

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(DIVORCE)

BVIHMT 2006/0014

BETWEEN:

RAISHAUNA WHEATLEY

Petitioner

AND

LAWRENCE WHEATLEY

Respondent

Appearances:

Ms. Susan Demers of Price-Findlay & Co. for the Petitioner/Applicant

Mrs. Tana'ania Small-Davis of Farara Kerins for the Respondent

2006: November 3rd, 8th, 17th

JUDGMENT IN CHAMBERS

(Family law – divorce – ancillary application by wife seeking discovery of credit card statements from husband who is an additional cardholder on his mother's account and discovery of documents relating to husband's inheritance - whether husband entitled to refuse discovery because a third party is involved – whether discovery is relevant to determining the application for ancillary relief – Matrimonial Proceedings and Property Act, 1995 – Matrimonial Proceedings Rules 1997)

[1] JOSEPH-OLIVETTI, J: This is an application for discovery and directions in aid of a claim for ancillary relief in divorce proceedings. I gave an oral decision on the 8th November, but as some interesting issues arose I thought full written reasons might prove useful.

The Wife's Application for discovery

[2] The wife sought the following relief in her application¹ filed on 16th October 2006:-

- (i) an order that Mr. Wheatley furnish all statements of all credit card accounts held anywhere in the world in the name of Lawrence Wheatley, whether singly

or jointly held; Anegada Ventures Ltd and the Anegada Reef Hotel, from 2002 to present.

- (ii) an order that Mr. Wheatley furnish all documents and materials relating to Lawrence Wheatley's share of the estate of Lowell Wheatley.
- (iii) an order that Mr. Wheatley furnish all documents and materials relating to the income, financial resources, and assets of Lawrence Wheatley and the family assets of Lawrence and Raishauna Wheatley.
- (iv) an order that the proceedings be stayed until such time as Mr. Wheatley complies with the request for further information.
- (v) an order that Mr. Wheatley pay the costs of this application.

[3] Mr. Wheatley made some financial disclosure by exchange of letters between Counsel prior to the hearing of this application. Counsel for the Petitioner appeared satisfied with most of the information provided and so the only dispute before the court related to claims (i) and (iii).

[4] Mr. Wheatley, with respect to claim (i) says that he had no credit cards but was an additional cardholder on his mother's account, that she received statements and that she had refused to allow him access to them or their discovery. With respect to claim (iii) he says that his share in the estate of Lowell Wheatley, deceased, is to be paid, pursuant to a family arrangement, by way of a mortgage with Banco Popular and that he and his sister are the borrowers and therefore he cannot make discovery without his sister's consent.

¹ Supported by the Affidavit of Mrs. Margaret Price-Findlay

Submissions

- [5] Counsel for the Petitioner in a nutshell submitted that the information sought in both claims was relevant and necessary to assist the court in determining the application for ancillary relief having regard to section 26 of Matrimonial Proceedings and Property Act 1995 (“the MPPA”). Counsel submitted in particular that the credit card statements are relevant to show the standard of living the parties’ enjoyed prior to the breakdown of their marriage, a matter the court is specifically mandated to take into account and so to with the inheritance which is a benefit Mrs. Wheatley will lose the chance of acquiring or sharing which falls squarely within section 26(h) of the MPPA. Counsel referred the court to several authorities including **Robinson v Robinson**², **Livesey v Jenkins**³, **Hughes v Hughes**⁴, **Vanterpool v Vanterpool**⁵
- [6] In reply, Counsel for the Respondent submitted in brief, that Mr. Wheatley did not have a duty to make disclosure as requested as the information sought was irrelevant. Counsel relied on **White v White**⁶ which held that on applications for ancillary relief a distinction must be made between family assets i.e. assets acquired by the parties’ efforts during the course of the marriage and assets acquired by one party by gift or by inheritance and that assets acquired by inheritance would only be taken into account in certain circumstances. Counsel urged that the inheritance ought not to be taken into account in these circumstances as the marriage was of short duration (3 years) and that Mr. Wheatley came into his inheritance after the decree nisi was granted. Therefore, Mrs. Wheatley did not have any right to share in the inheritance and accordingly, disclosure concerning the

² [1982] 2 All ER 701

³ [1985] 1 All ER105

⁴ [1995] 45 WIR 149

⁵ Suit No. 29 of 1999, BVI High Court, Civil

inheritance ought not to be made. Further counsel submitted that Mr. Wheatley's sister was a party to the family arrangement on the inheritance and that disclosure ought not to be ordered without her consent.

- [7] With respect to the credit card statements Counsel submitted that Mrs. Vivian Wheatley (the husband's mother) had refused to consent to the disclosure of the statements and that Mr. Wheatley could do nothing about that. Counsel also submitted that this information was irrelevant.

The Law

- [8] Rule 61 of the Matrimonial Proceedings Rules 1997 states that:- *'any party to an application for ancillary relief may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party apply to the judge for directions'*.
- [9] Further Rule 60 (4) provides:- *'at the hearing of an application for ancillary relief the judge shall, subject to rule 62, investigate the allegations made in support of and in answer to the application, and may take evidence orally and may at any stage of the proceedings, whether before or during the hearing, order the attendance of any person for the purpose of being examined or cross-examined and order the discovery and production of any document or require further affidavits'*.
- [10] And Rule 62 (1) states:- *'the judge shall, after completing his investigation under rule 60, make such order as he thinks just'*.

