

BARBADOS

No. 131 of 2006

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(FAMILY DIVISION)

BETWEEN

MARCELLE DELORES PRESCOTT

Applicant/Wife

AND

EDWARD GRAY PRESCOTT

Respondent/Husband

Before the Honourable Mr. Justice Randall Worrell Judge of the High Court

2010: September 15, December 15

2011: January 17

March 15, 28

June 22

**Ms. Marguerite Woodstock Riley Q.C., in Association with Ms. Tammy Bryan
for Applicant/Wife**

Mr. Randall Belgrave Q.C., for Respondent/Husband

DECISION

INTRODUCTION

[1] On January 8th, 2009, the Applicant in this matter by application sought a Declaration and/or alteration of her interest in the following matrimonial properties.

- (i) *the matrimonial home situate at 33, Ridgemont, Durants, Christ Church;*
- (ii) *Lot 1, Silver Hill in the parish of Christ Church;*
- (iii) *Lot 3, Warners in the parish of Christ Church in this Island;*
- (iv) *Lot 8, Mount Standfast, in the parish of Saint James in this Island.*

[2] In support of the above the applicant has filed several affidavits on various dates and these affidavits are already before the court.

[3] The Respondent has also filed affidavits in response to the above affidavits and they are before the court.

BACKGROUND FACTS:

[4] The Parties to this action were married on the 23rd of December, 1978 and that union produced two children who are both adults. The marriage was desolved on the 11th of January, 2008, hereby making it a marriage of approximately some 30 years. It is common ground between the parties that the Applicant/Wife is entitled to half share and interest in the matrimonial properties which can be classified as follows:-

- (1) *Lot 33 Ridgemont Estate, the matrimonial home;*
- (2) *Lot 1, Silver Hill, Christ Church;*
- (3) *Lot 2, Silver Hill, Christ church;*
- (4) *Lot 3, Warners, Christ Church;*
- (5) *Lot 8, Mount Standfast, St. James, which was sold in 2008.*
- (6) *P'S Security Aluminum Windows & Doors Co. Ltd.*

- (7) *Edward G. Prescott Customs Brokers;*
 (8) *Worldwide Marketing Inc.*

[5] There is agreement by both parties in respect of the following assets, valuations of which have been produced to the Court;

(1)	Lot 33 Ridgemont, Durants, Christ Church	1,225,000.00
(2)	Lot 3, Warners, Christ Church	150,000.00
(3)	Lot 1, Silver Hill, Christ Church	621,000.00
(4)	Lot 2, Silver Hill, Christ Church	1,215,000.00
	Total	\$3,211,000.00

[6] Despite several requests in order to ascertain the value of the remaining assets, namely, P'S Security and Aluminum Windows, Edward G. Prescott Customs Brokers and Worldwide Marketing Inc. there has been reluctance by the Respondent/ Husband to properly comply with the relevant orders of the court made in this matter and as a result of this the only liabilities accepted by the applicant wife are as follows:-

Lot 3, Warners, Christ Church -	
Due to Consolidated Finance	150,000.00
Lot 33 Durants, Christ Church -	
Due to Sagicor Life	17,000.00
Lot 1, Silver Hill, Christ Church	442,000.00
Total accepted liabilities	\$ 609,000.00

- [7] Of course, the Respondent/Husband contended that there are additional liabilities and has produced Statement of Financial Affairs by a Mr. Philmore Alleyne indicating that these additional liabilities amount to some \$1,898,206, 08. I must state that having perused this document I tend to agree with the submission by Counsel on behalf of the applicant that this statement is unaudited and clearly there is no audit opinion set out in or attached to the Statement verifying the true financial position of the Respondent. I will return to this aspect of the case later.
- [8] In dealing with applications for the Declaration of Interest in property the court has to adhere to the three step approach which is set out in the local case of (*Proverbs v. Proverbs 61, WIR 9*). These steps are as follows:
- (i) *Assess the value of the property of the parties based on the evidence before the Court.*
 - (ii) *Evaluate the respective contributions of the parties in relation to S.57 (3) of the Family Law Act, Cap.214.*
 - (iii) *Consider the relevant S. 53(2) factors.*
- [9] In this case, I do not think it relevant to evaluate the contributions of the parties as the Respondent/Husband through his counsel accepts that the Applicant/Wife is entitled to a half share and interest in the matrimonial properties. Accordingly the main issue then is for the court to evaluate the applicant's share and interest based on the evidence in this case. What then is the value of the matrimonial assets in this particular matter? This is the

question which the court has to grapple with in particular with reference to the fact that there are disputes which have arisen with regard to the net value of some of the matrimonial properties.

[10] For instance, the Respondent/Husband has claimed in the Statement of Financial Affairs prepared by Mr. Philmore Alleyne that there are debts associated with the matrimonial assets to the tune of \$1,898,206.08. Of course these are additional to the accepted debts which have been duly proved as being owed to the respective reputable financial institutions set out in the respective written submissions of the parties.

[11] This Court finds that in addition to this Financial Statement of Affairs being unaudited, the evidence surrounding the existence of these debts is most unsatisfactory and surely the Respondent must be put to strict proof in support of these debts.

[12] If one has a look at the affidavit evidence, the Respondent's affidavit of 5th March, 2010 Paras, 63,64 and 65 he states as follows:-

The property listed at Silver Hill in the parish of Christ Church is my principle place of business. This property is registered in the name of P.A.L Holdings Inc. of which I am a Director and shareholder. The shareholding of this business is made up as follows: I have 30%, Karen Prescott has 25%, Ramon Prescott has 20%, Robert O'Neal has 15% and George Holder has 10%.

[13] Now the husband's assertion in respect of the ownership of P.A.L Holdings Inc. is an area of major dispute in respect of the value of this particular matrimonial asset as P.A.L Holdings Inc. owns real estate valued at some \$1,215,000.00. To prove his assertion that he only owns 30% of P.A.L Holdings Inc. (hereinafter called P.A.L) the Respondent husband has provided the court with the copies of share certificates issued to the son and daughter of the parties. One wonders where the original documents in support of these Certificates are and the question which the court also has to ask itself is where is the evidence to show that there has been any valuable consideration paid for these shares.

[14] In addition to the above it is contended by the husband that some 25% of this company P.A.L is owned by two named individuals Robert O'Neal and George Holder. There is absolutely no evidence before this court that either of these two good gentlemen's name are on any share Certificates, original or copy. There is indeed no evidence from the Respondent/Husband as to any valuable consideration paid by these two gentlemen in respect of these shares and again the court is left to ask the question as to the whereabouts of these original share Certificates. Surely the Respondent would have been in a position to provide this information to the court or at least some

verification by these parties by way of either affidavit or viva voce evidence of their interest in this company.

[15] In respect of the shareholding of P.A.L this court has not been provided with any original share Certificates or any documents verifying or certifying that the copies of any such share Certificates do exist. One would also expect to see some sort of share register indicating the same and if the question of transparency of these dealings has to be satisfied it also is of some bewilderment to the court that absolutely no resolution of the company exists confirming these purported share transfers. To date there has been no credible evidence before this court that this company P.A.L has lawfully issued shares to the four individuals whom the Respondent claims are the additional owners of the company.

[16] Counsel for the applicant has referred the court to the local case of (*Lenora Ottaline Boyce vs. Henry Fitzalleyne Boyce, No.204 of 1987*) as for the approach which the court should take in this matter in relation to and urges this court to hold that the contention that P.A.L is owned by these additional parties is merely an attempt to defeat the applicant's claim that the Respondent is the sole owner of the company. What I would say in respect of the ownership of his company is that it is indeed the Respondent/Husband's evidence that he solely owned the company from

incorporation and this he placed at 1988/1989. It is also his evidence that this ownership remained that way until 2003 when he then became the owner of only 30% of the company. This court finds the evidence of the Respondent woefully lacking in relation to the said transfer of shares, and the paucity of credible evidence in relation to the purported ownership of shares by these additional individuals leads this court to believe and find that on a balance of probability this company P.A.L is still wholly owned by the Respondent and any assets of this company therefore fall to be treated as matrimonial property.

- But if that were not all, this court has to mention that it was an order of the court that the Respondent was to produce to the court the following:-

- *Share Certificates for P.A.L Holdings Inc.;*
- *Trust Deeds in relation to the shareholdings in the P.A.L Holdings Inc. held on trust;*
- *All mortgage documents and statements of account from the lending institutions in relation to the land at Silver Hill which is vested in P.A.L Holdings Inc.*

[17] To date there has been no proper compliance with the above Order despite the fact that the Respondent was under a duty to do so on or before October 7, 2010.

- [18] The provision of the above information, if it existed and could be properly verified and certified, would have gone a long way in satisfying the court of the claims made by the Respondent and the failure to comply can only lead this court to conclude that P.A.L holdings Inc. is wholly owned by the Respondent/Husband.
- [19] The cases of (*Briese v. Briese (1986) FLC 91-713* and (*Stay v. Stay (1997) FLC – 92-751*) clearly show that where it is clear that a party has breached the obligation to disclose all relevant facts there is no obligation on the part of the court to exercise caution in the making of findings in favour of the “innocent party”. In this case the Respondent/Husband has disclosed very little information about the ownership of P.A.L Inc. and despite orders of the court. Also what information has been produced can only be termed as not being credible and unsupported by either documentary evidence, affidavit evidence or direct testimony under oath. The Respondent had the duty to make a full and frank disclosure of all of the affairs in relation to the ownership of P.A.L Holdings Inc. and its financial affairs and his repeated failure to do so can only lead this court to conclude that the assets of P.A.L Holdings Inc. namely the land at Lot 2, Silver Hill, Christ Church is unencumbered and the ownership of this said asset be divided equally between the parties.

**THE STATEMENT OF AFFAIRS PRODUCED
IN THE HUSBAND'S AFFIDAVIT**

[20] This Statement of Affairs deserves particular mention by this court as it clearly is an area of dispute between the parties and accordingly needs detailed examination and analysis.

- *First of all, let me state that it has been accepted that the first two items set out as liabilities, namely the debt of \$150,000.00 due to Consolidated Finance and the \$14,000.00 due to Sagicor Life have been accepted by the parties, and if I may say so, this court as well, as verified liabilities which must be considered in relation to the valuation of the matrimonial assets.*

- *The respondent's unaudited Statement of Affairs also contains liabilities in the sum of \$27,000.00 respectfully due to Mr. Philmore Alleyne. This court can find no invoice in support of this document and the same can be said of the alleged credit card sum of \$19, 417.15.*

- *There is also a sum of \$22,566.35 purportedly due to one Entralinda Larrier and also purported loans, presumably to the Respondent from Mark Cummins in the sum of \$27,000.00 and also Robert O'Neale in the sum of \$66,5000.00, for which again there are no documents in support.*

[21] I have taken the time to deal with these particular items as any order which the court has to make has to be deemed just and equitable and this is a requirement that must be borne uppermost in the court's mind. If these alleged debts referred to above were substantiated either by way of some

physical document, be it an invoice or any other loan document it would be a factor in making an order because the indebtedness of the Respondent would be of concern to the court when considering the factors set out in Section 53(2) of the Family Law Act. I shall now turn to the unaudited Statement of Affairs of P.A.L Holdings Inc.

P.A.L HOLDINGS INC. UNAUDITED
STATEMENT OF AFFAIRS

[22] P.A.L Holdings Inc. is one of the assets which form the subject matter of the matrimonial assets and as such the Financial Statement signed by Mr. Philmore Alleyne and dated January 28th, 2011 is also subject to examination by this court it being appended to the affidavit of the Respondent filed on February 11th, 2011.

- *The contention by the Respondent is that he only has an equity of some \$131,498.00 representing his 30% share holding in P.A.L. Holdings Inc. The court has already determined that there is no credible evidence to support any 30% shareholding and has indicated that its finding is that the Respondent is a 100% shareholder.*

- *But that is not the end of the matter as there are liabilities which are set out in the Statement of Affairs of P.A.L Holdings Inc. This Court does not have before it any information to confirm or verify any of the liabilities which total some \$963,398.00*

- *Again this court has been hamstrung yet again by the lack of information about these liabilities. For example, Mr. Philmore Alleyne, BSc, FCCA Chartered Accountant has prepared the Statement of Affairs of P.A.L Holdings Inc. and indicates that there is a sum of \$650,000.00, not \$6,500.00, representing shareholder's loans. I have to ask myself as the finder of fact in this matter, who are these shareholders that are owed this money? Is it one or more than one? What are the amounts owed to the individual shareholder? What is the security for such loans to the company, if indeed there is any security? When are these funds to be repaid to the company and on what conditions? Are they interest free loans and where is the relevant loan document?*

- *The lack of the above information suggests to me that the Respondent's duty to disclose this relevant information has again been breached by him and his failure to comply meaningfully with the Court's order of September 30th, 2010 does a disservice to his case and the contention that P.A.L Holdings Inc. has these liabilities in the sum of \$963,398.00.*

[23] Accordingly this court does not accept that these liabilities exist and one would have also thought that if a seemingly reputable finance company such as Consolidated Finance Co. Ltd., is owed \$224,000.00 by P.A.L Holdings Inc., then the necessary documentation should be available to the court. In the same way this documented approach was taken in relation to Lot 3, Warners, Christ Church and the relevant information provided, then the

same should be done with respect to the land at Silver Hill which is vested in P.A.L Holdings Inc. Clearly no attempt has been made to provide this documentation or comply with the court order and as such this court finds on a balance of probability and relying on the case of (*Biltoft, 126 FLR- 385*), that these liabilities are “vague; and uncertain” and no account of them shall be taken into consideration in the determination of the value of P.A.L Holdings Inc. In the circumstances this court finds that the value of the matrimonial asset, P.A.L Holdings Inc., is basically the value of the asset, namely the real estate at Lot 2, Silver Hill, Christ Church in the agreed valuation of \$1, 215.000.00.

- *In passing this court must also state that what purports to be audited Financial Statements provided by the Respondent in respect of the companies Worldwide Marketing and P’S Security leave a lot to be desired as the same bear no signature and also no approval by the Directors of these companies. Accordingly this court will not place any reliance for its value of the matrimonial assets on these statements.*

[24] The equity is therefore computed as follows based on the agreed amounts due to the relevant lending agencies.

Assets	\$3,211,000.00
Liabilities	\$ 611,434.00

Equity	\$2,599,566.00

Wife's half share of the equity results in a figure of \$1,299,783.00.

- [25] Now what just an equitable way is the court to embark upon making an order in respect of the above bearing in mind the S.53(2) Family Law Act factors.
- [26] It is true that both parties are nearing retirement as they are now almost 60 years of age and the wife does have a pension to look forward to but the husband has neither insurance or pension and both parties would be expected to continue to enjoy a reasonable standard of living and also require living accommodation or a home for themselves. The question may be asked and which the court has to grapple with is where will these parties live at such an advanced stage?
- [27] This court is of the opinion that if a transfer of the house is made to the wife then clearly the husband will have to live elsewhere. Also if the property were to be sold in this depressed market, one wonders what will be realized for the parties by such a sale. Not only that, if this were the approach taken by the court, and the proceeds divided 50% between the parties, how will the wife be able to secure her remaining funds, especially given the Respondent's history of non-compliance with court orders.
- [28] This court considers that the only just and equitable manner for resolution of this matter is for the Respondent to transfer the matrimonial home at Lot 33,

Ridgemont, Durants to the wife and let him remain in control of the remaining assets as these are so closely connected with his business which he is still able to operate and providing good health persists he would be able to do so. Of course such a transfer to the wife will result in her being out of pocket in the sum of approximately \$74,000.00 as the matrimonial property home is valued at \$1,225,000.00 but it is in the circumstances reasonable to expect that from the apartments attached to this asset, she will be able to make adequate provision for herself and the husband would be in a position to provide for himself as well through the retention of his business interests.

[29] This court is of the opinion that if the Respondent is left to dismantle his business in order to pay the wife her share, then this will place undue hardship on the husband as he will have to obtain funds in order to do so and his only source of funds appears to be his business.

[30] In the circumstances the order of this court is that the matrimonial home, situated at Lot 33, Ridgemont, Durants, Christ Church be duly transferred to the wife by the Respondent and any costs associated with the same be duly met by him.

[31] Such transfer is to be completed no later than 6 months from today's date, failing which there shall be liberty to apply.

RANDALL WORRELL
Judge of the High Court