

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 02054

BETWEEN GWENETTA CLARKE CLAIMANT
AND WILLIAM CLARKE DEFENDANT

IN CHAMBERS

**Lord Anthony Gifford Q.C., Scheree Miller and Tiffany Lofters instructed by
Alton E. Morgan and Co for the claimant**

**Judith Cooper-Batchelor instructed by Chambers Bunny and Steer for the
defendant**

**APPLICATION FOR DISCLOSURE OF SETTLEMENT – SECTION 2 OF
PROPERTY (RIGHTS OF SPOUSES) ACT – MEANING OF PROPERTY
IN ACT – WHETHER SETTLEMENT IS PROPERTY WITHIN MEANING
OF ACT**

July 18 and 22, 2011

SYKES J.

[1] This is an application, by Mrs. Gwenetta Clarke, the claimant, for an order directing that her husband and defendant, Mr. William Clarke, discloses the particulars and details of a settlement of a dispute between Mr. William Clarke and his former employer, the Bank of Nova Scotia Jamaica Limited ('the bank').

[2] By notice of application for court orders dated July 5, 2011, Mrs. Clarke is asking for the following orders:

a. that there be standard disclosure of the details of the terms of settlement of the chose in action being the dispute between the defendant and his past employer the Bank of Nova Scotia Jamaica Limited;

b. that there be standard disclosure of the details of the defendant's retirement package and entitlements.

[3] By a fixed date claim form dated April 14, 2009, Mrs. Clarke is asking the Supreme Court to grant declarations declaring that she has interest in various properties, real and personal, within and outside of Jamaica. In support of this litigation a case management conference was held before Thompson-James J. on November 19, 2009 at which her Ladyship

ordered both parties to disclose all assets either owned by them, whether singly or jointly with others, or in which they have an interest. In addition, her Ladyship ordered specific disclosure of a great number of documents relating to property jointly owned by the parties solely or with others, or property in which each party has an interest.

[4] Lord Gifford Q.C. began his application by emphasizing that where an order for disclosure directing litigants to make disclosure of documents or information, the duty of disclosure is an ongoing one. The duty continues until the proceedings are concluded (see rule 28.13 (1) of the Civil Procedure Rules). Rule 28.13 (2) states that 'where documents to which the duty extends come to a party's notice at any time during the proceedings, that party must immediately notify every other party and serve a supplemental list of those documents. Learned Queen's Counsel continued by saying that the obligation, in this case to comply with order of Thompson-James J is an ongoing one and the fact that at the time when it was made the disclosure now being sought could not be done because the issue between Mr. Clarke and the bank was not resolved makes not one iota of difference. Consequently, Mr. Clarke must make the disclosure. This, therefore, was Lord Gifford's syllogism.

[5] In addition, he added, property as defined in section 2 of the Property (Rights of Spouse) Act ('PROSA') supports his proposition. Lord Gifford

submitted that property as defined in PROSA is quite wide and encompasses what Mrs. Clarke is asking for. It is now appropriate to set out the definition because the court will deal with the second submission first.

[6] The definition is as follows:

“property” means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled.

[7] Learned Queen’s Counsel further added that in this definition careful note must be taken of the words ‘chose in action’. A chose in action is really a broad term covering a great variety of rights that are enforceable by court action. The words following the expression ‘chose in action’ are extending the definition of property beyond real property, beyond personal tangible property, beyond documentary intangibles such as a bill of exchange, beyond pure intangible rights such as a right to sue for damages in contract or tort, all the way to ‘any other right or interest’, whatever that interest may be, ‘whether in possession or not to which [they or either one] is entitled’. According to Lord Gifford, a wider definition could hardly be

developed. He continued by submitting that the dispute between Mr. Clarke and the bank, out of which the settlement flowed, arose in July 2008 and that was the date when a cause of action accrued to Mr. Clarke. It was further submitted that the settlement between the bank and Mr. Clarke falls within this definition.

[8] Mrs. Cooper-Batchelor contended that

- a. the settlement was not a chose in action or the fruits of a chose in action;
- b. even if it were a chose in action, the settlement occurred after the parties separated and so is outside the purview of PROSA;
- c. the definition of property under the legislation is narrow. In support of this she cited the case of *Best v Best* [1993] Fam CA 109. One of her main points under this head was that whatever it was that Mr. Clarke received from the bank was not capable of being alienated to third parties and consequently it lacked one of the main characteristics of property.

[9] Two points must be noted about this case. First, the statutory definition of property in that case was this: *'property' in relation to the parties to a marriage or either of them, means property to which those party are, or that party is, as the case may be, entitled, whether in possession or reversion.*

[10] It is to be observed that the definition does not enumerate the things (tangible and intangible) which the law, over hundreds of years, has defined as property. Thus it was up to the courts to determine the width of the definition. In so doing, the court (Fogarty, Lindenmayer and McGovern JJ.) cited a number of cases which held that the term 'property' is a 'word of the widest connotation' (see para. 51).

