



IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2008: No. 6

BETWEEN:

PAUL ANTHONY WELLMAN

Plaintiff

-v-

JOANNE MARGUERITE WELLMAN

Defendant

JUDGMENT

Date of trial: April 11, 2008, May 19, 2008 and June 17, 2008

Date of Judgment: July 18, 2008

The Plaintiff in person

Ms. Keren Lomas, Lomas & Co., for the Defendant

Introductory

1. The present action arises from the parties' divorce which resulted in the Plaintiff buying the Defendant's 50% share of the former matrimonial home. This resolution of the ancillary relief application of the Defendant in divorce proceedings commenced by the Plaintiff (and in which both parties were legally represented) was embodied by consent in this Court's Order dated July 22, 2004 in Divorce Jurisdiction 2003: No. 32 (*"the Divorce Proceedings"*).

2. At a Chambers hearing on November 5, 2004 in the Divorce Proceedings, the Plaintiff's attorney advised the Court that a claim by the Plaintiff's father for some \$400,000 in respect of work he had done on the matrimonial home (which I indicated appeared to be tenuous in the extreme) was impeding the Plaintiff's ability to obtain the necessary financing to purchase the Defendant's share of the property which was appraised at \$875,000. The Plaintiff sought to use this claim as leverage for reducing the buy-out price. I suggested that the Defendant by way of compromise might agree to be bought out based upon a property value somewhat lower than the appraised value, but the Defendant insisted upon her strict rights under the July 22, 2004 Order.
3. On December 9, 2004 the parties appeared before me again in the Divorce Proceedings for consequential relief in respect of the July 22, 2004 Order, and the Plaintiff complained that clothing left in the garage of the former matrimonial home had been damaged. It was suggested that \$75,000 could be held back from the monies payable to the Defendant until the amount of compensation due to the Plaintiff could be quantified. I indicated that any claim for tortious damage to the Plaintiff's chattels could be brought independently of the Divorce Proceedings, and declined to vary the terms of the July 22, 2004 Order. I also stated that it was unfortunate that no Order had been made with respect to the parties' jointly owned personal assets.
4. It was against the background of these matters of record in the Divorce Proceedings, that the Plaintiff acting in person issued his Writ in the present proceedings on July 25, 2007.

The pleadings

5. The Plaintiff claims \$61,770.32 as particularised in Exhibit 1 to his Writ. \$20,636.30 is claimed in respect of damaged clothing. \$35, 270.42 is claimed in respect of personal belongings, \$35, 270.42 (\$469.95 he explained in evidence was claimed for damage, the balance being missing items). In respect of joint property which the Plaintiff claims the Defendant retained, he claimed 50% of the total value or \$5,863.60.
6. The Defendant in her Defence denies damaging the Plaintiff's property, disputes the value of all the property and alleges that the Plaintiff is estopped from seeking damages for the loss of his personal property or joint assets because he made no application in this regard in the Divorce Proceedings. She also avers that he retained items worth more than the items he complains of losing in any event.

The Plaintiff's evidence

7. The Plaintiff's evidence broadly supported his own claim. He explained that in 2003 he left the matrimonial home after the Defendant obtained a restraining

order against him, and returned to the property after the Defendant vacated it in December 2004 and he had purchased her interest in it. He found the clothing and tool box itemised in Exhibit 1 to the Writ damaged, and did not find the other missing items. He took pictures inside the house and in the garage where his clothing had been stored, and these photographs were produced in evidence.

8. Under cross-examination, the Plaintiff admitted that he had used today's replacement values for all the loss of which he complained. He accepted that it was possible that a tall lamp had been damaged by his son. He agreed that he did on one occasion return to the garage to collect certain items before his clothes were placed in the garage. He stated that the BMW car was given or loaned to the parties by his father, although his father only paid the deposit and the Plaintiff paid off the car loan. He accepted that the parties may have been registered as joint owners in about 1999, but stated that this was only for insurance purposes.
9. The Plaintiff called a number of witnesses who corroborated his account that after the Defendant gave up vacant possession, a bag of clothes ruined by mould and mildew was found in the garage of the former matrimonial home. The "live" witnesses were Mr. Gilbert Charles Pearman and Mrs. Leora Grant-Yarde, a Woman Police Constable. A witness statement by Mr. Lawrence Scott, the Plaintiff's attorney in the ancillary relief aspects of the Divorce Proceedings, was not challenged.

The Defendant's evidence

10. The Defendant testified that she cleaned and packed the former matrimonial home over the weekend of December 3-5, 2004 and moved out on the evening of Sunday December 5, 2004. She stated that she packed the Plaintiff's belongings in trash bags and stored them in the garage in August 2003. Between 2003 and 2004, the Plaintiff accessed the garage to remove various items and never complained about the clothes until after she vacated the premises. Early in 2003, the fridge was leaking but this was repaired long before she moved out. She stated that she believed the garage was a safe place to store the items which she placed there, and had no idea what items the Plaintiff moved from there from time to time before December 2004 as he had the key to the garage. She denied damaging the tool box or taking any of the items referred to in the Plaintiff's claim.
11. Under cross-examination she denied that her brother-in-law had previously reported the damaged clothing to her. She indicated that no agreement was reached between the parties as to who would keep what items from the matrimonial home. She stated that she regarded the sound system as the Plaintiff's personal property and never touched it; this and the bookshelf said to be missing were there when she vacated the premises. She insisted that the BMW car belonged to the Plaintiff. The Defendant also generally challenged the value placed on the items estimated by the Plaintiff (in detail in her witness statement),

and asserted that the value of the chattels he retained far exceeded what she kept for herself.

12. The Defendant called three witnesses. Mr. Dana Rawlins, who together with his wife was a tenant of one of the apartments, confirmed that he helped the Defendant to move the Plaintiff's belongings into the garage. He also observed the Plaintiff removing items from there from time to time. Mrs. Wendy Davis-Parsons, the Defendant's sister, confirmed that when the Plaintiff's belongings were packed in the garage, it was dry. She helped her sister vacate the former matrimonial home, and noticed no damage to any of the Defendant's belongings which were left behind. Mr. Delmont Tucker also helped the Defendant to vacate the former matrimonial home, and stated that the picture showing clothing on the garage floor was not the way the Defendant left the premises. He also confirmed that while the Defendant was still occupying the property, he helped to secure the internal door leading from the garage into the house so that the Plaintiff would not be able to enter the house from the garage.
13. Because of the history of animosity between the parties in the Divorce proceedings, I have treated their evidence with caution. I found all of their respective witnesses to be credible.

Findings: Plaintiff's damage to property claim

14. I find that the Defendant in or about August 2003 after the Plaintiff had been excluded from the former matrimonial home stored the Plaintiff's clothing and other personal effects in a secure manner in the garage and that the Plaintiff had free access to the garage and the contents thereof. I find that when the Defendant vacated the premises, the clothing was not visible on the garage floor in an obviously damaged state.
15. I find that there is no evidence that the Defendant deliberately damaged the Plaintiff's clothing. I further find that the Defendant did not as a matter of law owe the Plaintiff a duty of care to take reasonable steps to ensure that the clothes did not become damaged by any dampness in the garage. Once she stored the clothing in trash bags in the garage in circumstances where the Plaintiff had access thereto, the Plaintiff assumed the risk of any such damage if he left the clothing there and they were ruined by damp and mildew.
16. I find that there is no evidence that the damage to the tool box of which the Plaintiff complained was caused by the Defendant.
17. The damage to property claims have not been proved and must be dismissed.

Findings: Plaintiff's claim for missing personal property

18. There is a conflict between the evidence of the parties which I cannot resolve by reference to independent evidence as to precisely what the Defendant took and what she left behind. The Plaintiff bears the burden of proving his case on a balance of probabilities. It is unclear both (a) that all of the items he described as "his" ought not to be regarded as family property jointly owned, and (b) that the Defendant actually retained the items in question.
19. The Plaintiff has failed to prove this aspect of his claim, which must accordingly be dismissed.

Findings: Plaintiff's claim for 50% share of jointly owned family personal property

20. It is common ground that in the absence of a court order or express agreement, the parties each retained various portions of what was jointly owned family property after their divorce. The question is whether the Plaintiff has proved, and to what extent, that the Defendant has retained more than her 50% share of the joint assets.
21. Assuming the Defendant kept all the items alleged by the Plaintiff, it seems likely that his gross valuation of \$11, 727.19 is somewhat inflated. The Plaintiff accepts that he kept the utilities. I am bound to find, having regard to the TCD records, that the BMW car retained by the Plaintiff was family property.
22. The Plaintiff has failed to satisfy me that it is more likely than not that the Defendant retained more than 50% of the parties' jointly owned assets.
23. In these circumstances I need not decide whether or not on legal grounds the Plaintiff is debarred from pursuing this aspect of his claim because he did not seek a property adjustment order in the Divorce Proceedings.

Findings: costs

24. The Defendant submitted that if the Plaintiff's claim was dismissed, she ought to be awarded costs on an indemnity basis because the Plaintiff has been vexatiously causing her to incur legal costs for several years in the Divorce Proceedings and related proceedings. She also testified in her evidence that the Plaintiff has threatened to damage her car should the present action be unsuccessful.
25. The Plaintiff argued that the present claim had been brought at the invitation of the Court in the Divorce Proceedings. This is only partially correct as regards the first of the three limbs of his claim. The Court did not direct him to pursue the claim, but merely indicated (at a time when he was legally represented) that if he wished to pursue a claim it would have to be pursued in separate proceedings.

Two-thirds of the Plaintiff's unsuccessful claim is an attempt to re-open the ancillary relief proceedings.

26. It seems obvious that the present proceedings constitute an attempt by the Plaintiff to reverse the financial effects of the equal division of the former matrimonial home sanctioned by this Court with the Plaintiff's express agreement in the Divorce Proceedings. He was, in the Divorce Proceedings, clearly encouraged by his father who issued proceedings seeking to recover money for the labour the father contributed to the former matrimonial home. Mr. Delmont Tucker in the course of the present trial described an incident in which he felt the Plaintiff's father was not setting the best example to his son in the context of managing the marital break-up in a sensible manner. When families are together, it is inevitable that from time to time one set of in-laws will make voluntary contributions to the matrimonial home based on the assumption that the marriage will last forever. It is emotionally understandable but legally irrational to expect such contributions to be recoverable if the marriage breaks up.
27. Defusing an emotionally charged divorce where one party is obviously aggrieved by the perceived injustice of the application of standard property adjustment rules in a particular case will not always be achieved by each party inflexibly relying on their strict legal rights. At the end of the Divorce Proceedings, the Defendant could have elected to be conciliatory and accepted less than 50% of the appraised value of the house to meet the objectively understandable perception of the Plaintiff and his father that equality did not mean equity in the circumstances of this particular case. Had that happened, it seems improbable that the present proceedings, and other Magistrates' Court proceedings of which the Defendant complains, would have taken place at all. It is also possible that the Plaintiff would have approached the access and child maintenance issues which are ongoing concerns to this Court in the Divorce Proceedings in a less contentious manner.
28. These are all exceptional circumstances which lead me to the conclusion that the normal rule that costs should follow the event should be modified in the present case. The Defendant shall be at liberty to apply for costs after the expiration of six months from the date of this judgment. In the interim, the parties (with the plaintiff taking the lead) shall use their best endeavours to reach an understanding on how they will deal with issues of child maintenance and access going forward in the Divorce Proceedings without further controversy. They should also use their best endeavours to resolve the issue of the costs of the present proceedings.

Summary

29. The Plaintiffs' claims are dismissed and the determination of costs is postponed for a period of six months.

Dated this 18th day of July, 2008

KAWALEY J