



[2019] JMSC Civ. 241

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV03442

BETWEEN	ROSETTA SCALE	CLAIMANT
AND	AUTLEY DENNIS BAHADOOSINGH otherwise called DENNIS AUTLEY BAHADOOSINGH	DEFENDANT

IN CHAMBERS

Miss Tavia Dunn and Miss Deborah Dowding instructed by Miss Stephanie Gritton for the Claimant.

Mr. Canute Brown instructed by Brown, Godfrey and Morgan for the Defendant

Heard: **11th June, 19th & 30th July, 16th September & 13th December, 2019.**

Property (Rights of Spouses) Act 2004 – Parties names on title as tenant-in-common- Amendment to Fixed Date Claim Form- Interest in property-Equity

WILTSHIRE J.

[1] By Fixed Date Claim Form the Claimant has sought a declaration that she and the Defendant are each entitled to fifty percent share (50%) in property located at Lot 77 Woodlawn in the parish of Manchester, registered at Volume 1270 Folio 118 of the Register Book of Titles (hereafter referred to as the Woodlawn property). The claimant sought this declaration on the basis that she was the defendant's spouse and pursuant to sections 6,11,13,14,20,21 and 23 of the Property (Rights of Spouses Act).

Claimant's Case

[2] The claimant stated that she was the ex-spouse of the defendant. They began living together as man and wife in 1978 and their union produced a child in September, 1988. She said that in November 1993 the Defendant alone purchased the Woodlawn property through the National Housing Trust (NHT) and they moved into same in 1993. They both commenced improvements to the property in 1994 and in 1999 the duplicate certificate of title for same was issued in both their names as tenants-in-common. She asserted that the property was intended for both of them. The parties lived together at the property until 2007.

Defendant's case

[3] The defendant has responded that he did acquire the Woodlawn property in 1993, and he and the claimant, with whom he shared a common law relationship, moved in immediately. He asserted that he alone carried out improvements to the property and paid the property taxes. He agreed under cross examination that prior to 1993, they had lived together and that through their joint efforts improvements were done on the property. The defendant has not stated the percentage interest that he believes the claimant should receive. It can however be implied from his evidence that he doesn't believe that she is entitled to fifty percent (50%). It was in response to questions posed by the court, that the defendant revealed that he was already married when he commenced cohabiting with the claimant and although he had filed for divorce, he was not sure if same had been granted.

Submissions on the amendment to the claim

[4] Searches conducted at the Registry confirmed that the defendant had filed a Petition for divorce but no decree absolute was found. As a consequence, Counsel for the claimant conceded that in light of the defendant's status, PROSA could not apply. After the close of the defendant's case, Counsel for the claimant applied for an amendment to the claim for the court to apply equitable principles.

[5] Counsel submitted that the declaration being sought was not subject to PROSA and an amendment at this stage before judgment would not be prejudicial to the Defendant as he sought to rely on equitable principles in his submissions to the court. Reliance was placed on the judgment of Fraser J, in **Forbes v Baker & Ors.** who considered the issue of prejudice as a critical determining factor.

[6] The learned judge also considered the following at paragraph 46 of the judgment:

- (i) Whether the application was made in good faith;
- (ii) Whether allowing the amendment would not affect the issues for determination before the court; and
- (iii) Whether the amendments would not yield to the claimant an unexpected advantage nor would they in any way affect the defence being advanced.

Counsel also relied on the ruling of the Court of Appeal in **Topaz Jewellers & Anor v National Commercial Bank Limited** [2011] JMCA Civ. 20 where on the issue of the amendment of a statement of case, the court considered the overriding objective as well as Part 20 of the Civil Procedure Code.

[7] It was further submitted that the application to amend was made in good faith as it only followed the discovery that the defendant was a married man. Counsel argued that allowing the amendment would not affect the issues for determination as, but for the recitals, the declaration sought does not ask the court to find that the Woodlawn property was the family home, but that the Claimant has an equal share which can fall for determination within the scope of equitable remedies. For those same reasons Counsel also submitted that the amendments would not yield an unexpected advantage to the Claimant or affect the defence being advanced.

[8] It was finally submitted that the court was empowered to grant remedies that a party may appear to be entitled to. Counsel referred to section 48(g) of the Judicature (Supreme Court) Act which states;

“The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter, so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined and multiplicity of proceedings avoided.”

- [9] Counsel for the Defendant referred to the absence of an application to amend the claim but took the view that the absence of a formal application had never been a barrier to the court resolving disputes consistent with the overriding objective of doing justice between the parties. It is therefore evident to this court that there is no resistance to the court permitting the amendment to the claim. In any event having examined the cases cited by counsel for the claimant this court finds merit in the submissions made. The court is also very mindful of its powers under section 48(g) of the aforementioned act to determine the parties’ legal and equitable rights and grant such relief and remedies as they are entitled. It therefore only remains for the court to determine whether in equity the claimant is entitled to an equal share of the Woodlawn property.

