

BARBADOS

FL No. 0127 of 2010

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

IN THE MARRIAGE OF

ERMENA GRAZETTE

APPLICANT

AND

ANDERSON LORDE

RESPONDENT

**Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High
Court.**

2012: March 03

2013: March 01

Ms. Carol-Ann Best for the Applicant

No appearance by the Respondent

DECISION

THE ISSUE

- [1] A preliminary issue relating to the jurisdiction of this court in property proceedings under the **Family Law Act Cap. 214** (the Act) arises for determination in this case. I have to decide whether the court has jurisdiction to hear a property application for orders under sections 56 and 57 of the Act where the marriage between the parties has been dissolved by decree of a foreign country. It is a question of law and one of general public importance.
- [2] Sections 56 and 57 of the Act set out the powers of the court with respect to property proceedings between parties to a marriage or a union other than a marriage. Section 56(1) provides that the court may declare the existing interest, if any, of a party in respect of property. Section 57 allows the court to alter the interest of parties in a property where it is satisfied that it is just and equitable to do so. The court may also make consequential orders, including orders as to sale and the distribution of the proceeds of any sale.
- [3] The relevant details of the parties' circumstances are derived from an affidavit filed by the wife on 22 February 2010 in support of her application of even date. By that application, she seeks, *inter alia*, the following orders:
- a) Leave from the court in accordance with Section 23 of the Family Law Act Cap. 214 of the Laws of Barbados to hear this Application.

- b) A declaration pursuant to Section 56 of the Family Law Act...that [she] is entitled to 50% of the equity of the matrimonial property at Lot 130, Long Bay in the parish of Saint Phillip on this Island (hereinafter called the said land).
- c) An order pursuant to Section 57 of the Family Law Act...in respect to the said land.
- d) ...
- e) That the said land be sold and the proceeds of the sale of such land be divided equally between the Applicant and the Respondent.
- f) That the Applicant be compensated after such sale for such expenses for the maintenance and upkeep of the said land.

[4] The parties are citizens of Barbados. The wife resides in Barbados, the husband in England. They were married in Barbados on 27 August 1977. The marriage ended formally on 15 May 2003 when a decree absolute was granted by the Croydon County Court in England.

[5] Almost three years prior to the dissolution of the marriage, the parties acquired a parcel of land in Barbados (the property). The fee simple interest in that property was conveyed to the parties, as joint tenants, by a deed dated 24 March 2000. On the face of that document, they are joint owners of the legal interest in the property.

[6] The Respondent has not entered an appearance in these proceedings. He has filed no documents. This is so despite orders granting him extensions of time to do so. The first such order was made by Chandler J on 7 March 2011 and

the second by me on 7 October 2011. On that date, I made an order that the hearing should proceed on the basis of the documents before the court unless the Respondent filed his documents within the time prescribed by that order.

- [7] On 8 December 2011 when the matter came back on before me, I indicated to Counsel for the wife, Ms. Carol-Ann Best, that before considering the application for leave, I needed to be satisfied that the court has jurisdiction to hear the substantive application. On 22 February 2012, I ordered the Applicant to file written submissions on this preliminary question. I received those submissions on 2 March 2012.

THE STATUTORY PROVISIONS

- [8] It is convenient at this stage to identify the statutory provisions of relevance to the determination of this question. These are contained in sections 2, 19 and 20 of the Act.

General jurisdiction of High Court

- [9] Section 19 outlines the general jurisdiction of the High Court. It provides as follows:

- 19(1) The High Court has jurisdiction in
- (a) matrimonial causes instituted or continued under this Act;
 - (b) matters concerning
 - (i) the adoption of children, or
 - (ii) the guardianship, custody or maintenance of children; and

- (c) matters in respect of which jurisdiction is conferred on it by any other enactment.
- (2) Subject to such restrictions and conditions, (if any) as are contained in the rules, the jurisdiction of the High Court may be exercised in relation to persons or things outside Barbados.

Forum in which proceedings may be instituted

[10] Section 20(1) relates specifically to the instituting of proceedings under the Act. It reads:

- 20(1) Subject to this Part, a person may institute
- (a) a matrimonial cause under this Act in the High Court; or
 - (b) a matrimonial cause under this Act, not being proceedings for principal relief, in a court of summary jurisdiction.

Matrimonial cause

[11] The term “matrimonial cause” is defined in section 2(1) to mean any of a number of types of proceedings. These include:

- (a) proceedings between the parties to a marriage for a decree of
 - (i) dissolution of marriage, or
 - (ii) nullity of marriage;
- (b) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise;
- (c) proceedings for a declaration of presumption of death;
- (d) proceedings between the parties to a marriage in respect of
 - (i) the maintenance of one of the parties to a marriage, or

- (ii) the custody, guardianship or maintenance of, or access to a child of the marriage;
- (e) proceedings between the parties to a marriage in respect of the property of those parties, or either of them, **being proceedings in relation to concurrent, pending or completed proceedings for principal relief between the parties;** [emphasis mine]
- (f) ...
- (g) ...
- (h) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship.
- (i) ...
- (j) any other proceedings including proceedings in respect of the enforcement of a decree or the service of process, in relation to concurrent, pending or completed proceedings of a kind mentioned in paragraphs (a) to (i) and (k) of this definition, including proceedings of such a kind pending at, or completed before 1st February, 1982;

Proceedings for principal relief

[12] Section 2(1)(e) requires that proceedings in respect of property be ‘proceedings in relation to ... proceedings for principal relief between the parties’. The term “proceedings for principal relief” is defined in section 2(1) to mean “proceedings **under this Act** of a kind mentioned in paragraph (a), (b) or (c) of the definition of “matrimonial cause” [emphasis mine].

[13] Section 2(2) extends the meaning of the term ‘parties to a marriage’ to include persons who were parties to a marriage that has been dissolved or annulled, whether the relevant decree was granted in Barbados or overseas.

It reads:

“A reference in this Act to a party to a marriage includes a reference to a person who was a party to a marriage that has been dissolved or annulled in Barbados or elsewhere.”

Jurisdictional nexus for divorce proceedings

[14] Section 20(2) sets out the jurisdictional nexus required for a party to a marriage to institute divorce proceedings under the Act. I set out this provision only because it is critical to an understanding of a decision referred to by Ms. Best in her submissions. It reads:

- (2) Proceedings for a decree of dissolution of marriage may be instituted under this Act by a party to the marriage, if at the date on which the application for the decree is filed in the court, either party to the marriage
 - (a) is a citizen of Barbados;
 - (b) is domiciled in Barbados;
 - (c) is a permanent resident of Barbados within the meaning of the *Immigration Act*; or
 - (d) is an immigrant of Barbados within the meaning of the *Immigration Act*, and has resided in Barbados continuously for 1 year immediately preceding that date.

Jurisdictional nexus for other proceedings

[15] Section 20(3) sets out the jurisdictional nexus required to institute other types of matrimonial causes. It provides that-

(3) Proceedings within paragraphs (a) to (i) and (k) of the definition of “matrimonial cause” in section 2(1), other than proceedings for a decree of dissolution of marriage, may be instituted under this Act, if

(a) either party to the proceeding is a citizen of Barbados at the date on which the proceedings are instituted in the court;

(b) either party to the proceedings is present in Barbados at that date; or

(c) the proceedings relate to a child of the parties and the child is present in Barbados at that date.

SUBMISSIONS & DISCUSSION

[16] Ms. Best submits that this court is the appropriate forum for the hearing. In support of this submission, she highlighted the connection between the parties and this jurisdiction and the fact that the land is located here. Counsel quoted extensively from the decision of the Court of Appeal in *Downer v Downer No. 663 of 2007 (decision 23 May 2008)* in this regard. However, no issue as to appropriate forum arises in the case before me. The only question for my determination is whether the jurisdiction of this court can be enlivened under the Act in the circumstances outlined at paragraph [4] above.

- [17] In *Downer* two distinct issues were before the court. This was made clear by Simmons C.J. at para. [2] of the decision. In that case, the parties were married in Barbados. The husband had filed an application for dissolution of marriage in Barbados and one month later, the wife filed for similar relief in New Jersey in the United States of America. The Court of Appeal was called upon to decide (1) whether the High Court had jurisdiction to entertain the husband's application for dissolution of marriage and (2) if so, whether the application should be stayed on the basis that the American court was the more convenient forum for the hearing. It decided both questions in the affirmative. Referring to section 20(2) of the Act, Simmons C.J. commented, at para. [16], that the provision evinced a clear intention "to confer jurisdiction on the High Court where either party to the marriage has a connection to Barbados by citizenship, domicile or residence."
- [18] At paragraph 11.10 of her written submissions, Counsel refers to section 20(2) in support of her contention that "the Applicant falls within the Jurisdiction of the Act." However, section 20(2) relates only to proceedings for dissolution of marriage. The application before me is one for property related orders under sections 56 and 57 of the Act.
- [19] Ms. Bests' submissions regarding sections 20(1) and the definition of "matrimonial cause" are more relevant. She submits that this provision

allows any person to institute a matrimonial cause in the High Court. She submits further that the court should give a liberal interpretation to paragraph (e) of the definition of “matrimonial cause” contained in section 2(1) and that the application falls within the scope of that paragraph. At paragraph 13.3 of her written submissions she posits that ‘the parties’ proceedings are completed and this Application is for principal relief with respect to the land.’

[20] I accept Counsel’s submission that section 20(1) of the Act allows a person to institute a matrimonial cause in this court. However, this is subject to the requisite jurisdictional nexus being satisfied. These are proceedings for relief other than dissolution of marriage. Hence, the access requirements are those contained in section 20(3). Of particular relevance are paragraphs (a) and (b) of that provision. Both parties are citizens of Barbados and the wife was present in this jurisdiction at the date when she instituted these proceedings.

[21] However, the fundamental question that remains is whether these proceedings constitute a matrimonial cause within the meaning of the term as defined by the Act. This is so because section 19(1) grants this court jurisdiction in matrimonial causes instituted or continued under the Act. This provision was explained by Husbands J, as he then was, in *Griffith v.*

Griffith High Court Suit No. 409 of 1986 (decision 30 June 1987). He

stated that:

“Section 19 of the Family Law Act, 214 gives the High Court jurisdiction in matrimonial causes instituted or continued thereunder as well as in matters concerning, inter alia, “the guardianship, custody or maintenance of children.”

- [22] Ms. Best contends that the proceedings commenced by the application constitute a matrimonial cause falling within the meaning of paragraph (e) of the definition contained in section 2(1). She is incorrect.
- [23] Paragraph (e) contains three essential requirements. These are (1) the proceedings must be between the parties to a marriage; (2) they must be in respect of the property of those parties, or either of them; and (3) they must relate to concurrent, pending or completed proceedings for principal relief between the parties.
- [24] Undoubtedly, the first two of these conditions are met. Though the parties are divorced and the divorce proceedings took place in England, they are ‘parties to a marriage’ for the purpose of proceedings under the Act. That is the effect of section 29(2). Clearly, the proceedings are in respect of property said to be owned by the parties. However, the third element presents an insurmountable hurdle for the wife. There are no concurrent, pending, or completed proceedings for principal relief between the parties

and, hence, none to which it can be said that the proceedings before me relate.

- [25] To constitute proceedings for principal relief, as the term is defined in section 2(1), the proceedings must be or have been brought ‘under the Act’ and have been or be for one of the four types of relief specified *i.e* proceedings between the parties to a marriage for a decree of dissolution or nullity of marriage; proceedings for a declaration as to the validity of a marriage or the dissolution or annulment of a marriage; or proceedings for a declaration of presumption of death. While there are completed divorce proceedings between the parties, these were not instituted under the Act. They were instituted in Croydon, England and governed by the relevant law of that jurisdiction. Consequently, the divorce proceedings do not constitute proceedings for principal relief as the term is defined by the Act.
- [26] This leads inexorably to the conclusion that this court has no jurisdiction to consider the application for orders under sections 56 and 57 of the Act and consequential relief in this case.
- [27] This conclusion is consistent with the decision in *Griffith*. In that case, the wife sought, *inter alia*, a declaration that that she was entitled to exclusive ownership of a dwelling house and certain items of personal property. No proceedings had been commenced between the parties for a decree of

dissolution of marriage or other principal relief. After examining section 19 of the Act and some of the other relevant statutory definitions, Husbands J concluded that the court had no jurisdiction to grant the property orders sought.

[28] The conclusion is also consistent with the legal position as obtained in Australia prior to the 1983 amendment to the **Australian Family Law Act 1975**. The definition in section 2(1)(e) of the Act replicates section 4(1)(ca) of the Australian Family Law Act 1975 as amended by the **Family Law Amendment Act 1976** while the definition of “proceedings for principal relief” in the Act reflects that found in section 4(1) of the Australian Act.

[29] It was held in a number of Australian decisions that foreign proceedings for a dissolution of marriage did not fall within the definition of “proceedings for principal relief” as set out in section 4(1) and, hence, were not proceedings for the purposes of section 4(1)(ca). In the matter *In the Marriage of Savage* (1982) FLC ¶91-281 the Full Court of the Family Court expressed the position in this way:

... it appears to us clear that where the parties’ marriage has been dissolved by decree of a foreign country, that it has not been dissolved by a decree under the *Family Law Act* or its predecessor, the Family Court does not have jurisdiction to entertain a property application between those parties. That is because such a proceeding does not fall within para. (ca) of the definition of “matrimonial cause” contained in section 4 of the

Family Law Act: see *Peters and Peters* (1982) ¶FLC 91-202;
Baba and Jarvinen (1980) ¶FLC 90-882.

[30] In *Savage*, the Australian court also considered whether it was appropriate for a party to seek a declaration as to the validity of a foreign decree so as to attract the court's property jurisdiction, even where there was no real issue as to the validity of the decree. Proceedings for such a declaration fall within the definition of "proceedings for principal relief". A similar question arose in *In the Marriage of Read* (1977) ¶FLC 90-201, *In the Marriage of Tansell* (1977) 35 F. L. R. 272 and in *Espie v. Espie* (1983) ¶FLC 91-347. In the latter case the declaration sought related to the recognition of a foreign decree of divorce.

[31] In her submissions, Ms. Best referred me to section 80 of the Act. This provision sets out the circumstances in which a foreign decree of dissolution or annulment of marriage shall be recognised as valid in Barbados. However, the wife brought no proceedings relating to the validity of the decree issued in the United Kingdom. Consequently, I am not required to determine the question as to the appropriateness of seeking declaratory relief as were the Australian Courts. Therefore, I will not comment further on those authorities.

[32] I must add that I have searched anxiously to see whether this application could be said to fall within any of the other parts of the definition of

“matrimonial cause” contained in section 2(1) of the Act. Counsel has not so contended and, it appears, rightly so. The only other paragraph that qualifies for consideration is paragraph (h) which refers to “proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship”.

[33] In *Tansell*, the Full Court of the Family Court of Australia considered a similar question in relation to paragraph (e) of the Australian definition, the Australian equivalent to paragraph (h) of the Act and answered it in the negative. The court’s decision turned on constitutional peculiarities in Australia that are not shared by this jurisdiction. However, I have reached a similar conclusion by a different route. Paragraph (e) of Section 2(1) of the Act stipulates conditions that must be met in order for proceedings in respect of property to constitute a matrimonial cause. To give paragraph (h) such a wide meaning as to embrace applications for orders under sections 56 and 57, would be, in effect, to render nugatory paragraph (e) and the criteria it contains. This could not have been the intention of Parliament.

[34] Finally, I feel constrained to say that I have reached this decision with some anguish. In 1983, the Australian legislation was amended to widen the definition of “matrimonial cause”, as it relates to property proceedings. Two additional types of proceedings were added to the then existing definition.

These are (1) proceedings arising out of the marital relationship and (2) proceedings in relation to the dissolution or annulment or legal separation of the parties to the marriage effected in accordance with the law of an overseas jurisdiction.

[35] A similar amendment to the Act would open the property jurisdiction of this court to persons in the position of the wife and, in appropriate cases, to persons who, like the applicant in *Griffith*, have not commenced divorce proceedings, for whatever reason, but find it necessary to seek a final resolution of issues relating to their rights with respect to property.

[36] However, it is for Parliament to effect such changes if it considers it desirable to do so after due deliberation. It does not lie within the judicial function to do so. To hold that this court has jurisdiction in this case would be to disregard the clear meaning of the statutory provisions that admit of no interpretation accommodative to such a result.

[37] Fortunately, the tapestry of our jurisprudence is sufficiently rich as to afford the wife alternative means of seeking relief in relation to the property she claims to own jointly with the husband.

[38] For the foregoing reasons, the application is dismissed.

Olson DeC. Alleyne
Judge of the High Court