant's involvement with the Deed and Mortgage but agrees that he had an input in the extension of the house. The Respondent insists that the land and house were purchased as separate property.

The Business

[14] The Appellant does not refute that Cecilia's Hair Design started before they met but insists that they were equal partners and that he was not a silent partner. He deposed to the following "the business took off only when the two of us came together."

[15] The Appellant deposed in his various affidavits to the amount of physical effort he exerted in the business. He said "whenever we were forced to relocate the business I was the one who did mostly everything given my background in maintenance. And when the salon began to prosper and become involved in, not only the provision of Cosmetology services but also the purchase and supply of beauty supplies. I was integrally involved in the salon business in clearing products from customs, restocking the salon, checking the books for the salon, making sure there was water for which we had to install two water tanks at the Brazil street location."

[16] The parties both agree that a branch of the business was opened at Soufriere. The Respondent states that she transferred one of her staff from Castries to Soufriere and in addition hired another lady from Soufriere, that the two of them operated the salon whilst the Respondent was expected to oversee and generally manage it. She said "the business failed miserably and the Respondent did not live up to his promise to manage and oversee…I paid the Respondent (Appellant)

the sum of $900.00 per month from the business for the assistance that he rendered at the time." The Appellant became a partner in the business from 24th March 1999 when it was registered as a firm under the name "Cecilia Hair Design and Beauty Supply". However the Respondent states that "because of the extent of the services offered, I was advised by my accountant to register the business as a limited liability company. The Certificate of Incorporation is dated 7th day of June 2000.

Issues

[17] The issues to be determined are firstly whether the Marigot and Monier properties including the business are indeed the separate property of the Respondent. Secondly, even if they are separate property whether the Appellant is entitled to any share.

The Law

[18] Article 1189 of Civil Code of St. Lucia hereinafter referred to as the Civil Code provides:

> "Community commences from the day the marriage is solemnized. The parties cannot stipulate that it shall commence at any other period."

[19] Article 1192 provides:

[1] The property of persons married in community is divided into separate property and the property of the Community.

[2] Separate property comprises

[a] the property movable and immovable which the spouses possess on the day when the marriage is solemnized:

[b] the income and earnings of either spouse, investments in the name of one spouse, and insurance policies taken out on the life and in the name of one spouse;

[c] property movable and immovable acquired by succession or by donation or legacy made to either spouse particularly;

[d] compensation payable to either spouse for damages resulting from delicts and quasi-delicts, and the property purchased with all funds thus derived; and

[e] fruits, revenues and interest of whatever nature they be, derived from separate property, the proceeds of separate property, and property acquired with separate funds or in exchange for separate property.

[3] Property which is acquired by the husband and wife during marriage in any manner different from that above declared to be property of the Community.

[20] Article 1193 provides:

"[1] Property is deemed to be the joint acquisition of the Community unless it is admitted or proved to have belonged to, or to have been in the legal possession of one of the spouses previously to the marriage, or if acquired after marriage, is admitted or proved to have been acquired in one of the ways set out in Article 1192 or to otherwise belong to one of the spouses only.

Provided, however that where property is acquired by one of the spouses while they were living separate and apart from each other by virtue of a separation deed, such property is presumed to be the separate property of such spouse unless it is admitted or proved to be Community property.

[2] Where spouses purchase property in their joint names such property falls into the Community unless it is expressly stated at the time of the purchase that they were purchasing with their separate funds."

[21] Article 1194 provides:

"Income and earnings are the separate property of that spouse from whose sole labour they came, without prejudice, nevertheless, to the liability of the spouses to contribute towards the education and the support of the children and the expenses of marriage".

Separate Property

[22] It is pellucid that the Marigot land and Monier land are the separate property of the Respondent. The contract for the purchase of the house is made out in Respondent's name and is dated 23rd of June 1995. The payments of the said loan for the house were completed within a year and during the subsistence of the marriage but I am satisfied that the Respondent paid the entire transaction out of monies obtained from her sole labour. I therefore affirm the trial Judge's finding.