[11] The second thing to observe about the case is that it made the point that inalienability does not deprive the thing under discussion from being property. Thus a right to sue for damages is not alienable but that does not make that right any less property; it is a chose in action. While it is generally true that for any right to be regarded as property it ought to be capable of assumption by third parties that is not an indispensable attribute.

[12] Finally, if the court in *Best* took such an expansive view of the word property in the context of that statute then it would seem that if there is a statutory definition that not only includes what is already accepted as property but extends it beyond those boundaries, then surely the conclusion must be that such a statutory definition is of great breadth. Therefore, the court does not accept that the definition of property in PROSA is narrow.

[13] Mrs. Cooper-Batchelor submitted that the payment or settlement with Mr. Clarke was purely gratuitous on the part of the bank and consequently, there was no chose in action in being that could possibly generate any legal obligation on the part of the bank. If there was no chose in action in being in July 2008, then there was no property within the meaning PROSA. She continued by submitting that the payment was made after the separation and so was not property acquired by Mr. Clarke during the course of the marriage prior to separation. For all these reasons there is no obligation on Mr. Clarke to make the disclosure sought. This is relation to the settlement.

[14] Regarding the retirement package and entitlements, Lord Gifford made the argument that the dollar figure of the retirement package was not arrived at by staring into a crystal ball. A person does not become a Chief Executive Officer of one of the world's most successful banks by

wishful thinking. He has to get there by hard work and proven success. Success is not usually the result of unilateral effort. Mr. Clarke's success, it is said, was achieved with the support of Mrs. Clarke. According to Lord Gifford, when one looks at section 14 of PROSA and sees the factors that a court may take into account an argument can be made that Mrs. Clarke's contribution to the household and taking care of the family enabled Mr. Clarke to concentrate on his chosen career. This in turn contributed to Mr. Clarke's rise to the top of his profession. In this sense it can be said that Mrs. Clarke's efforts contributed to Mr. Clarke being able to secure a retirement package regardless of the actual dollar figure. It was an indirect contribution and under the legislation monetary contribution has no greater weight than other kinds of contribution. The contribution that enabled Mr. Clarke to receive a retirement package took place, it is said, before the parties separated, enabled him to soar to the top. Finally, it was submitted that the retirement package, on the face of it, falls within the definition of property under PROSA and so should be disclosed because it is directly related to Mr. Clarke's job with the bank and Mrs. Clarke enabled her husband to have that job and thus the connection between Mrs. Clarke's contribution and the retirement package.

[15] Mrs. Cooper-Batchelor rejected this and stated that the only thing Mr. Clarke was entitled to was his pension which he is receiving but the

rest of the package was purely within the discretion of the bank and in any event it lacked the characteristic of property to which reference has already been made, namely, alienation to third parties. In examining Mrs. Cooper-Batchelor's submission on this point, the court bears in mind that it is a statutory definition and not the definition developed by courts over the centuries. While the court accepts that Lord Gifford's proposition is perhaps stretching the point, the court is of the view that it is sufficient to enable the court to grant the order.

[16] For the proposition that Mr. Clarke had a cause of action against the bank in July 2008, Lord Gifford relied on the decision of the Court of Appeal in *William Clarke v Bank of Nova Scotia Jamaica Limited* SCCA No. 38 of 2009 (delivered October 2, 2009). Particularly, he relied on the narrative of facts to support the view that Mr. Clarke was constructively dismissed from his job as Chief Executive Officer of the Jamaican operations of the bank. He also relied on an affidavit filed by Mr. Clarke on July 14, 2011.

[17] In this affidavit, Mr. Clarke indicated that the contract between him and the bank was an oral one and it was of indefinite duration terminable by a written notice by either party. He said that he opted to go on early retirement and so was not in a position to sue the bank for benefits which were not lawfully due to him. He added that the payment by the bank was

purely gratuitous and an effort to save the bank from unfavourable publicity.

[18] From the judgment of the Court of Appeal, it appears that Mr. Clarke was asked to go to Canada, the headquarters of the bank. This is how the three judges of the Court of Appeal describe what took place at that fateful meeting of July 8, 2008. Smith J.A. noted that a 'decision was taken that the appellant should go on early retirement and a compensation package was offered' (see paragraph 4). Cooke J.A. described it in this way at paragraph 57:

The appellant [Mr. Clarke] was summoned to a meeting in Toronto, Canada by Robert Pitfield, the Chairman of the Board of BNS. ... At this meeting the appellant was informed that a decision had been made. He would 'be separated' from B.N.S. and would retire in August 31, 2008. This separation would be done on 'an amicable basis to be negotiated' At the meeting of July 8th in Canada, the appellant was given a letter which proposed the terms on which he should retire. This was not accepted.

