[2015] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 21/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**HYACINTH GORDON**	**APPELLANT**
AND	**SIDNEY GORDON**	**RESPONDENT**

Ms Dionne Meyler instructed by Dionne N S Meyler and Associates for the appellant

Respondent absent and unrepresented

16 June and 3 July 2015

MORRISON JA

[1] I have read, in draft, the judgment prepared by my brother Brooks JA for delivery in this matter. I have found his conclusions irresistible and there is nothing that I can possibly add to them.

PHILLIPS JA

[2] I too have read the judgment of Brooks JA. I am in agreement with his reasoning and conclusion and there is nothing that I can usefully add.

BROOKS JA

[3] This is an appeal by Mrs Hyacinth Gordon from the decision of Her Honour Mrs Dionne Gallimore-Rose, the judge of the Family Court for the parishes of Saint James, Hanover and Westmoreland. The learned judge ordered on 7 April 2014 that Mrs Gordon's husband, Sidney, was "entitled to a 10% share and interest in the dwelling house" which was formerly their matrimonial home. Mr Gordon had moved out in 2012 when their marriage broke down irretrievably. The marriage had lasted for 12 years.

[4] Mrs Gordon contended that the learned judge, having found that the nine or 10 bedroom concrete house was built on land owned by her family, was therefore not the family home, for the purposes of the Property (Rights of Spouses) Act ("the PROSA"), and was built with money provided by Mrs Gordon's family, erred in awarding an interest to Mr Gordon. In her submissions, the major thrust of learned counsel Ms Meyler, on behalf of Mrs Gordon, was that the learned judge having rejected Mr Gordon's claim that the property was the family home, was not entitled to thereafter treat the property as being other matrimonial property for the purposes of section 14 of the PROSA. Learned counsel argued that it was indicative of the error that the learned judge did not seek to award any interest to Mrs Gordon.

[5] The court did not have the benefit of any submissions on behalf of Mr Gordon. It has, based on the grounds of appeal and the points raised during Ms Meyler's submissions, identified the following issues for analysis:

1. Where a claim is brought in respect of a share or division of the family home is the court at liberty to consider an entitlement pursuant to section 14 of the PROSA?

2. What is the jurisdiction or entitlement of the court, where it accepts that other persons have an interest in the property, to make an order concerning entitlement to the property, if those persons are not made parties to the action?

3. Is there any basis for the judge to have allocated an interest of 10% of the property to Mr Gordon?

4. In the event that the learned judge erred in making the award, is there any basis for returning the claim for re-trial?

[6] Before turning to those questions, a brief outline of the background to the claim will be given. It will be followed by a summary of the learned judge's finding.

Background to the claim

[7] The Gordons married on 24 October 2000. Thereafter, they lived together at Mrs Gordon's house. It was a board structure. There was, however, an incomplete concrete structure consisting of a bedroom, kitchen and bathroom on the said premises. Over the course of the next 12 years the board structure was replaced by an enlarged concrete building with nine or 10 bedrooms, along with other normal characteristics of a dwelling house.

[8] Mr Gordon testified that he contributed to the development of the property. He stated that he was in the transportation business, doing removals and that he transported all the materials that his van could carry. He said that he contributed his

labour in a number of ways and also bought building material. He testified that he had also paid for grillework to be done. He also said that he cooked for the workmen.

[9] He accepted that it was Mrs Gordon who bore the brunt of financing the construction as she was in a better financial position than he was. He also contended that he supported the appellant by spending his money at the supermarket during this time. He also told the court that he made breakfast for the appellant every morning and took her to work.

[10] Mrs Gordon testified that the land on which the house was built did not belong to her but belonged to her great great grandparents, presumably both dead as Mrs Gordon was 62 years old at the time of the trial. She said that it was her mother who gave her the money to start the construction. This was done so that when her siblings and other relatives, who resided overseas, visited Jamaica they could stay there. Thereafter, it was her sister who contributed the majority of the funds that financed the construction. Mrs Gordon worked as a massage therapist at a local hotel. She said that none of her money was used to finance the construction.

[11] She insisted that she could not have financed the construction and she relied on a bank account jointly held by her and her sister to show that it was the sums deposited by her sister that was used to build the house. She stated that Mr Gordon did not contribute financially to the construction of the house neither did he do any actual work on the house. She contended that all he did was cook for the workmen and painted the water tank. She accepted that he did cook breakfast for her but otherwise

did not contribute anything. She also stated that she supported him financially throughout the marriage.

