BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 11 of 2019

BETWEEN:

ALICIA BECKLES **Appellant**

AND

BARBARA CORBIN **Respondent**

Before: The Hon. Kaye C. Goodridge, The Hon. Francis H.V. Belle and The Hon. Jefferson O. Cumberbatch, Justices of Appeal.

2020: March 05, July 21

Ms. Alicia A. Dells Attorney-at-Law for the Appellant

Mr. Bryan L. Weekes Attorney-at-Law for the Respondent

DECISION

CUMBERBATCH JA:

INTRODUCTION

[1] *"Attorneys in union cases should bear in mind that union obligations only arise where a union is proved to have come into existence and they should ensure that the question is dealt with in a satisfactory manner and not left in*

conjecture …" per **Williams CJ** in **Thompson v Layne (1985) 20 Barb, L.R. 85**.

[2] This is an appeal against the decision of **Richards J** delivered on 10 May 2019, wherein she ordered the appellant, then defendant, (hereafter the appellant) to deliver up immediate possession of the property situate at No. 11, Brighton Crescent, Brighton in the Parish of St. Michael to the claimant, (hereafter the respondent).

FACTUAL AND PROCEDURAL BACKGROUND

[3] The order now appealed against owes its origin to an action initiated by the respondent for possession of the above-mentioned property in which the appellant was then residing with her minor son. The respondent was the sister of one Peter Beckles, now deceased (hereafter the deceased), the husband of the appellant since April 2012, and the original owner of the property. Before his death in 2015, the deceased had conveyed the property to the respondent by deed of conveyance dated 9 January 2012. The property was immediately leased back to the deceased for a fixed term of three years at a monthly rental of BDS$10.00. This lease was made subject to termination by one month's written notice given by either party.

[4] In February 2013, the deceased commenced proceedings against the respondent, seeking to invalidate the conveyance of the property to the

respondent but these proved to be unsuccessful, both in the High Court and in the Court of Appeal.

[5] The expiry of the lease by effluxion of time occurred on 9 January 2015 and the deceased passed away one month and a number of days later on 21 February 2015.

[6] The respondent issued a notice of termination of the tenancy to the estate of the deceased dated 3 March 2015, that, by its terms, required the appellant to vacate the property by 9 April 2015. On her refusal to vacate the property, the respondent filed proceedings by fixed date claim form, claiming possession of the property; damages for loss of its use; interest; and costs.

[7] It was not until 12 December 2016 that the appellant filed her affidavit in reply to the fixed date claim form. In this affidavit, she asserted a proprietary interest in the property on the basis that she had lived at the property with the deceased in a union other than marriage for approximately six years and four months before their formal marriage, and for approximately six years before the deceased had conveyed the house to the respondent.

THE JUDGMENT OF RICHARDS J

[8] At the trial the learned judge first noted the definition of "a union other than marriage" in the relevant legislation, the **Family Law Act, Cap. 214**

(Cap. 214) of the Laws of Barbados, and observed that **sections 56** and **57** of that statute respectively permit a court to declare the property interests of the parties to such an union, or to alter the property interests of those individuals.

[9] Relying further on the local decision of **Shepherd v Taylor (1987) 22 Barb. LR 118**, she stated that a union cannot be established if there is no cohabitation within the year immediately preceding the institution of the related proceedings and she referred to the amendment to the **Act** that allowed the court to extend the 12 month period by such longer period as the court thinks fit where it is satisfied that the party to the proceedings or a child of the union will suffer hardship if the extension is not granted, as is now expressed in **section 39**.

[10] Quite rightly, in our view, **Richards J** determined that whether or not parties have cohabited in a union other than marriage for five years is a question of fact to be decided by the court and the burden of proof, in accordance with the well known maxim, *onus probandi incumbit actori,* the burden of proof lies on the party alleging cohabitation to the civil standard of the balance of probabilities or whether it was more likely than not that there was cohabitation.

[11] In her judgment, cohabitation, on the legal authorities required, *inter alia*, "a serious relationship" or "a family commitment to each other during the existence of that union" **Phillips v Alleyne (1989) 24 Barb. L.R. 1**, per **Belgrave J**; and one that is "clearly distinguishable from a casual or visiting association, however intimate" **Adams v Clarke (1991) 26 Barb. L. R. 371, 372** per **C.S Husbands J**.

