

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SAINT LUCIA

CLAIM NO. SLUHMT2015/0178

BETWEEN:

ANDREA MARIA VIVILLE (nee CLAREY)

Respondent / Petitioner

and

SHERMAN VIVILLE

Applicant / Respondent

Before:

The Hon. Justice Godfrey P. Smith SC

High Court Judge

APPEARANCES:

Diana Thomas for Applicant/Respondent

Esther Greene Ernest for the Respondent/Petitioner

2018: February 15th
February 21st

JUDGEMENT

- [1] **Smith J:** In this application for ancillary relief, Sherman Viville (“the husband”) asks the court to order an equal sharing, between himself and Andrea Viville (“the wife”), of the value of the matrimonial home constructed on parcel 1457B 721 (“the

house”) based on his contributions to the building of the house. He says he is entitled to a beneficial interest in the house, in the share corresponding to his overall contributions to it.

- [2] The wife says that both the land and the house is her sole property (subject to the co-ownership rights of her brother in the land) and that she is only liable to the husband for such sum as represents his contribution, if any, to the construction of the house.

Does s. 45 (b) of Divorce Act preclude Resulting Trust?

- [3] The application is brought under section 45 (b) of the **Divorce Act** (“the Act”) which provides as follows:

45. Order of court as to property

The Court, on making a decree of divorce or of nullity of marriage may, if it thinks fit, on the application of either party made before the decree of divorce or nullity is made, make an order—

(b) if any property of the parties or of either of them is separate property within the meaning of the Civil Code and the Court is satisfied that the other party has made a substantial contribution (whether in the form of money payments, or services, or prudent management, or otherwise howsoever) to the improvement or preservation of such property—

(i) directing the sale of such property and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the Court thinks fit,

or

(ii) directing that either party pay to the other such sum, either in one sum or in installments and either or at a future date and either with or without security, as the Court thinks fair and reasonable in return for the contributions made by that other party.

- [4] Relying on **Barnard v Barnard**¹, the *cause célèbre* on division of matrimonial property in Saint Lucia, Mrs. Greene-Ernest, counsel for the wife, submitted that, the applicant, having come squarely under section 45 (b) of the Act, this court is

¹ Saint Lucia, SLUHMT2001/0131

limited to directing a sale of the property and dividing the proceeds, or directing that one party pay a determined sum to the other in return for contributions made to improvement or preservation of the property. The court was unable, she contended, to make an award of an interest in the property or a declaration of a trust. The only relief, if proven, is the value of the husband's contribution less any deductions the court was entitled to make.

- [5] Ms. Thomas, counsel for the husband, agreed that the application was brought under section 45 (b) of the Act but submitted that if the grounds of the originating summons are examined it will clearly be seen that the husband was claiming a beneficial interest based on common intention of the parties, which is the basis for the construction of a trust. She contended that, in the context of the intersecting of the **Civil Code** of Saint Lucia with the jurisprudence on constructive trusts, it was open to the court to find, if proven on the evidence, that there was a constructive or resulting trust, notwithstanding the nomenclature of the originating summons as a section 45 (b) application.
- [6] In the end, the court was spared from forensic toil in the vineyard of that intersection when Ms. Thomas conceded, in her closing oral submissions, that there was no sufficient evidence of a common intention that could ground a claim for a beneficial interest based on constructive/resulting trust principles.

Issues

- [7] That issue having been disposed of, the questions that remained for the court's determination was (1) what is the value of the husband's contribution to the construction and maintenance of the house, if any; and (2) what deductions could lawfully be made from that sum?

Relevant Undisputed Facts

- [8] It is not in dispute that the wife is co-owner with her brother of Block 1457B, parcel 721 and that it is not community property. The parties began courting sometime in May 2012. There was a discussion about the husband constructing a house for her on the land. He did some steel work for the foundation of the house for which he was paid. Then, they signed a short, one-page document entitled "Job Description" which described the duties and responsibilities of the contractor (the husband) as: (a) buying materials; (b) transportation; (c) renting tools e.g. mixer, jackhammer etc; (d) paying labourers; (e) securing excavator. Construction started in November 2013. The wife paid for all materials, professional services and labour. The husband sourced materials, supervised the workers and paid the workers with funds provided by the wife; he did work himself on the building such as masonry, plumbing and tiling. The parties were married on 19th February 2014. They moved into an apartment together while the house was being completed. She paid the rent and all household expenses. They left the rented apartment and moved into the unfinished house in November 2014. Some work like painting, tiling and hanging of doors continued on the house in November 2014 and January of 2015. In March 2015, the wife moved out of the matrimonial home alleging abuse by the husband. She was granted a Decree Nisi on 3rd November 2016 and a Decree Absolute on 8th February 2017.

Relevant Disputed Facts

- [9] The following represent the main areas of evidential discord. The wife's narrative is that at the time of the signing of the "Job Description" the husband requested payment of \$120.00 per day for his construction services which she agreed to and that this remained so even after they were married. She says that, prior to the marriage, he was paid this \$120.00 per day in cash in his hand or via deposits into his account. After the marriage, according to her, they agreed that his \$120.00 would be put towards his share of household expenses and this was in fact done. She stated that the construction was prolonged because to fund the construction she had to sell off other lands she owned and this took some time. She contends

that she encouraged him to take other jobs during the lull in construction but that he refused to do so.

- [10] On the husband's narrative, they never discussed and agreed on the price of \$120.00 per day; the understanding was that he would give his services as the house was to be their matrimonial home. He agreed that they never discussed that he would have a one-half interest but insisted that it was to be their home together. In his witness statement, he stated that for an entire year he took no other jobs because he was focused on building the matrimonial home. He denied there was ever any agreement that his wages would be put towards his share of household expenses and averred that the wife knew of the huge income disparity between them and accepted it. He stated that the construction took the time it did because he was doing most of the work himself; he denied that he refused other jobs.

Husband's Contribution: The Heywood Report

- [11] The parties agreed to the appointment of Mr. Charles Heywood, quantity surveyor. Based on the jointly agreed terms of reference, he was to visit the property and assess the value of the husband's contribution to the construction of the house by way of management services, labour and application of contractor's discounts/savings. Mr. Heywood did a walk throughout the building on 3rd November 2017 with the parties and their counsel and discussed various issues related to the construction of the building. He did so again on the 7th November 2017. He assessed the building as being 79% complete. His assessment examined substructure, frame, upper floor, roof, external and internal walls, windows and doors, wall, doors and ceiling finishes, built in furniture, concrete staircase and railings, electrical installation, plumbing installation and external works

[12] His findings are set out below follows:

The estimated construction cost to the date of site visit	EC\$359,568.53
The value discounted for defects	EC\$ 47,623.98
Material cost	EC\$197,762.69
Labour cost	EC\$125,848.98
Transportation cost	EC\$ 35,956.85

The amount due to the contractor is as stated:-

(a) Management services

For management services we use a 15 No. month for productive time in relation to the 20 No. month contract but the contract is only 79% complete. We hereby recommend a project completion time in say five to six months

Therefore the amount is 15 No. months @ EC \$1,500.00/month 22,500 79.00 \$17,775.00

(b) Labour 20 No. months @ EC\$5,000.00/month 100,000 79.00 \$79,000.00

(c) Contractors discount/savings 2.5% (65% of EC\$197,762.69) \$3,213.64

Amount due to contractor EC\$ 99, 988.64

Deduction for defects

[13] Mrs. Greene-Ernest pointed out to the court that the value identified by Mr. Heywood as “the value discounted for the defects”, namely \$47,623.98, was not subtracted from the estimated construction cost of the house (which he placed at \$359,568.53) since, when the figures for material cost, labour cost and transportation cost are totaled, they amount to \$359,568.53. She submitted that the sum of \$47, 623.98, representing the value to be discounted for defects, would have to be deducted from the sum of \$99, 988.64 identified by Mr. Heywood as due and owing to the husband. She contends that were it to be otherwise the wife would have to absorb the cost of fixing the defects which would be unfair and unjust. I think this a fair and reasonable point. Indeed, were it to be otherwise, it would mean that husband would be entitled to his contract price or the cost of his services regardless of how serious or hazardous his defective workmanship might have been and regardless of the cost of remedying it. This could not be right. It

could not have been the intention of the parties that the wife would absorb the cost of remedying defective workmanship regardless of the cost involved.

Household Expenses

- [14] There is no gainsaying that the wife paid 100% – or very close to 100% – of the household expenses. The question is: should a sum representing the husband's share of the household expenses for the time they lived together as man and wife in the matrimonial home be now deducted from the value of his contribution to the construction of the house? The answer to that depends on what was the understanding of the parties. The husband says there should be no such deduction whatsoever because the wife took him as he was and they never agreed that his wages would be put towards household expenses. He said that, in the first place, they never agreed on wages because the understanding was that it was to be their matrimonial home. The wife's testimony was that the husband consumed much food and as the expenses mounted he agreed to his wages going towards household expenses because he wanted to contribute his share. Whose narrative do I believe?

Assessing Demeanor of Witnesses

- [15] Before turning to the assessment of the witnesses, I remind myself that assessing the demeanor and credibility of witnesses should be approached with caution. How much emphasis should I place on perceived demeanor? And, what is meant by demeanor anyhow? Lord Bingham offered this answer: "his conduct, manner, bearing, behavior, delivery, inflexion; in short, anything which characterizes his mode of giving evidence but does not appear in a transcript of what he actually said."²
- [16] It was Lord Pearce in the House of Lords in **Onassis v Vergottis**³ who offered this compelling guidance on assessing witness credibility:

²Bingham, *The Business of Judging*, (Oxford) p. 8.

³ [1968] 2 Lloyd's Rep. 403 at p.431

"Credibility' involves wider problems than mere 'demeanor' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases that, with every day that passes, the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process."

[17] And, Mr. Justice MacKenna, writing extra-judicially, commented as follows:

"I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanor, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose

statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or natural timidity? For my part, I rely on these considerations as little as I can help.⁴

Payment of \$120.00 per day

- [18] Keeping these precepts in mind, I assessed the respective testimony of the parties. I have no hesitation in concluding that I found the wife to be a very credible witness. She was confident, clear and firmly in control of her narrative. She was never evasive and ready to expand on any question she was asked. She did not contradict herself. She provided the kind of details in her answers that lend the ring of credibility to her narrative; she did not appear at all rehearsed. She appeared frank and direct.
- [19] Ms. Thomas, in her oral closing arguments pointed out, correctly, that the wife, in her first affidavit had averred that the husband had been paid his wage like every other worker for the duration of the project. In a subsequent affidavit, she had amended that statement to say that, after their marriage, she and the husband had agreed that his wage would go towards his portion of household expenses. Ms. Thomas submitted that this eroded her credibility.
- [20] The court observes that the alteration to the narrative was made before the trial so that the wife was not caught in a situation where she was changing her narrative on the witness stand in the middle of the trial. Moreover, under cross-examination, her explanation seemed sufficiently plausible. She explained that when she said he had been paid his wages like every other worker, she meant prior to the marriage. While she did say in that first affidavit that it was for the duration of the

⁴ 'Discretion', *The Irish Jurist*, vol IX (new series) 1 at p. 10.

project, I do not think that her revision of this rose to the level of affecting her credibility.

- [21] In contrast, the husband contradicted himself on two material aspects of the case. He denied ever signing any agreement for the construction works other than for the steel works. When confronted with the “Job Description” agreement he was obligated to agree that he did sign that document. He said the job description set out how the work would be done in phases; “it was just a document we made to give a guideline as to how we would do the work.”
- [22] He also materially contradicted himself by stating in his witness statement that during the entire year that he worked on the house, he took no other jobs because he was focused on completing the house. When faced with the suggestion under cross examination that the wife paid for every single household expense, he blithely shifted his position to say that he in fact did some side jobs which enabled him to contribute to household expenses from time to time. The court recalls – but will not apply – the Latin maxim: *falsus in uno, falsus in omnibus*.
- [23] When asked whether he accepted any responsibility for the defects, he replied “No”. When asked “why not?”, he simply replied: “I have no answer for that.” He then, seemingly as an after-thought, stated that every step that he took in the construction he had engineers. When asked how he paid for them, he replied that he never had to pay them. They checked the works for him, apparently at no charge. This portion of his testimony, in the words of Justice Oliver Wendell Holmes, should be washed with cynical acid. He therefore maintained that there were no defects even in the face of Mr. Heywood’s report which he said he had never seen. This, unsurprisingly, erodes his credibility in the eyes of the court.

[24] It was not in dispute that, prior to the marriage, the parties lived in separate apartments and that the husband had to pay rent at his apartment. The wife maintained that when the construction was underway, prior to the marriage, she paid the husband the daily wage of \$120.00 per day. She stated that he quoted this price and said he could not ask for a higher price because he was not qualified. He needed to be paid his wages, according to her, because this was how he paid the rent for his separate apartment where she visited him from time to time. The court is inclined to believe this since, if the husband's narrative is true that he was never paid any wages before or after the marriage, it would leave the question of how he managed to pay his rent unanswered. He never contended that she paid rent and maintained him in his separate apartment. The wife's unchallenged testimony was that when another tradesman did work on the site at the price of \$150.00 per day he was able to charge at that price because he was qualified. In his own affidavit, the husband stated: "I am employed as a mason/day labourer. I earn \$120.00 per day." If he stated that his earning capacity was \$120.00 per day, I am inclined to believe that in fact he did quote her at that price when the job description was being signed.

[25] Even though the job description did not state a contract price or a wage rate and even though the wife could only exhibit two bank deposits which she said represented evidence of payment of wages, I believe her oral testimony that the agreement between the parties was that he be paid at the rate of \$120.00 per day. I also believe that they agreed that his wages would be put to his share of household expenses. There might not have been a formal decision but I think that the understanding was that since she was paying every single household expense, no wages would be paid; any such wage would go to household expense.

[26] The expenses of the husband, as set out by the wife in her affidavit, for the one year and one month that they lived together included outgoings such as a monthly tithe of \$100.00 paid to his church, \$100.00 entertainment expenses at "men's

ministry”, expenses for cinema tickets and refreshments, expenses related to dining out at *Café Ole*, *Felly Belly*, *Elena’s* and *Rituals*, *Bread Basket*, a Chinese restaurant and sundry places and barbering. I accept the wife’s testimony that there was an understanding that the husband’s wage would go towards his share of household expenses. I do not think however that it was their understanding that the household expenses would include those regular entertainment and dining out expenses which would clearly have been beyond the means of the husband. I think those expenses should be treated as outlay that the wife, given her superior financial position, was happy to expend on her husband out of love and affection for him in that period before the marriage foundered. Or, to put it in the vernacular, these expenses amounted to gifts to the husband before the marriage ‘mash up’.

[27] The wife’s estimate of the husband’s share of household expenses for the period they lived together (at their rented apartment and in the matrimonial home) is calculated at \$31,641.62. This was not challenged under cross-examination or otherwise contested. I reduce this estimate by \$7,000.00 which I think is the approximate sum that the wife expended on entertainment-related items out of love for her husband. The sum to be deducted as the husband’s share of household expenses is therefore \$24,641.62. This sum is to be deducted from the figure found by Mr. Heywood as the amount due to the contractor (the husband).

[28] The sum due to the husband as the value of his contribution to the matrimonial home is therefore as follows:

Amount due to contractor as calculated by Mr. Heywood	\$99, 988.64
Less the value discounted for defects	\$47,623.98
Less the value of husband’s share of household expenses	\$24, 641.62
Final amount due to husband	\$27, 723.04

[29] I therefore make the following orders:

- (1) The wife shall pay to the husband the sum of \$27,723.04.
- (2) Interest is awarded at the rate of 6% from date of judgment until payment is made.
- (3) Each party shall bear his and her own costs.

Godfrey P Smith SC
High Court Judge

By the Court

Registrar