[11] It is apparent from the foregoing that the court has wide powers to order a party to make disclosure for the purposes of ancillary relief and to even compel the attendance of any person for examination.

[12] The court in deciding whether to exercise its power to order disclosure under Rule 61 must first determine whether the information sought is relevant. In this regard section 26 of the MPPA is instructive. It provides that the court must consider the following:-

- a. **the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future,**
- b. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future,
- c. **the standard of living enjoyed by the family before the breakdown of the marriage,**
- d. the age of each party to the marriage and the duration of the marriage,
- e. the physical or mental disability of either of the parties to the marriage,
- f. contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home,
- g. any order made under section 49
- h. **the value to either of the parties to the marriage, of any benefit (for example, a pension) which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring.**

- [13] Further, the court is required to have regard to all the circumstances of the case to exercise its powers so as to place the parties, so far as is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each party had properly discharged his or her financial obligations and responsibilities towards the other. (See section 26 MPPA)
- [14] It is clear from these provisions that the court in exercising its powers to make ancillary relief orders must have regard to all the circumstances of the case and in this case sections 26 (a), (c) and (h) are particularly relevant to the substantial relief and therefore to this application.

Disclosure

- [15] It is well established that both parties are under a duty to make full and frank disclosure of all material facts to the court and that such disclosure is a crucial part of the investigative process in applications for ancillary relief. Unless the court is provided with correct complete and up to date information on matters which it is to have regard to it cannot properly exercise its powers as stipulated by section 26. See **Livesey v Jenkins [1985] 1 All ER 105**. If disclosure is not complied with the court is entitled to draw adverse inferences, though such inferences must bear a genuine relationship to the available assets. See **Hughes v Hughes [1995] 45 WIR 149**.
- [16] However, before the court can make an order for discovery certain requirements must be satisfied. First, the person against whom the discovery is sought must be a party to the proceedings. Here, disclosure is properly sought against Mr. Wheatley.

- [17] The next question is whether or not the documents are in Mr. Wheatley's possession, custody or power. Dunn J in the case of **B v B [1979] 1 All ER at para. H** states that 'possession means the right to possess a document, custody means the actual, physical or corporeal holding of a document regardless of the right to its possession e.g. a holding of a document by a party as servant or agent of the true owner, power means an enforceable right to inspect the document or to obtain possession or control of the document from the person who ordinarily has it in fact. The requirements of the rules are disjunctive in their operation, so far as possession, custody and power are concerned'.
- [18] Mr. Wheatley has said on affidavit that he will get an interest in Anegada Reef Hotel as a result of an agreement as to the division of his father's estate and that that interest is to be paid by way of a mortgage with Banco Popular commencing September 2006 and that he and his sister are the borrowers.⁷ Whether or not he has actual physical custody of documents relating to this inheritance, clearly Mr. Wheatley has a legal right to custody or at the least inspection of them and therefore for the purposes of disclosure he has power of these documents.
- [19] In a letter dated 3rd October 2006 from Mr. Wheatley's solicitor, it was stated that Mr. Wheatley is not a joint cardholder but an additional cardholder on his mother, Vivian Wheatley's account. He does not receive statements and his mother had declined to provide the statements for production.
- [20] At first sight one would think that the credit card statements are documents which he has a right to inspect thus giving him power over them but I am mindful that he must have a legal right to do that and in the absence of production of any contract with his mother and the

issuing bank or of any document to show the basis on which additional cardholders are facilitated, I cannot conclude that this is indeed so. Accordingly, I cannot order Mr. Wheatley to produce the statements neither can I order Mrs. Vivian Wheatley to do so as she is not a party.

[21] However, I must say that his mother's actions in refusing to disclose the statements strike me as unreasonable as her son is an adult and was married at the time and in sharing her credit card facilities with him she must have been prepared to give him full access to the statements for any purpose even if it was simply reconcile accounts. Having regard to the allegations, that he used credit cards, it would be unjust if the court has no information about this user - see exhibits MAPF1 and exhibit MAPF2. Accordingly it is proper for Mrs. Vivian Wheatley to be called to be examined on the additional credit card facilities she extend to her son and I will so order.

[22] The third requirement before an order for discovery can be made is that the documents requested must relate to the proceedings. In other words, they must be relevant. Having regard to section 26 of the MPPA and to the whole of the evidence⁸ it is clear that the documents mentioned in claim (iii) are relevant and will assist the court in determining the substantive application. It follows that Mr. Wheatley has an obligation to disclose all the documents relating to his share in the estate of Lowell Wheatley, deceased even if those documents are jointly held with others⁹.

[23] Accordingly, it is hereby ordered as follows:-

⁷ See Para. 7 – 1st Affidavit of Mr. Wheatley

⁸ See Affidavit of Raishauna Wheatley paras. 5 & 11,
See Affidavit of Lawrence Wheatley paras. 6, 7& 8

⁹ See Halsbury's, 4th Edition, Vol. 13 para. 60

- a. Mr. Wheatley shall disclose all documents and material relating to his share in the estate of Lowell Wheatley, deceased on or before 15th November, 2006.
- b. Mrs. Vivian Wheatley shall attend this court on Friday, 1st December, 2006 at 10:30 a.m. for the purpose of being examined on the credit card statements on the account held by her on which Lawrence Wheatley is an additional cardholder.
- c. Mr. Wheatley is to pay costs of \$1000.00, the costs of this application to Mrs. Wheatley.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands