SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SLUHMT 2004/0139

BETWEEN:

LARRY SCOTT

Petitioner

AND

MARY SCOTT nee HALL

Respondent

Appearances:

Mrs. Veronica Bernard for Petitioner
Mrs. Kim St. Rose for Respondent

……..
2007: October 25
November 23, 26
2008: March 4
……

JUDGMENT

Mason J

[1] When these parties got married in August 1982, they had no assets except for a parcel of land belonging to the Petitioner. They were a very enterprising and industrious couple who from 1983, almost immediately after marriage, and starting from scratch, ventured into business and made a success of it. They formed the company known as Scott's Limited in

1988. They eventually spread into a couple of the other islands – St. Vincent and Dominica.

[2] The evidence reveals that they both worked so relentlessly that they were able to build their matrimonial home without the benefit of any loans although a loan was subsequently secured using the house as collateral to finance the business. During the course of the business they purchased two (2) vehicles for both personal and business use.

[3] This couple has three (3) children: two (2) of whom are over the age of eighteen (18) (one son just reaching 18 on 5th January, 2008) but are both presently undertaking tertiary education.

[4] Marital differences arose in 2001 and the husband petitioned for divorce on 22nd December 2004. A decree nisi was granted on 15th April 2005 with leave for either party to apply for determination of ancillary matters. Such application was made by the Respondent who sought with respect to their property, firstly, an order for sale of the matrimonial home and an equal distribution of the proceeds after payment of the outstanding loan, and secondly, an audit of the St. Lucia business and after payment of all reasonable outstanding debts, an equal distribution of the remaining equity, or alternatively a lump sum payment to her. A request for determination of custody and maintenance of the minor sons (only one since the hearing of this application) as well as payment of her costs was included in the Respondent's application.

[5] The parties have essentially agreed to equal division of the property

MATRIMONIAL HOME

[6] The parties have both accepted that after payment of the loan secured by the property, the property should be sold and there ought to be an equal division of the proceeds. To this end each party provided a valuation:

a) *by the Petitioner a value of $279,185.00 representing $242,825.00 as the value of the house and $36,360.00 for an incomplete structure on the grounds. This valuation was dated 8th December 2006 but according to the valuer his last visit to the house was 8th February 2003.*
b) *by the Respondent a valuation dated 5th June, 2005 of $327.243.75 - $267,243.75 for the house and $60,000.00 for the incomplete structure together with a valuation of $183,141.00 for the land.*

[7] The court appointed a valuer who submitted a valuation as at 19th July 2006 of $282,656.00 - $269, 696.00 for the house and $12,960.00 for the incomplete structure, a figure which is inordinately low even by the Petitioner's standards: "I would agree that it cost more than $12,000.00 to build", he stated under cross examination.

[8] It should be noted that the valuation of $183,141.00 for the land was earlier accepted by the Petitioner as is evidenced by paragraph 24 of his Affidavit of 9th November 2005 in response to the Respondent's Affidavit in support of her application for ancillary relief and so the court accepts this valuation .

[9] I shall here state that I deem it unnecessary to consider any possible argument that it is only to the house that the court should look regarding division since it is my view that the land is essentially a part of the "property". In any event it is apparent that the Petitioner in providing the land on which the parties built their home intended it for the benefit of the family.

[10] It is established law that in the absence of an express agreement between the parties with respect to the beneficial interest in the matrimonial property, a common intention must be implied having regard to all of the circumstances of the case. See the statement of Sir Nicholas Browne – Wilkinson VC in Grant v Edwards et al (1986) 2 AER 426:

> *"where there has been no written declaration or agreement, nor any direct provision by the Plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the Defendant, acted on by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the Defendant to deny that interest and will construct a trust to give effect to It".*
>
> *In most of these cases the fundamental, and invariably the most difficult question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively".*

Also in Lloyd's Bank plc v Rossett (1990) 1 AER 1111 per Lord Bridge of Harwich:

> *"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between that them the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been".*
>
> *"Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel".*

[11] Thus without further deliberation the court will determine the value of the matrimonial property to be $489, 197.00 - $269,696.00 as the value of the house, $183, 141.00 as the value of the land and $36,360.00 as the value of the incomplete structure.

[12] The Petitioner has requested that he be given a first option to purchase on the following grounds:

a) he is a co-owner;

b) he has throughout his married life lived there, and

c) the parties' children regularly stay with the Petitioner and they have developed a bond and affinity to the house

- all tenuous arguments which could equally be made by the Respondent if she so wished.

[13] However while not specifically objecting to this request, the Respondent has voiced some concern at the behaviour of the Petitioner who she believes has acted deliberately in not making the loan payments while living in the house and this she deems a deliberate ploy on his part to get the house for himself.

[14] The Petitioner contends that it would be unreasonable were he asked to pay rent for residing in the house since he never requested nor demanded that the Respondent leave the house but that she left of her own free will; he was never physically violent to her and so she could have returned at any time.

