



[2017] JMSC Civ. 86

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 06068

BETWEEN	MARLENE SOPHIA SEWELL	CLAIMANT
AND	ANDREW FITZGERALD SEWELL	DEFENDANT

Mr. William Panton instructed by Dunn Cox for the Claimant

Mrs. Denise Senior-Smith instructed by Oswest Senior-Smith & Company for the Defendant.

Heard: November 19, 2015, April 24, 25 and June 06, 2017

Matrimonial Property – Division of matrimonial home – Division of household items – Claim for maintenance by wife – Lump sum – Adjustment of pension rights – Section 6 of The Property (Rights of Spouses) Act – Sections 3 (2), 5, 14 and 15 of The Maintenance Act.

IN CHAMBERS

COR: V. HARRIS, J

[1] By way of a Fixed Date Claim Form ('FDCF') filed on November 5, 2013 the claimant is seeking the following orders:

- (1) A Declaration that the Claimant is entitled to a 50% share in the property situated at 49 Saturn Avenue, Harbour View, in the parish of St. Andrew and registered at Volume 971 Folio 96 of the Register Book of Titles.

- (2) An Order that the Defendant have first right of refusal to purchase the Claimant's half share in the said premises.
- (3) An Order that if the Defendant refuses to sign, the Registrar be empowered to sign the relevant documents on the Defendant's behalf.
- (4) An Order that the Claimant's Attorneys-at-Law have Carriage of Sale.
- (5) An Order that the Defendant makes a lump sum payment to the Claimant.
- (6) An order for the adjustment of pension rights in favour of the Claimant.
- (7) An Order that the Defendant pay maintenance to the Claimant in the amount of \$40,000 per month.
- (8) That there be a division of household items, in particular the Claimant seeks an order that she be given the following: 16 Piece Pot Set, 6 Quart Cake Mixer, 2 of the several paintings and the 6 Ball and Claw Mahogany chair set.

[2] On March 02, 2015 when the matter was heard by Pusey J the parties settled items 1, 2, 3, 4, and 8 of the FDCF (see Formal Order filed on May 14, 2015). As a result, the court is only concerned with items 5, 6 and 7.

Background

[3] The claimant Mrs. Marlene Sewell is forty-five (45) years old and currently employed in the insurance industry as an insurance claims technician. At a time in the past she styled herself as an insurance executive. She has been employed in this area before she got married. She was a director and shareholder in two limited liability companies – Claims Administration Ltd ('CA Ltd') and Narysa Enterprises Ltd. She holds a first degree in Culinary Arts and Production and a diploma in Marketing. Mrs. Sewell has also completed many courses at the

College of Insurance and is licensed by the Financial Services Commission as a sales representative.

- [4] Mr. Andrew Sewell, the defendant, is fifty (50) years old and was a member of the Jamaica Defence Force (JDF). He retired in 2011 at the rank of Lieutenant Colonel. He is currently operating a grocery business and describes himself as an “aspiring businessman”. He holds a first degree in Accounts and two Masters degrees – one in Business Administration and the other in Defence Studies.
- [5] The parties were married on July 22, 1995. Their marriage was dissolved in 2013. The union produced a daughter who is now an adult attending university overseas.
- [6] The parties purchased the family home located at 49 Saturn Avenue, Harbour View, in the parish of St. Andrew in February 1999. It is perhaps useful to indicate at this juncture that Mr. Sewell resides in the family home while Mrs. Sewell occupies rented premises.
- [7] The deposit and mortgage for the matrimonial home was paid from a joint account held in their names. The funds that were deposited in that joint account were also used to offset household and other expenses. They also held other joint accounts. Mr. Sewell was the principal account holder of all those joint accounts. Mrs. Sewell had her own account into which her salary was deposited. She told the court that Mr. Sewell’s name is on that account, but that he has never withdrawn any monies from it. Mr. Sewell’s evidence on this point was that he was not a signatory on the account. I have accepted Mr. Sewell on this aspect of the evidence. It is to be noted that it is undisputed that during the marriage Mr. Sewell was the main breadwinner.
- [8] While married, the parties had several motor vehicles at their disposal including a Suzuki Aero and Suzuki Vitara. The Suzuki Aero was registered in Mrs. Sewell’s name and it was sold by her for \$480,000.00. It was not clear, from the evidence, when this took place. However, sometime in 2009, the Suzuki Vitara was sold

and the sum realized from that sale (\$1,150,000.00) was deposited into the joint account that was used mainly for the payment of household and other related expenses. At the time of the hearing, Mr. Sewell owned two motor vehicles and Mrs. Sewell drove a company vehicle.