The claim

[12] Mr Gordon's claim, when filed, sought a, "50% share of 10 bedroom three storey concrete house (6 bedrooms unfinished) locate [sic] at Belmont Dist, Bluefields P.O. in the parish of Westmoreland". His claim was made pursuant to the PROSA. At the trial, he modified his claim, saying that he was entitled to a 30% share of the property.

The decision

[13] The learned judge made the following order:

> "Upon the evidence the court declares that the Applicant is entitled to Ten Percent (10%) share and interest in the dwelling home located at Belmont District, Westmoreland which is to be valued at the cost of both parties in terms of their respective share [sic] 90:10."

[14] The learned judge accepted that Mr Gordon did make some, albeit mainly indirect, contribution to the property. She made reference, in her reasons for judgment, to section 14(3) of the PROSA. She found particularly helpful, paragraphs (d), (e), (f) and (g) of that section. The basis for that decision was summarised at paragraph 15 of her reasons for judgment. There she said:

> "While finding that Mr. Gordon in their twelve (12) year marriage did make indirect contribution including moral support of his wife and direct contribution of labour to the construction of the house alongside small expenditure and his assistant supervisory role during the actual building, this was within the context of Mrs. Gordon being the main breadwinner in the household and there being no children

> and the court duly acknowledging the chunk of finances coming from Mrs. Gordon's relatives. It is with all due contemplation of these most pertinent factors that I find as reasonable, a grant of 10% to the husband of the dwelling structure (i.e. the house only)."

Was the court at liberty to consider an entitlement pursuant to section 14 of the PROSA?

[15] This property cannot be said to have constituted the "family home", as defined in the PROSA. It did not satisfy the definition of that term as it was not owned solely by one or both of the spouses. The claim, as filed, was therefore misguided.

[16] Despite a claim having been filed on an inappropriate basis there is, however, nothing to prevent the court, in a proper case, from dealing with property involved, as being other than the family home. Section 13 of the PROSA allows a spouse to apply to the court for a division of property in certain specific circumstances. One of those circumstances is where the spouses have separated and there is no reasonable likelihood of reconciliation. Where that application is made it is section 14 that next applies. Section 14(1) directs the court as to the approach to be used if the property is the family home and if it is property other than the family home. It states:

> 14.--(1) Where under section 13 a spouse applies to the Court for a division of property the Court may-
>
> (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; **or**
>
> (b) subject to section 17 (2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),

or, where the circumstances so warrant, take action under both paragraphs (a) and (b). (Emphasis supplied)

[17] Ms Meyler submitted that if the claim were based on the premise that the property was the family home and that premise proved to be false, the court could not thereafter treat with the property on the basis that it was other matrimonial property. Not surprisingly, learned counsel did not provide any authority to support that submission. The submission is not well founded. A fair reading of the section leads to the conclusion that the court, on considering the claim, may deal with it according to the type of property that it deems the property to be, that is, whether it is the family home or it is property other than the family home.

[18] The remaining subsections of section 14 reinforce the point that the court may treat with property according to the category in which it places that property.

"(2) The factors referred to in subsection (1) are-

(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) **that there is no family home**;

(c) the duration of the marriage or the period of cohabitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

(3) In subsection (2) (a), "contribution" means-

(a) the acquisition or creation of property including the payment of money for that purpose;

(b) the care of any relevant child or any aged or infirm relative or dependant of a spouse;

(c) the giving up of a higher standard of living than would otherwise have been available;

(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which-

(i) enables the other spouse to acquire qualifications; or

(ii) aids the other spouse in the carrying on of that spouse's occupation or business;

(e) the management of the household and the performance of household duties;

(f) the payment of money to maintain or increase the value of the property or any part thereof;

(g) the performance of work or services in respect of the property or part thereof;

(h) the provision of money, including the earning of income for the purposes of the marriage or cohabitation;

(i) the effect of any proposed order upon the earning capacity of either spouse.

> (4) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution." (Emphasis supplied)

Is the court entitled, where it accepts that other persons have an interest in the property, to make an order concerning interests in the property, if those persons are not made parties to the action?

Is there any basis for the judge to have allocated an interest of 10% of the property to Mr Gordon?

[19] These two questions are closely related and may be analysed together.

[20] It is a basic tenet of our common law that a person could not be deprived of his interest in property without having been given an opportunity to be heard in respect of any such deprivation. A court that is made aware of a person's interest in property should, therefore, make no order concerning that property, unless that person is given an opportunity to appear and make representation in that regard.

[21] The learned judge, although accepting that this property was not wholly owned by either Mr Gordon or Mrs Gordon or both, was therefore in error in declaring that Mr Gordon had an interest in it, not having the other interested parties before the court.