[15] I consider this argument to be somewhat specious for it is almost inconceivable for parties to remain together under the same roof when they consider their marriage at an end – one party invariably leaves and cannot be punished for so doing. And as the Respondent states in her Affidavit in support of her application:

"In January I had reached my limit due to the Petitioner's disregard of me and his withdrawal from the family……. On the 3rd day of February 2005 I moved out of the matrimonial house due to repeated confrontations with the Petitioner in the presence of the children ….."

[16] It is also usual to expect the remaining party to be responsible for the outgoings (mortgage etc) related to the maintenance and upkeep of the property in lieu of rent for the period he or she remains there before the property is disposed of. Thus it would be unreasonable for the Petitioner to live rent free while the Respondent has to seek accommodation elsewhere. Her unchallenged evidence is that she now stays at the home of her brother, a precarious situation, since she can be asked to leave at any time.

[17] In my view the Respondent ought to be compensated for her dislocation and her discomfort and to be placed as far as it is practicable in the financial position in which she would have been if the marriage had not broken down and the parties had each properly discharged their financial obligations and responsibilities towards each other (see section 25 of the Divorce Act 1973 as amended). Thus any settlement made must allow her to make a fresh start.

[18] It was posited by the Respondent that a sum of $1,500.00 per month for that type of house in that area would be reasonable, a position rejected by the Petitioner on the grounds that the house had fallen into disrepair. The court is prepared to accept the Respondent's contention and will determine that the Petitioner is responsible for the payment of a rental at the rate of $750.00 i.e. half of $1,500.00 per month from February

2005 until sale of the property and his share in the proceeds after payment of the loan reduced by the appropriate amount.

[19] I find support for this determination by the following passage in Rayden on Divorce, 14th edition, page 789 paragraph 70 under the caption: Ability to pay: relation to matrimonial home and other provision: occupation rent:

> *"It has been said: The question of a lump sum needs special considerations in relation to the matrimonial home, in most cases the principal capital asset and sometimes the only asset. Where the wife leaves the home and the husband stays in it in a case where the house is virtually the sole asset, on the breakdown of the marriage arrangements should be made whereby it is vested in him absolutely, free of any share in the wife, and he alone is liable for the mortgage installments. But the wife should be compensated for the loss of her share by being awarded a lump sum sufficient to enable her to get settled in a place of her own, such as by putting down a deposit on a flat or a house. It should not, however, be an excessive sum: if should be such as the husband can raise by a further mortgage on the house without crippling him".*

[20] In making the decision with regard to the division of the matrimonial property it should be stated that there should also an equal division of the contents of the house. If this cannot be settled amicably leave is hereby given for either party to present an application to this court.

BUSINESS

[21] Before the hearing of the application, the parties agreed that the Petitioner would keep the business in Dominica and the Respondent that in St. Vincent.

[22] It has proved almost impossible for this court to come to any plausible determination with respect to the St. Lucia business. Before the hearing of this matter and during attempts at settlement, the court suggested that an audit be undertaken but the independent professional appointed by the court was unable to elicit any assistance from the Petitioner especially with regard to appropriate documentation with which to provide financial statements. Similarly the Petitioner has been unable to furnish the court with any material with which to support his claim with respect to the debts owed or incurred by the business.

[23] While he accepts that the Respondent is entitled to a share of the value of the business as at the date she left, he seeks to persuade the court that there is indeed no value left in the business, because the Respondent took away a "substantial amount" of stock which she has not accounted for or returned. By the same token he has neglected to or is himself unable to allocate or attach a value to this stock. He also states that the Respondent left the business when it was heavily in debt; that he has had the burden of significantly reducing the debts and that whatever stock the Respondent left was sold to do so, but yet he is unable to state categorically the size of the debt, provide proof of any sale of stock or give any concrete proof relating to this. The few invoices which he did submit related to dates after the Respondent had already left the business.

[24] The Petitioner argues that the stock taken away by the Respondent should be viewed as her share of the business and if it were found that she is entitled to a further share then she should contribute towards the debt which he estimates to be "over $100,000.00".

[25] I was not particularly impressed by the demeanour of the Petitioner, his responses were rather glib. I was left with the distinct impression that he was dissembling.

[26] It needs be asked how can the stock taken away be regarded as her share when no value has been placed on it, how can the Respondent be asked to share in the debts when this debt has not been ascertained.

[27] It can only be just and equitable if a proper audit/accounting is made with respect to the business before a determination can be made. It is the responsibility of the Petitioner to place before the Court the necessary data on which a decision can be made, without it, it is pure guesswork: SvS (1977) 1AER 56.

[28] Despite the Petitioner's denial, I accept the Respondent's evidence that he managed the financial aspect of the business, that when she needed money she went to him. The Petitioner for his part stated that he never refused her requests. Under cross examination he admitted to having taken out the loan against the matrimonial property without her knowledge. He admitted to having the records for the business in his possession.