- [9]** When Mr. Sewell retired he received a lump-sum payment of \$7,419,044.20 as a part of his pension package. He is also in receipt of an annual pension in the amount of \$2,059,272.00. Mr. Sewell invested a significant portion of his pension (\$6,000,000.00) in two restaurants, one here in Jamaica and the other in the United States of America (USA). He told the court that both businesses have “failed miserably”.
- [10]** In May 2012, after Mr. Sewell’s lump sum pension payment had been lodged to the joint account, Mrs. Sewell withdrew \$1,200,000.00 and then she travelled overseas and also went on a cruise.
- [11]** Their daughter’s tertiary education is being funded by a partial scholarship. The evidence that is agreed is that Mrs. Sewell does not assist Mr. Sewell with her housing and incidental expenses. There is also no agreement between them concerning her maintenance, although she is pursuing her tertiary education. Their daughter’s expenses are being met by Mr. Sewell only.
- [12]** Mrs. Sewell has filed the current application for Mr. Sewell to pay her a lump sum, monthly maintenance of \$40,000 per month and is asking the court to award her twenty to twenty-five percent (20 - 25%) of Mr. Sewell’s annual pension.
- [13]** I have examined the claim and the affidavits filed by Mrs. Sewell. I have noted that she has not expressly put forward any reason for requiring support. However, I have gleaned from a totality of the evidence and submissions that Mrs. Sewell’s monthly expenses were at some point in time in excess of her salary and that Mr. Sewell ought to make maintenance payments to her to cover the shortfall.

- [14] It was also put forward on her behalf that she was entitled to a percentage of Mr. Sewell's pension for two main reasons. Firstly, she had "contributed significantly to his [Mr. Sewell] building a successful career in the military and academically, sacrificing her own career to support his and was required to travel with him when he was posted abroad." Secondly, she had just started (in 2013) to contribute to a pension scheme. Her employer makes no contribution. Therefore when she retires she will only have access to what she has contributed, plus a small pension from the state (the National Insurance Scheme ('NIS')) which is in sharp contrast to Mr. Sewell's pension entitlement.
- [15] The order for a lump-sum is being sought on the basis that the parties "asset base are dissimilar and to the disadvantage of the claimant."
- [16] It was advanced on Mrs. Sewell's behalf that Mr. Sewell, given his income and expenditure, has undeclared income and is in a position to pay her maintenance. Mr. Sewell on the other hand has indicated that his monthly pension is the main source of income for him, his expenses far exceed his income, he is indebted, as well as, being solely saddled with the responsibility of maintaining their daughter. He has posited that he is not in a position to make maintenance payments to Mrs. Sewell.
- [17] The court therefore has to decide whether Mrs. Sewell would be entitled to an adjustment of Mr. Sewell's pension rights in her favour, a lump-sum payment and maintenance of \$40,000.00 per month.

The basis for the application

[18] When the hearing commenced, Mr. Sewell had raised a preliminary point that there was no reliance or reference to the Maintenance Act ('the Act') in the claim. However, I ruled that the claim could proceed because Mrs. Sewell was seeking an order for the division of the family home under the Property (Rights of Spouses) Act ('PROSA'). As a result, she could also ask the court to make an order for her maintenance by virtue of section 3(2) of the Act which states:

"In any case where the application is made for division of property under the Property (Rights of Spouses) Act, the Court hearing the proceedings under the Property (Rights of Spouses) Act may make an order in accordance with the provisions of this Act."

The relevant legal principles

[19] The relevant sections of the Act are sections 4, 5 (2), 14 (4) and 15. Section 4 provides:

*"4. Each spouse has an obligation, so far as he or she is **capable**, to maintain the other spouse to the extent that such maintenance is **necessary** to meet the **reasonable needs** of the other spouse, where the other spouse **cannot practically meet the whole or any part of those needs** having regard to –*

(a) the circumstances specified in section 14 (4); and

(b) any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.

(Emphasis added)

[20] Section 4 makes it clear that a spouse has no absolute right to maintenance. Maintenance is awarded at the discretion of the court provided that certain criteria are met. These are:

- (1) the dependent spouse is required to show that he/she is incapable of meeting his/her reasonable needs in whole or part making maintenance necessary; and

(2) the respondent spouse is financially capable of providing maintenance.

[21] Sections 5 (2) and 14 (4) set out the factors that are to guide the court in considering if an award of maintenance should be made and if so, how much and for how long. Section 15 (1) (b) makes provision that the court may make an interim or final order “requiring that a lump sum be paid...”

[22] There have been no submissions on behalf of Mrs. Sewell in regard to the legal basis for the adjustment of pension rights in her favour.

[23] I will now review the factors that are to be taken into account as provided by the Act when considering a claim of this nature.

Section 5 (2) considerations

Duration of marriage

[24] The parties were married on July 22, 1995 and their divorce was made final on October 15, 2013. The marriage, therefore, lasted for over eighteen (18) years. This was, in my opinion, not a marriage of short duration.

Mrs. Sewell’s contribution to the relationship and the economic consequences of the marriage for her, particularly for her earning capacity

[25] Mrs. Sewell was employed during the marriage except for a period of twenty-four to thirty (24 - 30) months when she accompanied Mr. Sewell overseas on two occasions. The evidence showed that Mr. Sewell was posted in the USA from January 2003 to July 2004 and in the United Kingdom (UK) from August 2007 to August 2008.

[26] During those periods, Mrs. Sewell testified, she was required to travel with Mr. Sewell. She was working at CA Ltd. on both occasions, and while she never lost her job, she was not paid a salary. (I understood this to mean that she was on unpaid leave). She said that as a result of the unpredictability of “army life” she

was unable to secure permanent employment which could provide a better salary for her or pursue higher education.

[27] In other words, her earning capacity and prospects to further her education were, as a result, significantly affected. She told the court that she had started her degree at the University of Technology in 2002 but had to terminate this when she travelled with Mr. Sewell to the USA in 2003.

[28] Mr. Sewell, on the other hand, stated that Mrs. Sewell was not required to accompany him and that while she was overseas she still worked via electronic means for CA Ltd. The inference that can be drawn from this evidence is that if it is accepted that Mrs. Sewell continued to work while overseas, she would still be receiving her salary. However, I am inclined to accept Mrs. Sewell on this aspect of the evidence.

[29] However, it was agreed that while she was abroad, Mrs. Sewell primary role was the management of the household and taking care of Mr. Sewell and the child of the marriage. Mr. Sewell in his evidence stated that:

“When I was studying abroad, she maintained the family home and looked after the children because I couldn’t be there 24/7 to do that.”

Mrs. Sewell’s needs having regard to the accustomed standard of living during the marriage

[30] The parties are the joint owners of the family home located at Harbour View in St. Andrew. Mrs. Sewell currently resides at Clieveden Avenue in the Hope Road area of St. Andrew (which is situated in close proximity to the area of St. Andrew that is known as the “Golden Triangle”). It would be fair to say that Clieveden Avenue is a more “upscale” location than Harbour View.

[31] During the marriage Mrs. Sewell during the marriage was a secretary at CA Ltd, an insurance claims technician and an insurance executive. She testified that she has vast experience in the field of insurance (and I agree with her).

[32] She had access to several motor cars including a Suzuki Aero which was registered in her name. She has since sold this car and used the proceeds from the sale to liquidate her credit card balance and a loan. She was recently promoted at work and as a result has been assigned a company vehicle. She is no longer paid a motor vehicle allowance.

[33] Additionally, Mrs. Sewell, while being married had free access to several joint accounts held principally by Mr. Sewell in which, it would be reasonable to comment, significant sums of money were deposited from time to time by him.

[34] She puts her monthly expenses at \$94,000.00 to \$105,500.00. Her expenditure includes:

- i) Rent - \$26,500.00
- ii) Cable and Internet - \$65,00.00
- iii) Food - \$15,000.00 to \$20,000.00
- iv) Cell phone - \$3,000.00
- v) Hairdresser - \$3,000.00 to \$5,000.00
- vi) Gas- \$20,000.00
- vii) Clothing - \$10,000.00
- viii) Personal items - \$10,000.00 to \$15,000.00

She also contributes \$23,580.00 towards a pension scheme and is provided with health insurance from her employer. She no longer pays for health insurance for her daughter. Her only source of income is her salary which is \$96,000.00 net per month.

[35] It was submitted on behalf of Mr. Sewell that some of these expenditures may be fabricated or inflated as no receipts were produced to verify them. However,

given the lifestyle that she was accustomed to during the marriage, I do not find that her total expenses are extravagant or exorbitant.

The housekeeping, child care or domestic service provided by Mrs. Sewell for the family

[36] Section 5 (2) (f) of the Act makes provision for this factor. The court is to determine whether the spouse who is seeking maintenance performed services for the family which could be treated as if those services were remunerative employment.

[37] The evidence clearly established that except for the time that she spent in the USA and UK when Mr. Sewell was posted overseas, she was a salaried employee in a permanent and secure job. The court accepts that during those two to two and a half (2 -2 ½) years she would have lost her income (but not her job) and her education was put on hold. She also managed the household and took care of the child of the marriage.

[38] However, this was a relatively short and temporary period during the eighteen-year marriage and it did not, in my view, affect materially, her earning capacity and career development. Therefore, in considering the claim I do not regard this as a significant factor in her favour.

The terms of any order made or proposed to be made under PROSA

[39] The parties have agreed that the family home will be sold and the net proceeds of sale will be divided equally between them. Mrs. Sewell told the court that she intends to use her portion of the proceeds to purchase a home of her own. I will bear this in mind when arriving at the final decision in this matter.

The eligibility of the spouses for a pension, allowance or benefit under any superannuation fund or scheme

- [40] Mr. Sewell is in receipt of a monthly pension of \$183,000.00. He also received a lump-sum pension payment of \$7,400,000.00 in 2012. Mrs. Sewell took \$1,200,000.00 of this amount. She used it to travel abroad, go on a cruise, liquidate her debts (credit card and loan) and cover her living expenses. Mr. Sewell invested \$6,000,000.00 in two failed restaurant businesses.
- [41] Mrs. Sewell currently contributes \$23,580.00 per month towards a pension scheme. She also makes contribution to the NIS. Mrs. Sewell therefore will receive two (2) pensions (albeit the amount is expected to be less than what Mr. Sewell receives) when she has retired.
- [42] The other factors that are contained section 5 (2) of the Act which have not been discussed were not considered relevant in the circumstances of this case.

Section 14 (4) factors

The assets and means of the parties

- [43] At the time of hearing the assets and means of the parties are as follows:
- a) Both parties own the matrimonial home.
 - b) Mr. Sewell's other assets are his monthly pension of \$183,000.00, a 1995 Toyota pick-up, 2007 Toyota Camry, investments valued at \$613,000.00 as at December 31, 2010 that are currently being managed by Mayberry Investments, his grocery business (although he said that this is operating at a 35% loss), two Jamaican savings accounts at Sagicor Bank with balances at \$1,542,638.63, two United States Dollar (US\$) savings accounts with balances at US\$15,29.75 and a current account with a balance of \$8,295.01. The sums in these accounts were as of January 2011. The court is unaware of the current balances. There is also a loan account which shows a balance of \$1,366.233.00 and a credit card account with a balance of \$230,586.87.

- c) Mr. Sewell's monthly personal and business expenses are \$142,000.00 and \$153,000.00 respectively. He is the only parent who is maintaining the parties' daughter. He testified that he will be sending her US\$500.00 per month to offset her living expenses. He owes his mother US\$8,700.00 (which was loaned to him to assist with his daughter's boarding and tuition expenses when she started university) and he pays \$10,000.00 per month towards this debt. He pays \$49,720.17 per month towards the mortgage (which had gone into arrears due to non-payment on the part of both parties). He is also indebted to Sagicor Bank in the sum of \$1,500,000.00 and will commence making monthly payments of \$60,000.00 per month to liquidate that debt. Mr. Sewell also testified that one of the restaurants he invested in which is in New York, USA (he has a thirty percent (30%) ownership in this business) will close at the end of May 2017 with a debt of US\$100,000.00. (This means that he would be responsible for at least US\$30,000.00 of this debt).
- d) Mrs. Sewell's other assets are her monthly net salary of \$96,000.00. She is a shareholder in CA Ltd. (There are two shareholders with equal shares in the company). However, she stated that CA Ltd no longer makes a profit and this caused her to leave the company in 2013.
- e) She has a personal account in which her salary is lodged. No disclosure was made by her of the balance in this account. There is no evidence if this is a savings or current account and the available balance. She also has a credit card but no disclosure was made about this account as well. The failure of the claimant to disclose the details of those two accounts is a factor that will be taken into account.
- f) It would appear from the evidence that Mrs. Sewell has no debts. She told the court that she used the \$480,000.00 that was realized from the sale of the Suzuki Aero to pay off her credit card debt and a loan. She said that the \$1,200,000.00 that she withdrew from the joint account in May 2012 was also used to liquidate

credit card debts and loans (which were incurred as a result of her educational expenses), as well as, to meet her living expenses.

- g) She does not assist Mr. Sewell with their daughter's educational and living expenses.

The assets and means that the parties are likely to have in the future

- [44] Given the ages of the parties and their qualifications it is likely that they will accumulate other assets in the future. Mrs. Sewell has already indicated that she intends to purchase a home of her own using her portion of the proceeds that will be realized from the sale of the family home. I do not believe that it would be unreasonable to conclude that Mr. Sewell may also do likewise.
- [45] The evidence is that Mrs. Sewell was recently promoted. She is still a relatively young woman with at least thirteen (13) years to go before retirement. Without venturing into the realm of speculation, I believe that it is more likely than not, given her qualifications and experience, that her salary and emoluments will increase in the future. Her degree in Culinary Arts and Production also provides her with the potential to earn additional income in this area. She has benefitted from, and will continue to do so, from the new income tax threshold, which has resulted in an increase in her net salary (even in circumstances where she has lost the motor vehicle allowance that used to be paid to her before she was assigned the company vehicle).
- [46] It is also likely that Mr. Sewell will eventually liquidate if not all, then at least a substantial portion of his debts, which will allow him to have access to additional income. His grocery business may also become profitable in the future. In any event, if it does not and he chooses to close it, this would mean that the portion of his pension that is being used to supplement the business would now be available to him. There may also be possible increases in his pension benefits as a result of inflation adjustments.

Mrs. Sewell's capacity to contribute to her own support

- [47] From the evidence, Mrs. Sewell earns a net monthly salary of \$96,000.00. The court is unable to say if she has any savings because the details of her personal account were not disclosed. She is gainfully employed with vast experience in the insurance field. She is assigned a company vehicle. She has a degree in Culinary Arts and Production and a diploma in Marketing. She appears to be debt free. She will receive fifty percent (50%) of the net proceeds of the former family home when it is sold. She has benefited and will continue to benefit from the new income tax threshold, which generates additional disposable income for her.
- [48] Her living expenses at the lower end (\$94,000.00) are within her means and at the upper end (\$105,500.00) represent a mere \$9,500.00 over her budget. Mrs. Sewell, therefore, possesses the capacity to contribute to her own support.

The capacity of Mr. Sewell to provide support

- [49] Mr. Sewell's monthly pension is \$183,000.00. His personal expenses amount to \$142,000.00. His business expenses amount to \$153,000.00 per month. He uses his pension to assist with shortfalls in his grocery business. He solely maintains the parties' daughter. He resides in the matrimonial home and pays the mortgage arrears, as well as, the monthly mortgage payments. He has had two failed businesses and is heavily indebted.