[19] Harris J.A. stated 'The Board ... having received reports of misconduct on his part, requested him to proceed on retirement with effect from October 31, 2008' (see paragraph 74).

[20] From what the three judges are saying, there was no written notice from either the bank or Mr. Clarke terminating the indefinite duration contract. It is clear that the meeting on July 8 in Canada was not about whether Mr. Clarke would remain with the bank but rather it was to inform him that he would leave and with that settled, the only remaining question was compensation. From this Lord Gifford submitted that it was not that Mr. Clarke decided to go on early retirement but that he was pushed before he could jump. It was the board in Canada that, in effect, decided that Mr. Clarke could not continue as head of the Jamaican operations. Lord Gifford continued that when one looks at this decision against the background of what Mr. Clarke himself described as 'a contract of indefinite duration' the only reasonable conclusion is that Mr. Clarke was dismissed from the job. Thus the cause of action, if any, would be constructive dismissal. The compensation was not gratuitous but a recognition by all concerned that from the moment the decision to end the indefinite contract was communicated to Mr. Clarke, litigation would ensue if the parties could not settle the issue. Mrs. Cooper-Batchelor's position on this was that Mr. Clarke was presented with the option of early retirement which he could either accept or reject. He accepted to go on

early retirement and so the compensation was purely gratuitous and not arising from any cause of action that Mr. Clarke may have had against the bank.

[21] Learned Queen's Counsel is saying that Mrs. Cooper-Batchelor's characterization of the situation as a gratuitous payment is not consistent with what is known. He submitted that what the judgments say is that Mr. Clarke was removed from his post. He was not presented with the option of staying. He was forced into retirement.

[22] The court appreciates the force of Lord Gifford's submission but is concerned that this court is being asked to label the bank's conduct as amounting to constructive dismissal in circumstances where the bank is not a party to this claim and has not made any submissions in this regard. This would be a breach of the audi alteram partem principle which is that one ought not to make any finding or form any conclusion that may reflect adversely on a person without that person having the opportunity to explain his conduct. For this reason, the court is not keen to go along with Lord Gifford on this but nonetheless on the basis of the judgments of the Court of Appeal a reasonable argument could be made that Mr. Clarke was constructively dismissed and so a possible cause of action arose from

July 8, 2008. This is clearly a chose in action within the meaning of PROSA's definition of property.

[23] If what has just been said is correct, then the cause of action would have arisen before the parties separated whether one uses the November 2008 date suggested by Mrs. Clarke (see paragraph 21 of affidavit dated April 14, 2009) or August 12, 2008 hinted at by Mr. Clarke (see paragraph 26 of affidavit dated October 30, 2009).

[24] Since the duty of disclosure is a continuing one then the full details of the settlement with Mr. Clarke should be disclosed. This does not necessarily mean that a court will take the settlement into account when considering the full application under PROSA. Disclosure is merely a step in determining what properties the parties have. The next step is to determine whether the property disclosed can be taken into account in proceedings under the statute. Finally, the court hearing the application will decide what proportion of the property, if any, should be allocated to the claimant.

[25] Another way of arriving at the same position is this: Thompson-James J has made an order asking the parties to disclose all their property and related documents. The terms of the order are quite wide and made no distinction between property acquired before separation and property

acquired after separation. Since disclosure is ongoing, then Mr. Clarke ought to make the disclosure of his settlement with the bank and should Mrs. Clarke make any claim in respect of that property at the hearing of the substantive matter, then the trial judge can determine whether the property falls within PROSA and can properly be taken into account when considering whether Mrs. Clarke has any interest in it. As stated above, disclosure per se does not mean that all property disclosed will be subject to the legislation. There is no injustice to Mr. Clarke in this regard. If he has concerns about confidentiality, then appropriate orders can be made dealing with that aspect of the matter.

Disposition

[26] The court wishes to point out that this judgment is by no means deciding that the retirement package and settlement must necessarily be divided between the parties. All that is being said is that, the definition of property in section 2 of PROSA is wide enough to bring these things within the definition and having regard to all that has been said the details surrounding them ought to be disclosed. It may be that when all the circumstances are examined the trial court may decide that despite falling within the definition they are not to be taken into account in this particular case.

[27] The order is granted in terms of paragraphs two, three and five of the notice of application for court orders dated July 5, 2011. The parties are to add appropriate paragraphs to protect the confidentiality of the settlement. The order is then to be submitted to the court for approval. Costs of this application to be costs in the claim.