[22] Even if Mr Gordon could have established that the other interested parties had so conducted themselves that he would be entitled to secure an interest as against them, it would have been necessary for them to have been present to answer his allegations. There have been cases where relief has been granted even when the property is owned by one spouse along with others. In those cases the other parties were joined.

[23] In **Greenland v Greenland and Others** Claim No HCV 2805/2007 (delivered 9 February 2011), the court held that a wife was entitled to an interest in property that was owned by her husband and his children. The interest had been secured by her contribution to the acquisition of the matrimonial home, the construction of the building thereon and her care of the children, who were all minors at the time of the acquisition of the land. In that case, however, all the children were joined as parties to the claim.

Is there any basis for returning the claim for re-trial?

[24] The learned judge having erred in making the order that she did, the question that remains is whether Mr Gordon's claim ought to be re-tried. It is apparent that that would not be a practical course. There does not seem to be anything in Mr Gordon's evidence to suggest that Mrs Gordon's mother, sister or any other member of the family, who would have had an interest in the property, had any interaction with Mr Gordon so that he could have made any claim in equity against them. The learned judge's finding that Mr Gordon made an indirect contribution to the improvement of the property could not avail him any benefit.

[25] There is a general principle that what is affixed to the land, as in this case, a concrete structure, becomes part of the land. Williams J in **Greaves v Barnett** (1978) 31 WIR 88 at page 91 j, expressed the principle this way:

> "[t]he general rule is that what is affixed to the land is part of the land so that the ownership of a building constructed on the land would follow the ownership of the land on which the building is constructed."

[26] Another general principle that is applicable to this case is that one cannot bind a person by carrying out work on his land without his tacit or express request or approval. This was stated by Bowen LJ in **Falcke v Scottish Imperial Ins Co** (1886) 34 Ch D 234 at page 248:

> "…work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

[27] Mr Gordon's contribution to the construction, as found by the learned judge, becomes part of the interest vested in the owners of the land. It does not entitle him to any interest in the property. Neither can he, on the mere basis of having made that contribution, properly make any claim against those owners for compensation for his contribution.

[28] Although he has no claim for an interest in the property, there is, however, the question of whether he has any claim against Mrs Gordon for a refund of his expenditure. The learned judge was clearly of the view that he had incurred expenditure. It would, however be difficult to award Mr Gordon any money on the claim that he had advanced. He failed to mention any sum that he had expended. The only mention of a figure in his entire testimony concerned the amount of money he received from Mrs Gordon toward paying for a boat that he had.

[29] The authorities are clear that he could receive nothing for providing personal services such as preparing breakfast for Mrs Gordon as that is expected as being part of the marriage contract. As an interest in the property is no longer a factor to be considered, it would seem that section 14(3) and 14(4) would not be able to assist him in countering the point made by Lord Hodson in **Pettit v Pettit** [1969] 2 All ER 385 at page 400 F where he agreed that a husband "should not be entitled to a share in the house simply by doing the 'do-it-yourself jobs' which husbands often do". Extending that principle to a claim against Mrs Gordon it could be said that Mr Gordon should not be entitled to be repaid for such things as making her breakfast. The evidence suggested that she provided much more to him by way of sustenance and comfort than the other way around.

[30] In **Shim v Shim** Claim No 2005 HCV 2986 (delivered 16 May 2008), a man was awarded a sum of money against his former wife and mother in law as a refund of expenditure he had incurred, at their request, in building a house. The expenditure was on the basis that he would have secured an interest in the property. It proved however that he could have secured no interest in that property as they had none that they could transfer to him. He, unlike Mr Gordon, provided documentary evidence as to his expenditure. Mr Gordon can secure no assistance from that case.

Summary and conclusion

[31] The learned judge, having found that the property, which was the subject of the claim, did not satisfy the definition of a family home, and having failed to recognize that

she did not have, before her, all the parties who were interested in that property, erred in declaring that Mr Gordon had an interest in it. There is, however, no practical benefit to be gained by returning the claim to be re-tried as Mr Gordon did not give any indication that the persons who had interests in the property were liable to him in any way. Neither did he provide any evidence of any expenditure that he could properly recover from Mrs Gordon.

[32] In the circumstances, the appeal should be allowed, the judgment of the learned judge of the Family Court set aside and a judgment entered for Mrs Gordon in its stead, with costs to her both here and in the court below.

MORRISON JA

ORDER

Appeal allowed. Judgment of the learned judge of the Family Court set aside. Judgment entered for the appellant. Costs to the appellant both here and in the court below. Costs of the appeal are set at $15,000.00.