[29] Quoting from Rayden on Divorce op cit, page 745 paragraph 15 captioned Disclosure to be full and frank:

"Both husband and wife must disclose all their resources to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath, the obligation is to be full, frank and clear in that disclosure: any shortcomings from this standard can and normally will be visited by the court drawing inferences against the party in default on matters the subject of the shortcomings, in so far as such inferences can be properly be drawn"

[30] In the premises, before the court can make a conclusive determination regarding the division of the assets and/or liabilities of the business, there must be provided adequate financial statements. The court is also of the view that should the appropriate audit not be concluded within a reasonable time, the court should proceed to make its own order.

VEHICLES

[31] The evidence reveals that the loan secured by the matrimonial property was in part used to purchase a vehicle – a new Mazda pickup in 1999. The other used vehicle was purchased for the sum of $2,500 in 2003/2004. The Petitioner stated that there was not much value in these vehicles.

[32] I am of the view that if the Respondent is expected to pay her share of the loan which it was agreed was used to purchase the vehicles, then she ought to be equally entitled to share in their value whatever it might be. I therefore find that the Respondent is to receive

her half share of the value of the vehicles as at February 2005 when she left the business and when she no longer had the use of the vehicles.

MAINTENANCE

[32] Section 25 (2) of the Divorce Act 1973 provides that in exercising its powers with respect to provision for a child on the breakdown of its parents' marriage, the court must take into account:

> *(a) the financial needs of the child*
>
> *(b) the income, earning capacity (if any), property and other financial resources of the child*
>
> *(c) any physical or mental disability of the child;*
>
> *(d) the standard of living enjoyed by the family before the breakdown of the marriage*
>
> *(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained*

so as to ensure as far as it is practicable that the child continues to enjoy the situation he would have been in had the marriage not broken down and each of the parties had properly discharged his or her financial obligations and responsibilities towards that child.

[33] The Petitioner stated that his children were accustomed to a high standard of living while the parties lived together and, while his own present standards might have declined somewhat, he would agree to pay half of all of the minor's expenses. There was

produced to the court a bill for orthodontic treatment for the said minor. In keeping with the Petitioner's agreement , the Petitioner will pay his half share of the bill. Also now made final is the interim order of this court made on 27th October 2007 in which the Petitioner pays to the Respondent the sum of $800.00 per month for maintenance of the minor child.

OTHER

[34] Included in the list of debts as produced by the Petitioner was the sum of $19,000.00 which according to him was owed by the business to his mother.

[35] There was admitted in evidence a letter written by the Petitioner's mother's lawyers to the parties indicating that on three (3) separate occasions she had invested in the company a total of $29,000.00. This she had done " with the understanding and under the condition that the parties would pay her bills and take care of her in time of illness" and that in light of the impending divorce of the parties, she was requesting a refund of said monies with interest.

[36] Interestingly under cross examination the Petitioner stated:

> *"If my mother had her lawyer wrote asking for $29,000.00, I am not sure of it…… The $19,000.00 which I took into account was the $16,000.00 and the $3,000.00. I had forgotten the $10,000.00. My mother sold land and gave us $10,000.00. We have nothing in writing because we did not know it would come to this".*

[37] It is my view from the Petitioner's evidence, that the $10,000.00 was a gift and the $19,000.00 a "trade off". Both parties agreed that during the course of the marriage, they paid the mother's bills. There was however no indication of how much these bills amounted to. I therefore find that this sum ought not to be considered as a debt to the company.

[38] The order of this court is as follows:

1) *The Petitioner to have first option to purchase the matrimonial property at a value of no less than $489,197.00, the value determined by the court, after payment of the bank loan as at February, 2005*
2) *The Petitioner's share of the proceeds to be reduced by an amount equivalent to the payment of rent at the rate of $750.00 i.e. half of $1,500.00 per month with effect from said February 2005, until purchase by him of the matrimonial property.*
3) *In the alternative the property to be sold by public auction and the proceeds thereof divided equally taking into account payment of the loan and rents as stated above*
4) *The contents of the matrimonial home to be equally divided between the parties. In the event of disagreement, leave is hereby granted to make application to the Court.*
5) *Within six (6) months of this order, the Petitioner must produce to the Court professionally audited financial statements with respect to the business. Failure to do so will result in an order made by the Court.*

6) *The Petitioner to pay to the Respondent as maintenance for the minor child of the family the sum of $800.00 per month with effect from 31st March 2008 until said child reaches the age of eighteen (18) years together with such sums as represent one half of all educational, medical, dental, ophthalmic and other reasonable expenses for said minor child. The Petitioner also to pay to the Respondent one half share of the current orthodontic bill for said minor child.*

7) *The Petitioner to pay to the Respondent one half share of the value of the two (2) vehicles as at February, 2005.*

8) *The Petitioner to pay the costs of the Respondent in the sum of $4,000.00.*

SANDRA MASON QC

High Court Judge