The respective ages and health of the parties and their capacity to secure gainful employment

- [50] At the time of the hearing, there was no evidence that either of the parties had any health issues. They both appeared to be very healthy to me. They are both relatively young with a number of years to go before retiring.
- [51] They are both qualified, but of the two, Mr. Sewell is better qualified. Given Mr. Sewell's qualifications and experience (especially in the area of security and defence) he is more than capable of securing alternative gainful employment.

[52] Mrs. Sewell is gainfully employed in the insurance industry and is quite experienced in this area. She also holds qualifications in Culinary Arts and Production and therefore is also capable of securing gainful employment in this sphere. She also holds a diploma in Marketing and would be able to access employment in this line of work.

Any legal obligation of the parties to provide support for another person

[53] The parties' daughter, although twenty (20) years old, is pursuing her tertiary education overseas. Mr. Sewell, at the time of hearing, was the only parent attending to her educational and other expenses.

Any contribution made by the dependent to the realization of the respondent's career potential

[54] It was submitted on Mrs. Sewell's behalf that she "contributed significantly to [Mr. Sewell] building a successful career in the military and academically." However, the evidence does not support this assertion. Mr. Sewell's post graduate endeavours were paid for by the USA and UK governments. There is no evidence that Mrs. Sewell contributed financially to either his first or second degrees.

[55] While it is undisputed that Mrs. Sewell travelled with him on the two occasions that he was posted overseas and studying, as indicated above [see paragraphs 36 to 38 above], those periods were short and temporary in nature. It cannot reasonably be said that as a result of this she contributed significantly to the realization of his career potential. She too was also permanently employed during the marriage, acquiring several certificates, a diploma and degree.

[56] The other section 14 (4) factors, it is opined, are not relevant to the outcome of this matter.

Case Law cited by the parties

- [57] I wish to thank the attorneys in this matter for their industry and assistance. I wish to make it clear that I have considered all the submissions that were made and authorities that have been cited, whether reference has been made to them or not.
- [58] Learned counsel for Mrs. Sewell relied on *Gloria Magdaline Maragh v Eric Maragh* 2005 F.D. 2343 (February 09, 2009), while learned counsel for Mr. Sewell placed reliance on the case of *Ivor Allen Francis v Pearl Francis* [2013] JMSC Civ 25.
- [59] In **Maragh** the marriage was of long duration – 39 years. The parties were both over sixty-two (62) years and had retired. Mrs. Maragh had sold her half share of the matrimonial home to Mr. Maragh. However, during the marriage Mrs. Maragh had only worked temporarily. Mr. Maragh was a banker who was transferred to various parts of the island to work. Mrs. Maragh was expected (and did do so) to give up any employment which she had to relocate with him. As a result, she did not get to the stage where she was self-sufficient. Mr. Maragh also maintained her during the marriage. He received a significantly higher pension than she did and had other assets including real estate. Mrs. Maragh's only asset was the proceeds from her half share in the family home and a "derisory" pension from the NIS. After he had purchased her half interest, Mr. Maragh paid her maintenance. Mr. Maragh was ordered to pay Mrs. Maragh monthly maintenance of \$35,000.00 for duration of their joint lives.
- [60] In **Francis** the parties had been married for thirty-seven (37) years, were in their sixties (60's) and retired. They resided in the UK during the marriage and were both employed. Their family home there had been sold and the net proceeds equally divided between them (they each received £112,500.00). After separation, Mr. Francis had paid Mrs. Francis £7,000.00. Mr. Francis was receiving two (2) pensions from the UK, while Mrs. Francis received three (3). Mrs. Francis had substantial savings and investments, owned real estate with her brother from which she received a monthly rental income, had sole use of a

motor vehicle that had been purchased for the use of the family and was entitled to a half share in a vacant lot of land in the community where they resided in Jamaica (Mr. Francis agreed to transfer his half share in this property to her and the court made an order to this effect). She applied to the court for maintenance in the form of a one-time lump-sum payment of £40,000.00 on the bases of poor health and the attending medical, as well as, dietary costs. She also contended that Mr. Francis had the ability to pay the sum she was seeking as he had more savings than she did, enjoyed higher pension benefits and his expenses were considerably less than hers were.

- [61] Her application was refused on the grounds that she had not demonstrated how she arrived at the lump-sum figure for maintenance to which she claimed to be entitled, the parties' assets base was fairly similar and she was more than capable to meet her reasonable expenses from the resources she had.

Analysis

- [62] Both cases relied on by the parties are distinguishable on their facts from the case at bar, although there are some similarities. For example, the parties in those cases were all over sixty (60) years old and had retired. This is not so in the matter being considered. Mr. and Mrs. Sewell have not yet reached the standard age of retirement in Jamaica. Mrs. Sewell is still employed and although Mr. Sewell has retired from the JDF he is self-employed as a businessman. Two of the similarities are that in both cases, like this one, the marriages were of long duration and the matrimonial homes were equally apportioned between the spouses. The latter similarity was a significant factor that was taken into account by the courts in determining whether or not maintenance was to be awarded to the applicant spouse and the quantum that was to be paid.
- [63] **Maragh** is distinguishable because unlike Mrs. Sewell, Mrs. Maragh was not permanently employed during the marriage. The number of times that she had to relocate, in light of Mr. Maragh's job, was much more than the two occasions that

Mrs. Sewell travelled overseas with Mr. Sewell. While abroad, Mrs. Sewell did not lose her job with CA Ltd and in fact resumed her employment with that organisation when she returned to the island. This was not Mrs. Maragh's situation. She had to give up whatever job she had on each occasion that she relocated. Mrs. Sewell's evidence was that she was able to contribute to the payment of the household expenses while the parties were married because she was employed. Mrs. Maragh on the other hand was not able to do so. She was supported, for the most part, during the marriage by Mr. Maragh. In other words, Mrs. Maragh did not attain self sufficiency during the marriage, unlike Mrs. Sewell who enjoyed a certain degree of economic independence, although it is agreed that Mr. Sewell was the principal breadwinner.

[64] On the issue of either spouse being eligible for a pension, Mrs. Maragh would only have access to what the court described as a pitiful pension from the NIS. This is certainly not the position with Mrs. Sewell who has taken the initiative since 2013 to contribute \$23,580.00 per month to a pension scheme. Although her employer does not contribute to the scheme on her behalf, she will have access to the principal amount that she has contributed plus any accumulated interest when she retires. Additionally, she will receive a pension, however small, from the NIS.

[65] In **Francis**, Mrs. Francis much like Mrs. Sewell shared a similar work history. Both were employed during their marriages. The marriages did not affect Mrs. Francis' or Mrs. Sewell's capacities to work and earn. However, some disparities are that Mrs. Francis was afflicted with certain lifestyle illnesses while there is no evidence that Mrs. Sewell is in a like state. Mrs. Francis was retired and receiving three (3) pensions while Mrs. Sewell is still employed and has at least thirteen (13) working years before reaching retirement age. However, when she retires she will receive two (2) pensions. Mrs. Francis had significant savings and investments. She also owned real estate from which she obtained rental income. Mrs. Sewell owns a half share in the family home. She has not disclosed the account in which her salary is deposited or any other accounts. I find that she

has not been totally frank with the court in this regard. Therefore, I am unable to say whether she has any other savings or investments apart from her pension plan.

Is there actually a need for maintenance and is Mr. Sewell capable of doing so?

- [66] When the claim was filed Mrs. Sewell was earning approximately \$54,000.00 per month. Admittedly, given her expenses, there was a shortfall of \$40,000.00 at that time and I believe that this was the reason for her initial claim for monthly maintenance. However, her financial circumstances have changed.
- [67] On the November 19, 2015 when she commenced giving evidence she indicated that her income had increased and she was at that time earning a salary of \$67,374.35 plus motor vehicle allowance in the amount of \$27,930.55 making a total of \$95,304.93. On April 24, 2017 she told the court that she had been promoted and was assigned a company car. Her salary was not increased. She stated that while she had lost the motor vehicle allowance, her salary was now \$96,000.00 net a result of the new income tax threshold.
- [68] I am of the view that her reasonable expenses are within her means and small shortfall of \$9, 500.00 can be addressed by adjusting the amounts spent on clothing and personal expenses.
- [69] Mrs. Sewell now resides at Cliveden Avenue which is, beyond contradiction, a more “upscale” neighbourhood than Harbour View. She has paid off her credit card debts and loans. It would appear that she is debt-free. She no longer pays for health insurance for her daughter and does not make any contributions towards her maintenance. Although she is no longer a shareholder and director in Narysa Enterprises Ltd, there is no evidence that the same applies to CA Ltd.
- [70] She has completed her first degree and has vast experience in the insurance industry. It is my view that her prospects for additional promotion and income are more probable than not. As an example, when the full effect of the new tax

threshold takes effect in January 2018, Mrs. Sewell should see an increase in her salary. She will also receive half of the net proceeds from the sale of the matrimonial home. I do not know if she has any savings or investment because she has made no disclosure about these important matters.

- [71]** Having considered the evidence and the law, I have concluded that Mrs. Sewell has not satisfied me on the balance of the probabilities that she is incapable of meeting her reasonable needs and that Mr. Sewell is financially capable of maintaining her. (See the discussion above). I have also found that she is quite capable of meeting her reasonable needs from her resources. She has failed to demonstrate why she needs a lump-sum payment, the amount she is seeking and how she arrived at the figure.
- [72]** Learned counsel for Mrs. Sewell did not indicate the legal basis that gives the court the jurisdiction to “adjust” Mr. Sewell pension rights in her favour by twenty to twenty-five percent (20 – 25%). I know that the pension or income of any person against whom a maintenance order has been made is liable to an order of attachment. (See sections 15 (1) (g), 15 (2) and 17 of the Act). However, I have not been directed to any statutory or common law authorities on the issue of “adjustment of pension rights.” In the circumstances of this case, I have decided that even if the court has the jurisdiction to do so, I do not believe that it would be just for the reasons given below.
- [73]** Firstly, Mrs. Sewell withdrew the sum of \$1,200,000.00 from the parties’ joint account after the first tranche of Mr. Sewell’s pension was deposited therein. I found her evidence that she had withdrawn this amount because Mr. Sewell could not account for the proceeds from the sale of the Suzuki Vitara as less than forthright.
- [74]** The documentary evidence revealed that \$1,150,000.00 was deposited to parties’ joint account on December 14, 2009. This was the account that they used to meet their household and other expenses. When it was put to her that

that figure represented the proceeds from the sale of the Suzuki Vitara, Mrs. Sewell's response was, "If that is the figure, then that is the figure."

- [75] I have concluded that she was well aware that the money realized from the sale of the Suzuki Vitara was lodged in their joint account and accounted for. She also knew that by 2012 that sum had long been used. As far as I am concerned she has already received a significant portion of Mr. Sewell's lump-sum pension, which is about one-sixth (1/6) of the total figure.
- [76] Secondly, it is my view that from the evidence Mr. Sewell has shown, that he is not capable, at this time, to pay maintenance to Mrs. Sewell. Mr. Sewell invested most of his lump-sum pension payment in two restaurants that have failed. The restaurant in the USA is indebted to the tune of US\$100,000.00. Being a thirty percent (30%) owner, he is responsible for at least US\$30,000.00 of that debt. This is quite a tidy sum when converted to Jamaican dollars. (The figure would be approximately J\$39,000,000.00). He owes his mother US\$8,700 which he borrowed to offset their daughter's educational and living expenses. He is the only parent who is maintaining her at this time. The revenue generated from his grocery business covers only basic costs. He is indebted to Sagicor Bank in the sum of \$1,500,000.00 and is paying off mortgage arrears of over \$400,000.00.
- [77] No evidence was presented by Mrs. Sewell to refute these assertions. It is therefore clearly evident, that Mr. Sewell's financial obligations and constraints, have effectively eroded his liquid assets base. His ability to provide maintenance to Mrs. Sewell is practically non-existent. Mrs. Sewell's claim on items 5, 6 and 7 of the FDCF, therefore, fails.

Disposal

- [78] Judgment for the Defendant on items 5, 6, and 7 of the Fixed Date Claim Form filed on November 5, 2013.
- [79] Each party to bear their own costs.