

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT**

**FAMILY DIVISION**

**No. 512 of 2013**

**IN THE MARRIAGE OF:**

**EILEEN VERONICA SMITH**

**APPLICANT/WIFE**

**AND**

**LLOYD ETHELBERT SMITH**

**RESPONDENT/HUSBAND**

**Before The Honourable Mr. Justice William J. Chandler, Judge of the High Court**

**2015: March 27<sup>th</sup>**

**Mr. Philip A. Pilgrim Attorney-at-Law for the Applicant/Wife**

**Mr. Chester Sue and Mr. Philip Gaskin Attorneys-at-Law for the Respondent/Husband**

**DECISION**

**BACKGROUND**

- [1] The parties were married on 20<sup>th</sup> December, 1974 and separated in the year 2010. There are three children of the marriage who are now adults.
- [2] An application for dissolution of the marriage was filed on the 19<sup>th</sup> November, 2013 and decrees nisi and absolute of dissolution of the marriage were pronounced on the 12<sup>th</sup> January, 2014. The Applicant/Wife filed an application on the 16<sup>th</sup> June, 2014 for, *inter alia*, declarations under **section 56** of the **Family Law Act Cap. 214 (FLA)** in respect of the parties' interests in several properties and in respect of Two Sons Funeral Home Limited, a limited liability company (the Company) run by the Respondent/Husband which carries on the business of funeral directors. The Applicant/Wife also sought orders under **section 57** of the **FLA** altering the parties' interests in the several properties and the Company as well as an order for urgent maintenance for herself.

- [3] On the 25<sup>th</sup> June, 2014 the Court granted an interim order for maintenance in favour of the Applicant/Wife.
- [4] This decisions relates to a very small aspect of this case, namely:  
An application filed 3<sup>rd</sup> December, 2014 for an order that “the Applicant/Wife be granted access to the company records, bank accounts and such other records of the business and assets of the Company within fourteen (14) days or such other period as this Honourable Court thinks fit”.
- Consequent upon the Court’s Order the Respondent/Husband filed his written submissions on 23<sup>rd</sup> July 2014 and the Applicant/Wife filed hers on 30<sup>th</sup> December 2014.

### **The Respondent/Husband’s Submissions**

- [5] The Respondent/Husband objected to the Order sought on the following grounds:
- (1) The Applicant/Wife offered no evidence about the origin of the Company. She had not shown that any of the properties the subject matter of the application for property settlement, are owned by the Company but, rather, that they are owned by the Respondent/Husband or the children of the marriage.
  - (2) It was not shown exactly how the Company fit into the scheme of things. It was, therefore, unwise for the Court to act on presumed knowledge since the Company and the Respondent/Husband are well known citizens.
  - (3) The Applicant/Wife sought a declaration that the Company was owned by herself and the Respondent/Husband jointly. In her affidavit in support she gave no evidence as to the creation and ownership of the Company. Her only evidence related to her alleged role as a secretary of the Company.
- [6] Counsel submitted that the Company was a separate legal entity relying on **Salomon v Salomon & Sons Co. Ltd [1897] AC 22 (Salomon)** and **s.17 (1) of the Companies Act, Cap. 308 (Cap. 308) of the Laws of Barbados**. The Company was therefore a third party and its rights and those of its shareholders ought to be protected. Where it was not shown that the Husband and Wife are the sole shareholders of the Company, the Company’s rights as an innocent third party ought to be protected. He relied upon **Family Law in Australia 3<sup>rd</sup> Edn. by H A Finlay, Para 254-259, Ascot Investments Pty Ltd v Harper (1981) 53 ACR 631 and R v Ross-Jones, ex parte Beaumont (1979) 23 ALR 179**.
- [7] The Court, counsel also submitted, had no power to grant the Applicant/Wife access to the financial records of the Company since the Company was a third party to the proceedings. Under the **FLA** the Court can only make an order against the parties to the proceedings.

### **The Applicant/Wife’s Submissions**

- [8] Counsel for the Applicant/Wife referred to a gift in the Last Will and Testament of Lloyd E. Smith Snr. (the Respondent/Husband’s father) of 50% of his shares in the Company to each of his sons Lloyd E. Smith Junior and Dudley M. Smith respectively and to the

subsequent death of Lloyd Smith Snr. on 12 July, 1987. Letters testamentary to his estate were issued on 18<sup>th</sup> March, 1988.

- [9] He referred also to the Applicant/Wife's affidavit filed 16<sup>th</sup> June, 2014 in which she deposed that she did whatever the Respondent/Husband told her to do without murmur or question and her pride in being able to play a part in the Respondent/Husband's development.
- [10] He referred also to (1) the appointment of the Applicant/Wife as Company Secretary by the Respondent/Husband on 9<sup>th</sup> September, 1991; (2) the deed of charge by way of legal mortgage dated 20<sup>th</sup> April, 1992 by virtue of which the Respondent/Husband in his personal capacity joined with the Company to provide security to Barclays Bank PLC for a loan of \$160,000.00.
- [11] Counsel submitted that the Applicant/Wife had made a contribution as a homemaker and her role in this regard had to be taken into account. **Waters v Jurek [1995] FLC 92-635 and Proverbs v Proverbs Civ App. No. 7 of 2001 (Proverbs) and s. 57 of the FLA.**
- [12] He also submitted that the Applicant/Wife's contributions are to be taken to extend "at least indirectly to the whole of the assets of the husband." (**Proverbs**). The property available for distribution between the parties was not limited to the concept of matrimonial assets but extended to the totality of their joint and several assets. Therefore, no distinction was to be made between "matrimonial" and "business assets". **Family Law in Australia 8<sup>th</sup> Edn. By Lisa Young and Aroney v Aroney [1979] FLC 90-709.**
- [13] Counsel also referred to **Towner v Towner Civ. App. No. 1 of 2009** in which **Simmons CJ.** stated that the complexity in understanding the husband's (Mr. Towner) financial affairs and thus ascertaining his true worth required expert investigation into his financial affairs.

### **The Law**

- [14] The Law is to be found in **sections 56 and 57** of the **FLA** which are now reproduced:
- “Section 56 (1) In proceedings between the parties to a marriage or union in respect of the existing title or rights to property, the court may declare the title or rights, if any, that a party has in respect of in the property.
- (2) Where a court makes a declaration under subsection (1), it may make consequential orders to give effect to the declaration, including orders as to sale or partition, and interim or permanent orders as to possession.
- (3) An order under this section is binding on the parties to the marriage or union, but not on any other person.

Section 57 (1) In proceedings in respect of the property of the parties to a marriage or union, or of either of them, the court may make such order as it thinks fit altering the interests of the parties in the property, including

- (a) an order for a settlement of property in substitution for any interest in the property; and
  - (b) an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage or union, such settlement or transfer of property as the court determines.
- (2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just an equitable to make the order.
- (3) In considering what order should be made under this section, the court shall take into account the following:
- (a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;
  - (b) the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent;”.

[15] Property has been defined in the Marriage of **Duff (1977) 29 F.L.R 46** as follows:

“We are of the view that the intention of s 79 is to enable the court to take into account and assess all the property of the parties upon being asked by either of them to make an order altering the interests of the parties in property. We are further of the view that when s 4 defines property as being "property to which the parties are entitled whether in possession or reversion" the words "whether in possession or reversion" are not intended to indicate that the kind of property with which this Act can deal must be property to which a party is entitled in possession or reversion but rather the phrase "whether in possession or reversion" is, as a matter of grammar, an adverbial phrase which qualifies the word "entitled". The phrase means that the entitlement to the property may be either in possession or reversion; ie, the phrase is descriptive of the entitlement and not of the property and it removes any fetter upon the court in dealing with property under this Act by limiting the nature of the entitlement thereto to entitlement in possession.”

[16] That case involved the question whether shares in the husband’s company were property within the meaning of the Family Law Act of Australia. The Court, after discussing the meaning of property said:

“For these reasons we are of the view that the shares held by the husband and the wife in the proprietary company of which they are the sole shareholders is property within the meaning of the Family Law Act 1975, and his Honour was correct in taking the value of this property into account in determining what assets the parties have.”

### **Discussion**

- [17] The application filed by the Applicant/Wife on 16<sup>th</sup> June, 2014 includes a declaration that “the business known as Two Sons Funeral Home Limited ... is owned by the Applicant and the Respondent at least jointly or such ownership as this Honourable Court thinks just.” There is also an application for an order to value the said business and that the costs of such valuation be borne by the Husband.
- [18] It is clear that the Company, as a limited liability company, has a legal personality separate and distinct from its shareholders. That trite proposition of law is derived from **Salomon** and **section 17 (1) of Cap. 308** which provides that:  
 “A company has the capacity, and, subject to this Act, the rights, powers and privileges of an individual.”
- [19] Notwithstanding the wording of the application filed July 4<sup>th</sup>, 2014, it is clear to the Court that the Applicant/Wife is claiming a share or interest in the Company. It is also clear that she is claiming an interest in the shares or other interest of the Respondent/Husband in the Company. His assets are not limited to the physical properties listed in the application but also to his business interests which may include shares in businesses operated as limited liability companies.
- [20] The Respondent/Husband’s objection to the Order sought is based upon the separate legal personality of the Company. He has not advanced any arguments in relation to his shareholding in the Company and the immunity, if any, from such shareholding being taken into account as part of the matrimonial assets. His shareholding in the Company and his participation in its operations are important to the issues of (1) what are the assets to be distributed applying the rules in **Proverbs** and (2) what level of maintenance the Applicant/Wife is entitled to.
- [21] In her affidavit filed in support of her substantive application on 16 June 2014, the Applicant/Wife deposed that her services were employed as a driver by the funeral home to transport relatives of deceased persons to and from funerals; ensuring that pallbearers did their duties; performing some of the functions of funeral director (para 50) dressing in jeans and gloves to assist the Respondent/Husband with the removal of dead bodies when there was a shortage of manpower; attending conventions overseas related to the funeral business with the Respondent/Husband and selecting and purchasing items for the funeral business including caskets.

- [22] Her claim is based on her direct and indirect contributions to the acquisition, conservation and improvement of the properties and the business as well as her contribution as a homemaker and parent. The business is conducted by the Company.
- [23] It is clear from **Proverbs** and **section 57 (3) (b)** of **FLA** that the Applicant/Wife's contribution as a homemaker and parent is also relevant to the resolution of the issues above outlined.
- [24] I now deal with a matter which is related to Mr. Sue's submission on the Company as a third party. The objection has been taken by the Respondent/Husband and not by the Company itself. I am of the view that any objection ought to have been taken by the Company.
- [25] The Applicant/Wife seeks an order for access to the records, bank accounts and assets of the Company. I find no support for such an invasive order in the **FLA** or the Rules made thereunder nor in the case law cited by both counsel. **Rule 63 (1)** of the **Family Law Rules 1982 of Barbados** is identical to regulation 92 of the Australian Family Law Regulations and provides that:
- “Where, on application by a party it appears to the court that a person other than a party has within his or her possession custody or power a document or thing relating to a matter in question in the proceedings and it is appropriate that the parties should be aware of the contents of the document or the nature of the thing prior to the determination of the proceedings the court may order the person to produce the document or thing to the Registrar or other officer of the court at a time and place specified in the order.”

### **Disposal**

- [26] In **In the marriage of Mallet (B.E. an IM); Commonwealth Saving Bank of Australia and Others Intervening (Mallett) 63 FLR 62** it was held that the whole effect of regulation 92 was to provide a means to both parties to have available at the hearing the best evidence in support of their claims and the machinery it provided should be used wherever and whenever it was available. The Court opined that the regulation was remedial and had been designed to meet specific needs relative to the litigation conducted in Family Courts and was clearly intended to place each of the parties on an equal footing so far as knowledge and understating of the affairs and transactions of the other was concerned. It was designed to assist the proper administration of justice in resolving disputes in the very delicate and sensitive area of family breakdown (per **Wood J.**). I agree with the opinion expressed in **Mallett**. I am of the opinion that the Applicant/Wife's application is to be properly interpreted as one for disclosure.
- [27] In consequence, I consider that there is no merit in the Respondent/Husband's objection to the application. I am also of the view that it would be better to order the Respondent/Husband to disclose to the Registrar of the Supreme Court the company records, bank accounts and particulars of its assets on a particular date and that the said

records be made available to the Applicant/Wife and her Attorney-at-Law rather than to make the order in terms of the Applicant/Wife's application.

[28] It is therefore ordered that:

- (1) The Respondent/Husband do produce to the Registrar of the Supreme Court the company records, bank accounts and particulars of its assets on or before the 17<sup>th</sup> day of April, 2015 and that the said records be made available to the Applicant/Wife and her Attorney-at-Law for their inspection.
- (2) The Applicant/Wife shall be at liberty to make copies of the said documents and the cost shall be borne by the Respondent/Husband.

**WILLIAM J. CHANDLER**  
**JUDGE OF THE HIGH COURT**