Submissions on entitlement to the Woodlawn property

- [10] Counsel for the claimant cited *Stack v Dowden* [2007] UKHL 17 as the leading case in equity involving cohabitees and referred to comments made by the law lords in arriving at their decision. The comments were summarised as follows:
1. *Where the beneficial interests are not declared, the presumption is that equity follows the law and the beneficial interests reflect the legal interests in the property.*
 2. *The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint names case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from the legal ownership.*

3. *The onus of rebutting the presumption will be heavier in joint names cases than in sole name cases.*

- [11] It was submitted that the crux of the decision in *Stacks* case was that since the starting point in joint names is joint beneficial ownership, the presumption is that the equitable interests of the legal co-owners are identical. On severance of the beneficial joint tenancy, the parties hold equal shares in the property. Further, where a property, intended to become their home, is conveyed into the joint names of a cohabiting couple, without an express declaration of their beneficial interests, there will be a presumption of a beneficial joint tenancy, unless and until the contrary is proved.
- [12] Counsel also cited the recent decision of Laing J. in **Stewart v Williams** [2018] JMSC Civ. 20 where the parties therein had cohabited for in excess of 20 years during which time they purchased property and were registered on the Certificate of Title as tenants in common. The learned judge at paragraph 20 in that case adopted the approach used in *Stack* that the Court should begin by taking joint beneficial ownership as the starting point and accepted that as the case was one of joint legal ownership, the onus was on the Claimant to show that the beneficial interests were divided other than equally as shown on the registered title.
- [13] It was therefore submitted that in the instant case, the burden would rest on the Defendant to prove that he has rebutted the presumption that the endorsements on the title of joint legal ownership was not a clear reflection of how the parties held their respective interests. Counsel argued that the Defendant did not challenge the Claimant's evidence that the property was acquired by them both with the common intention that it be the principal family residence. Further that the course of dealings of the parties was indicative of the Claimant's active contribution to the mortgage, household expenses and upgrading the property.

Defendants submissions on entitlement to the property

- [14] Mr. Brown submitted that PROSA would not apply to this claim and the court must therefore resort to the rules of common law and equity to determine the beneficial interests of the parties and their respective share in the property. The court should consider the history of the property, how and when it was acquired and with whose money. Counsel recommended that a useful starting point would be to consider the proportionate contributions of the parties, by way of mortgage or otherwise, to the acquisition, conservation and improvement of the property. It was therefore submitted that the court should consider section 14(2) of PROSA in determining the Claimant's share in the property.
- [15] Counsel stated that in certain circumstances the court would have recourse to the equitable principle that equity leans towards equality but submitted that the court would only resort to that doctrine when the evidence was insufficient or inconclusive hence the court's decision would amount to guess work.

Law and Analysis

- [16] It is without doubt that this cannot be treated as a claim pursuant to the Property (Rights of Spouses) Act. The issue of the division of the property in question must therefore be determined by applying common law and equitable principles. I must respectfully disagree with counsel for the Defendant who has submitted that the court should apply the factors set out in section 14(2) of PROSA to determine the Claimant's share of the property and use as a starting point her contribution to the acquisition, conservation and improvement of the property.
- [17] It is noteworthy that both parties at the outset of this matter were clearly of the view that they were common law spouses. The Claimant referred to herself as the Defendant's ex-spouse and the Defendant did not dispute this. The undisputed evidence is that the Defendant, through the National Housing Trust, alone purchased the house in 1993 and moved in immediately with the Claimant with whom he shared a common law relationship. It is not disputed that the parties were

living together elsewhere from 1978 and had a child in 1988. The court is of the view that when they moved into the house in 1993, they moved in as a family.

[18] On the 29th July, 1999, by transfer no. 1071556 the property with the said house was registered in the names of both parties as tenants in common. The parties remained together until 2006/2007, approximately 28 years. The Defendant has not stated that the Claimant is not entitled to the fifty (50) percent share that she has sought and he has given no reason to this court why she is not so entitled.

[19] I agree with counsel for the Claimant that the approach which should be adopted is that laid out in *Stack* by Baroness Hale at paragraph 56,

“..... the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial interest is different from the legal ownership.”

And at paragraph 58,

“.....at least in the domestic consumer context, a conveyance into joint names indicates both legal and beneficial joint tenancy, unless and until the contrary is proved.”

[20] The Defendant must prove the contrary and do so by showing that the common intention when having the property registered in their joint names was that they should hold the property other than as joint beneficial owners. The Defendant himself has not countered the Claimant's request for a fifty percent entitlement. It is counsel who has submitted that the court should consider an award of one quarter share in the property. The Defendant's evidence is largely about his improvements to the property, the payment of the mortgage and the payment of taxes. He has conceded that the Claimant did contribute to the improvements to the property. The Defendant has not shown this court in what way the parties intended their beneficial interest to be different from their legal interest. The court is therefore of the view that in this case “equity follows the law”.

Disposition

[21] The court therefore declares as follows:

The Claimant and the Defendant are each entitled to 50% interest in property located at Lot 77 Woodlawn in the parish of Manchester registered at Volume 1270 Folio 118 of the Register Book of Titles.

[22] It is ordered as follows:

- I. A valuation report must be prepared in respect of the said property registered at Volume 1270 Folio 118 of the Register Book of Titles by a reputable valuator agreed by the parties within 30 days of the order of the court. If the parties fail to agree, the valuator shall be appointed by the Registrar of the Supreme Court.
- II. The cost of preparing the valuation report shall be borne equally by both parties.
- III. The said property shall be advertised for sale on the open market if the Defendant does not express an interest in purchasing the Claimant's share within 14 days of the date of this order.
- IV. If sold on the open market, the net proceeds of the sale shall be shared equally between the parties.
- V. Stephanie N.R. Gritton Attorney at law shall have carriage of sale.
- VI. The Registrar of the Supreme Court is empowered to sign any documents which may be necessary to effect the sale and or transfer of the property if either party is unable to or refuses to do so within 14 days of being required so to do.
- VII. Costs to the Claimant to be taxed if not agreed.