[23] There is much documentary evidence of different bank accounts and of two vehicles being bought which were paid from the various accounts noted in the judgment of the trial Judge. (I will deal with this aspect later in the judgment).

[24] The Appellant by the order sought is claiming an equal share in the Marigot land but by paragraph 15 of his last affidavit filed on the 4th of February 2004 he deposes "with respect to the property at Marigot I still maintain that the property was purchased by the Petitioner and I, but I have agreed, on account of the fact that her family, are indeed fighting the Petitioner for the property, not to pursue any further claims on the property as long as I am given my fair share of the other properties the petitioner and I purchased".

[25] Section 45 (a) and (b) of the Divorce Act provides for the Court to make an order with regards to property on the application of either party:

[a] If any property of the parties is Community property within the meaning of the Civil Code:

[i] directing that either party shall, for such time as to the Court may seem fit, be entitled to the use or usufruct of a part or the whole of such property"; or

[ii] declaring either party forfeit to the other of his or her share of a part or of the whole of such property; or

[b] if any property of the parties or of either of them is separate property within the meaning of the Civil Code and the Court is satisfied that the other party has made a substantial contribution (whether in the form of money payments or services, or prudent management or otherwise however) to the improvement

[i] directing the sale of such property and the division of the proceeds after the payment of the expenses of the sale, between the parties in such proportions as the Court thinks fit"; or

[ii] directing that either party pay to the other such sum, either in one sum or in instalments and either forthwith or at a future date and either with or without security, as the Court thinks fair and reasonable in return for the contributions made by that other party.

[26] Counsel for both the Appellant and Respondent went through the celebrated cases of Pettit v Pettit [1969] 2 AER 385 and Gissing v Gissing [1970] 2 All ER 780 and Kowakzuk v Kowakzuk [1973] 2 All E R 1042. There can be no dispute that the principles laid down in the above cases are the ones to be applied in determining whether, in the absence of an express agreement, the Appellant has a beneficial interest in the properties which were registered in the Respondent's name only and to which she alone had the legal title.

[27] The many cases decided on this point show that the Appellant can only succeed in a claim of having a beneficial interest in the properties if (1) he can prove that there had been a discussion or an agreement of understanding that he would be given a share; that in the absence of such common intention then the law of trust would come into operation.

[28] The Appellant has said that he contributed to the purchase of the lands, and that such contributions gave rise to a resulting, implied or constructive trust.

[29] An application of the facts of the case to the principles of resulting implied or constructive trust shows that the Appellant does not qualify. The finding of the learned trial Judge is affirmed.

[30] It is indeed a question of fact whether the appellant's contribution to the operation of Cecilia Hair Design was sufficiently substantial to justify the inference of a common intention that the beneficial interests should be shared and that he acted on the basis of that common intention to his detriment.

[31] The trial Judge has said that she accepts the Respondent's testimony concerning how the purchase price for both properties were financed. While it is true that this matter was decided on only affidavit evidence and the Judge did not have the opportunity of appreciating the demeanour and credibility of the parties, the judgment has not been shown to be affected by material inconsistencies or inaccuracies or that the Judge has failed to appreciate the weight of the evidence or was plainly wrong. This being so I accept the finding of the trial Judge and see no reason to disturb it.

[32] The trial Judge found that the Appellant was adequately compensated for his contributions. He was paid for his services both in cash (managing the Soufriere branch) and in kind by the purchase of a vehicle and the maintenance and final payment on his pickup van.

[33] The trial Judge accepted the testimony of the Respondent that the monies in Account No.500 1284 was used for paying miscellaneous bills including the maintenance of the Appellant's child and household expenses.

[34] The appeal is dismissed. The order of Justice Ola Mae Edwards is affirmed in its entirety.

[35] These being matrimonial proceedings and the parties being of limited financial means, I make no order as to costs.

Suzie d'Auvergne
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal