[2018] JMSC Civ. 20

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 04765

BETWEEN	**GLORIA STEWART**	**CLAIMANT**
AND	**HERBERT WILLIAMS**	**DEFENDANT**

IN CHAMBERS

Ms Simone N Gentles, instructed by Robinson, Gentles & Co, Attorneys-at-Law for the Claimant

Mrs Gloria Langrin, Attorney-at-Law for the Defendant

31st May 2017, 7th February and 16th February 2018

Property Division - Principles to be applied

Civil Procedure - Acknowledgment of service - Effect of admission contained therein - Effect of failure to apply for withdrawal of admission

LAING, J

[1] The Claimant seeks a declaration that she is entitled to eighty percent and the Defendant twenty percent, of property known as Grey's Inn Estate and Fairy Land Pen in the Parish of St Mary being lot numbered sixteen on the plan of Gray's Inn Estate, registered at Volume 939 Folio 72 of the Register Book of Titles ("the Property") as well as other consequential relief.

[2] The Defendant asserts that he is entitled to fifty percent of the Property in keeping with the expressed legal interests as contained in the registered title in respect of the Property.

Background

[3] The Claimant and the Defendant met in London, England and cohabited there between 1977 and 2002 or between 1978 and 2000 depending on which party's evidence one accepts.

[4] The parties purchased the Property as tenants in common and the transfer was registered on the Certificate of Title dated 22nd September 1983, in the names of Herbert Williams and Gloria Dunn. It is not disputed that the Claimant's maiden name was "Gloria Dann" and the reference to "Dunn" on the Certificate of Title was an error on which nothing turns.

The Claimant's case

[5] The Claimant asserted that the Property was purchased for J$41,000.00 and that she contributed half of that sum from the money she had received following the end of her employment at the Guy's hospital. She asserted that there was a house on the Property when it was purchased and the Defendant built a building at the back. The Claimant made it absolutely clear in cross examination that she was not saying that she spent any money on the building that the Defendant added.

[6] It was not contested that the house that was on the Property was in a state of disrepair and the Claimant reluctantly admitted that the Defendant sent J$28,000.00 to her with instructions to pay it to a contractor named Roy Anderson. That sum was duly paid pursuant to a written contract for "reconstruction" which was signed by the Claimant.

[7] The Claimant initially asserted during cross examination that Mr Anderson did not use any of that money for the building "*not even one single nail*" were her words. She said that Mr Anderson used the money for another building he was working on instead. Her evidence was that Mr Anderson did "*some work*" although not from the $28,000.00 and that the Defendant had paid Mr Anderson to do "*some*

work" before he left for England. She explained that at the time Mr Anderson started to work on the house the Defendant was there "*so that part of the work is between he and Mr Williams*". In answer to a question posed by the Court the Claimant conceded that the Defendant contributed to the repairs but "*not much*".

[8] The Claimant's evidence is that when the construction came to a standstill, the house was a mere shell and was not habitable. She made arrangements with Mr Haffezula, a hardware merchant to obtain items on credit from him and make payments over time. She said that she also purchased items from other suppliers over the years. She employed another contractor named Ruel Wiseman to finish the house and also employed other workmen when he was unavailable.

[9] Mr Wiseman also gave evidence on behalf of the Claimant and was cross examined. He confirmed that he was employed by the Claimant and did work on the Property but that this was not pursuant to a written contract. He said that he did various tasks as requested including, removing and replacing the front door as well as other doors, installing 11 windows, and replacing the entire ceiling.

[10] The Claimant's position in support of her claim, is that she did extensive improvements to the Property over the years including, remodelling the old bathroom and replacing the bathtub, adding a helper's quarters, and a verandah the latter of which was extended and renovated using decorative blocks, replacing the back galvanised zinc fence with a concrete wall and adding decorative blocks to the front boundary wall.

[11] The Claimant also asserted that the Defendant told her that the house belonged to her based on the amount of work and money that he knew she had spent on it and that it was alarming to her that he would now say that all the monies spent on the repairs were done by him.

The Defendant's case

[12] The Defendant asserted that the Property was purchased using only his funds and that explains why the receipts issued by the Attorney Mr Belnavis who handled the purchase were all in his name. He included the Claimant's name on the title as tenant in common as she was his girlfriend. He said he opted to have the parties hold the Property as tenants in common because it was his intention that his children would eventually have his interest. He said she did not participate in the process for the acquisition of the Property until it was time for her to execute the documents. He admitted that the Claimant did expend some of her money on the Property and that she did supervise the work, but said that she could not have afforded to finance the repairs and as a consequence he sent her money for that purpose. The Defendant exhibited a number of Western Union money transfer receipts which show him sending various sums of money to her.

The applicable law

[13] It should be noted from the outset that this is not a claim pursuant to the Property (Rights of Spouses) Act (PROSA). As a consequence the claim falls to be determined in accordance with well established common law and equitable principles relating to the division of property. The objective of this Court in these proceedings is therefore to declare the respective interests of the parties to the Property and not to adjust or redistribute property rights in order to accord with what might be considered to be principles of fairness.

[14] Support for the continued existence of the right to bring a claim outside PROSA may be found in the consolidated appeal of **Angela Bryant Saddler v Samuel Oliver Saddler** and **Fitzgerald Hoilette v Valda Hoilette and Davion Hoilette** [2013] JMCA Civ 11. The appellant in the **Hoilette** appeal filed a fixed date claim form with affidavit in support thereof pursuant to sections 16 and 17 of the Married Women Property Act ("MWPA") for division of the matrimonial home and another piece of property. A Judge on 10th July 2007 granted permission to

amend the fixed date claim form to include a claim under PROSA since sections 16 and 17 of the MWPA had been repealed on 1st April 2006 when PROSA came into effect. The learned Judge also ordered that the amended fixed date claim form filed on 20th June 2007 stand as a valid claim form. Subsequently on a preliminary objection, another Judge held, following the case of **Allen v Mesquita,** [2011]JMCA Civ 36, that there had been no prior application for leave or extension of time to file the fixed date claim form and accordingly there was no valid claim under PROSA before the Court.

[15] One of the issues considered on appeal was whether a claim form is valid if filed under a repealed statute and in addressing the issue the Court confirmed the ability of the Court to determine the respective common law, equitable, and legal rights and remedies independently of PROSA. At Paragraphs 51 and 52 of **Saddler and Hoilete** (supra), the Court of Appeal stated the following:

> *[51] By section 48 of the JSCA [Judicature (Supreme Court) Act], a judge of that court was given the power to recognize all equitable estates, titles and rights and all equitable duties and liabilities, and remedies and to grant such relief as could have been granted in the Court of Chancery before the passing of the JSCA. The Court was also given the power to give effect to all legal claims, demands, estates, rights, duties, obligations and liabilities existing at common law or by any custom or created by statute. In fact, section 48(g) of the JSCA reads thus:*
>
> > *"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 a multiplicity of proceedings avoided".*
>
> *[52] I agree with counsel for the appellant in the Hoilette appeal that in filing the fixed date claim form, regardless of its inaccurate title, the claimant wished the court to determine between the parties, their respective common law, equitable and legal rights and remedies. It would have been a valid claim, and the court is also enabled under PROSA to determine those rights and remedies.*

[16] Counsel for the Claimant submitted that the House of Lords in **Stack v Dowden** [2007] 2 All ER 929, laid down the principles to be applied to joint legal ownership where the parties are not married and that a similar approach ought to be taken in this case. The Court notes that in **Stack v Dowden** the Court was primarily concerned with cohabiting spouses and as Lord Hope of Craighead recognised at paragraph 3 of the judgment:

> *...But cohabiting couples are in a different kind of relationship. The place where they live together is their home. Living together is an exercise in give and take, mutual co-operation and compromise. Who pays for what in regard to the home has to be seen in the wider context of their overall relationship. A more practical, down-to-earth, fact-based approach is called for in their case.*

[17] The evidence of the Claimant in this case is that the Defendant returned to live in Jamaica in 1997 and lived with her for about a year before moving out of the home in 1998. Although the parties only cohabited in Jamaica for this short period there is still an issue raised as to who paid for what in regard to the usual household expenses based on the Defendant's assertion that he assisted with the maintenance of the Claimant's son and that even while he was abroad he sent money to the Claimant for household expenses. However there was no suggestion by the Defendant that he was relying significantly on his contributions during the period of cohabitation, but rather that he was relying more so on his contributions to the Property towards the purchase price and his contributions by way of all the funds he sent to the Claimant even when they were not cohabiting.

[18] Although in many cases the property in dispute was acquired by the parties utilising mortgage financing that was not the case here. One minor benefit of that fact in the Court's analysis is that the Court is not being called upon to perform the sometimes difficult task of analysing the direct and indirect contributions to the mortgage payments as well.

[19] Notwithstanding the short period of cohabitation of the parties in Jamaica and the absence of mortgage payments from the equation, the principles outlined in **Stack** offer helpful guidance to the approach to be taken in the case herein

although the Court's analysis will primarily be focused on the issue of the value of alleged improvements to the Property.

[20] Adopting that approach in **Stack** I agree that the Court should begin by taking joint beneficial ownership as the starting point. I also accept that because this is a case of joint legal ownership, the onus is on the Claimant to show that the beneficial interests are divided other than equally, as shown on the registered title for the Property, and that in order to do so the Claimant must demonstrate this to the Court on the evidence.

[21] In **Stack** Lord Walker of Gesting Thorpe commented as follows:

> *[33] In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case. I agree with Lady Hale that this is, on its facts, an exceptional case.*

[22] Unfortunately, a detailed examination of the parties' relationship and finances is precisely the approach adopted by the parties in the case herein. The Claimant exhibited a bundle of invoices for items that she asserted were purchased by her (many of which were poor copies), without even adding the figures and providing the Court with the total of those invoices. The undesirability of such an approach is obvious and needs no further comment. Counsel for the Claimant explained that the purpose of the invoices was not only to demonstrate the actual amount which the Claimant asserts she spent but also to provide evidence of her consistent efforts at improving the property over a long time.

[23] The Claimant did not give evidence as to the total amount she claims she expended on the repairs and/or refurbishing of the Property. For this reason, the Court is not in a position to embark on the detailed analysis of the Claimant's contribution which it is being invited by the Claimant to perform. However there are other reasons preventing an arithmetic analysis. One such reason being that

no evidence was presented to the Court as to the current market value of the Property and of its respective components. If the Court were to embark on an arithmetic approach, it would have been significantly assisted by evidence of an expert who could express the improvements as a fraction of the current value of the property having regards to what might have been the appreciation of the Property as a result of the natural movement in value over time (without such improvements). Having regard to the absence of this sort of evidence, it is very difficult to determine whether the asserted level of expenditure of the Claimant, (which is not represented in an actual sum), would justify her having the greater 60 percent share for which she prays. This difficulty is especially highlighted in the face of the admitted evidence that the Defendant built another building on the Property which the Claimant said he referred to as his “office”, the construction of which was not funded in any way by the Claimant. The Value of this building is unknown and its value as a portion of the total valueof the Property cannot be determined on the evidence before the Court.

[24] The Defendant has similarly exhibited a bundle of wire transfer receipts evidencing transfer of various sums of money to the Claimant. He also did not see it necessary to add the figures and provide a total and so the Court was constrained to perform that exercise. Those wire transfer receipts total well in excess of $41,000.00 which is the price at which the Property was purchased. The Claimant suggested that much of this money was in respect of another property but produced no other evidence to support this assertion. I accept the evidence of the Defendant that the funds sent to the Claimant by wire transfer was in keeping with his practice of providing money to her for her support and for the support of her child which started from the time when they were in England and she stopped working at the Hospital. I also find that it s a reasonable inference that the Claimant utilised directly or indirectly some of these funds in the improvements to the Property.

[25] The Defendant’s evidence was that he was a small businessman who had the resources to pay for and did pay for the improvements to the Property. The

evidence supports this and I accept his evidence and find that he contributed substantially to those improvements to the Property.

[26] The Claimant asserted that she was the person who provided the funds for most of the renovation and improvement of the Property over the years. Her evidence as to the source of these funds has been less than clear. She indicated that she received pension benefits from the British Government for disability as well as a benefit from Guys Hospital which was her former employer. In addition she said that she received benefits from her son's father for her son's maintenance and that she also used some of this money to assist with the accommodation of herself and her son. Glaringly absent was any evidence of these amounts.

[27] I accept the evidence of the Claimant that when she retired she received £2000.00 which she used to contribute to the purchase of the Property. However I find that she did not, by herself provide all or a substantial portion of the funds that were used to renovate the property as she asserted. Her evidence is that she received pension benefit in the amount of seven hundred and eight pounds (£708.00) per year. Evidence was also produced to show that there was a court order for her child's father to pay maintenance but the amount was not disclosed and the point was made by Counsel for the Defendant that there a was no evidence that the payments were actually being made. Counsel for the Claimant apologized for not having been able to provide evidence as to the rate of exchange between the Jamaican Dollar and the British Pound at the relevant time but I am not of the view that the absence of this evidence matters much. The amount is seven hundred and eight pounds per year and I think the Court is entitled to use its knowledge to have an idea of the approximate purchasing power of that sum, whatever the rate of exchange.

[28] If the Claimant was not being maintained by the Defendant, she would have had to have paid all her usual expenses, from this sum. There could not possibly have been much, if any, left over to pay for improvements to the Property. Similarly Court ordered child support payments are usually not so enormous as

to leave the mother with a large surplus which she may utilize at her pleasure. Accordingly, even if the Claimant was receiving child support payments as she asserted, I find that she would not have been able to use a substantial portion thereof (if any) for the improvement as to the Property.

[29] Consistent with the guidance offered by **Stack**, I am of the firm view that, that sort of precise mathematical analysis which the parties have adopted ought not to be applied in this case. Having regard to the nature of the evidence before the Court, to the extent that such an analysis may even be possible given the previously identified limitations, it does not support a finding other than that equity follows the law and the parties are entitled to a share in keeping with the declared equal legal interest. For the avoidance of any doubt, there was insufficient evidence presented to the Court to support the granting of the relief sought by the Claimant of a declaration that Property "*is owned by the parties as follows: 80% to the Claimant; 20% to the Defendant*,..."

[30] I do not accept the evidence of the Claimant that prior to this claim the Defendant orally promised that the Claimant would have a greater than 50 percent interest. However the Court notes the evidence that the Defendant in his Acknowledgment of Service filed 4th February 2013 with the assistance of Counsel, indicated that he admitted part of the claim and "*That Claimant may be entitled to about 60% of the value of the house*."

The Defendant's admission in the Acknowledgment of Service

[31] Rule 14.1 of the **Civil Procedure Rules** ("CPR") deals with judgment on admission. Rule 14.1(1) provides that a party may admit the truth of the whole or any part of any other party's case and rule 14.1 (6) provides that where such an admission is made the court may allow a party to amend or withdraw it.

[32] In **Rewachand Free Zone N.V. t/a Rewa's Enterprise v Beverly Rhoden** [2016] JMSC Civ. 32 this Court adopted the reasoning in the case of **Sowerby v Charlton [2006] 1WLR 568** in which the Court of Appeal of England took the

opportunity to clarify the ambit of the UK Civil Procedure Rules, rule 14 (which is in similar terms to our CPR part 14) and concluded that leave of the Court is only required for post-action admissions. I have reproduced an extract of the Court of Appeals instructive analysis in **Sowerby** as follows:

> *"...Needless to say an admission, depending on its content, may open the way for judgment to be entered on the admission under **CPR Pt 14**.*
>
> ***18*** *This new regulatory scheme has been so carefully crafted that in our judgment the rule-makers cannot have intended a pre-action admission of liability to be embraced by the words "A party may admit the truth of the whole or any part of another party's case" in **CPR r 14.1.** In the same way as an admission of guilt to a police officer cannot in itself be equated with an admission of guilt when a charge is brought in court (so as to dispense with the need for the charge to be put formally to the defendant in court), an admission of liability before an action is brought cannot be equated with an admission of "the truth of the whole or any part of another party's case". That party's "case" will not have been formulated until the claim form or the particulars of claim are prepared (see para 11 above), and it would not ordinarily be meaningful to describe someone as a party until legal proceedings have been commenced. It would have been very easy for the rule-makers to have made it clear that admissions of liability made before an action was started were also included in the language of **CPR r 14.1**, and the simplicity of the procedures for admissions leading to judgments on money claims that are set out in **CPR rr 14.4** to **14.7** would be made very much more complicated if an admission that might give rise to a judgment being entered as of right could also be gleaned from possibly fast-moving pre-action correspondence about an accumulating debt."*

[33] An acknowledgment of service filed by a Defendant in a civil claim is a post claim document. As such, any admission made therein can properly be considered to be a post claim admission. Having made the admission in his acknowledgment of service to which reference has already been made, the Defendant did not apply to withdraw it. Although the admission is in respect of "*the house*" I have considered the admission in light of the evidence that the Defendant also built another building on the Property. The distinction between the house only and the Property is significant and no doubt would have been highlighted by his able Counsel and appropriately addressed if there was an intention to rely on this distinction. I have therefore construed his admission to be an admission that the Claimant is entitled to up to 60 percent of the Property. Having regard to this

admission, and the fact that there was no application to withdraw it pursuant to CPR rule 14.1(6), the Court will make a declaration that the Claimant owns a 60 percent interest in the Property.

Disposal

[34] For the reasons expressed herein, the Court makes the following orders:

1. The property known as land part of GRAY'S INN ESTATE AND FAIRY LAND PEN in the parish of St. Mary being lot numbered SIXTEEN on the plan of GRAY'S INN ESTATE, registered at Volume 939 Folia 72 of the Registered Book of Titles ("the Property"), is owned by the parties, beneficially as follows: Sixty percent (60%) by the Claimant and forty percent (40%) by the Defendant.

2. The Market value of the Property is to be determined by a reputable valuator to be agreed by both parties and who shall prepare a Valuation Report. In the event there is no agreement on a valuator, one is to be appointed by the Registrar of the Supreme Court.

3. The Cost of the valuation report is to be borne by each party in proportion to their respective beneficial interests, that is, 60% by the Claimant and 40% by the Defendant. If any party advances the cost of the valuation payable by the other, that party is to be given credit therefor and refunded from the proceeds of sale.

4. The Defendant shall have the option of purchasing the Claimant's 60% share of the Property and is to indicate his intention to exercise that option in writing to counsel for the Claimant within 30 days of the receipt of the Valuation Report.

5. In the event that the Defendant does not indicate his intention to exercise his option to purchase within 30 days of receipt of the Valuation Report, or having indicated his intention to purchase, is not in a position to purchase the Claimant's

share within 90 days of notification to the Claimant's attorney, the Property is to be offered for sale on the open market by private treaty or auction.

6. Simone N. Gentles Attorney at law is to have carriage of sale of the Property.

7. In the event that either party fails or refuses to sign the documents necessary to effect a sale of the Property, the Registrar of the Supreme Court is hereby authorised to sign any such document.

8. Each party is to bear his own attorneys cost of the claim.

9. Liberty to apply