[12] In addition, her Ladyship referred to the text, **Commonwealth Caribbean Family Law: Husband, Wife and Cohabitant** by Karen Tesheira, at **pp. 59-60**, wherein the author identifies seven constituent elements of *consortium vitae* or cohabitation. These are, the duration of the relationship; whether or not a sexual relationship exists; the degree of financial dependence or independence, and any arrangements for financial support between the parties; the degree of mutual commitment to a shared life; the care and support of children if any; the performance of household duties; and, lastly, the reputation and public aspects of the relationship.

[13] She noted too that the appellant was also relying on **section 64** of **Cap. 214** to have the court set aside the conveyance. This provides in **subsection**:

> (1) that *"the court may set aside or restrain the making of any instrument or disposition by or on behalf ... of a party which is made or proposed to be made to defeat an existing or anticipated order for ... the declaration or alteration of any interest in property or which, irrespective of intention, is likely to defeat any such order".*

According to the remainder of the section-

> "(2) *The court may order that any money or real or personal property dealt with by any such instrument or disposition may be taken in execution or charged with the payment of such sums for costs or maintenance as the court directs, or that the proceeds of a sale shall be paid into court pending an order of the court*.
>
> (3) *The court shall have regard to the interests of, and shall make an appropriate order for the protection of, a purchaser in good faith or other interested person.*
>
> (4) *A party or person acting in collusion with a party may be ordered to pay the costs of any other party, or of a purchaser in good faith or other interested person of an incidental to any such instrument or disposition and the setting aside or restraining of the instrument or disposition.*
>
> *(5) In this section, "disposition" includes a sale and a gift."*

[14] **Richards J** then isolated two issues for determination:

> (1) Whether the appellant and the deceased were in a union other than marriage prior to the execution of the conveyance; and
>
> (2) If so, whether the conveyance should be set aside.

[15] In her, in our view, careful treatment of the evidence, the learned trial judge treated the affidavit of the appellant's mother as being of no assistance to the appellant "because it contains no eyewitness details of the alleged domestic arrangement between Mr. Beckles and the appellant at the home post December 2006."

[16] In the opinion of **Richards J**, the evidence of the respondent, that of Dr. Malcolm Howitt and of the helper, Ms. Dianne Yearwood, constrained her to find that there was no cohabitation between Mr. Beckles and the appellant within the year immediately preceding the institution of the appellant's action.

[17] Moreover, the appellant had not adhered to the timeline set by **section 39** for the filing of a claim to an interest in property by virtue of a union other than marriage in proceedings.

[18] And, while it was accepted that the relevant law did provide for the extension of the 12 month period if the court was satisfied that the party would suffer hardship if an extension were not granted, the appellant had offered no evidence of likely hardship either to herself or her son. Indeed, **Richards J** was prepared to find that the child was not the child of a union but was "the child of her marriage to the deceased".

[19] And having found no credible evidence, apart from the appellant's affidavit that she began cohabitation with the deceased Mr. Beckles in 2006, the learned judge, while, in her own words, "prepared to accept that the parties began to live together at the house after the death of the mother of the deceased", this would have been too late to establish the existence of a union other than marriage before the respondent became the owner of the property.

[20] At para 31 of her judgment, she notes decisively, "While a sexual relationship under the same roof is an indicator of cohabitation, other elements of *consortium vitae*, referred to by Ms. Nunez Tesheira, are absent. … There is no evidence of the degree of financial dependence or interdependence between the (appellant) and the deceased, or of any arrangements for financial support between them. Also absent is any evidence as to the reputation and public aspects of the relationship. For example, did the deceased and the (appellant) shop together or attend social events together as a couple? Secret relationships do not support the existence of a union other than marriage".

[21] The learned trial judge thus concluded "The (appellant) has not satisfied this Court that, on a balance of probabilities, she cohabited with the deceased in a union other than marriage". She thereafter entered judgment for the respondent, noting that the setting aside of the conveyance did not therefore arise for consideration by the court.

[22] From this decision, the appellant now appeals to this Court.

THE APPEAL

[23] Learned counsel for the appellant, Ms. Alicia Dells, filed two grounds of appeal in her Notice of 7 June 2019. These were:

> (1) That the decision of the learned judge of first instance is against the weight of the evidence; and,

(2) That the learned judge erred in law.

[24] And she sought orders that the decision of the lower court should be set aside and the appeal allowed and that the order of **Richards J** should be stayed pending the determination of this appeal.

[25] Counsel subsequently amended these grounds on 15 November 2019 to the more specific:

> (1) The learned judge erred in law in that she did not find that there was sufficient evidence upon which she should have held that the parties cohabited in a union other than marriage for 5 years; and
>
> (2) The Honorable judge erred in law in that she did not find that there was sufficient evidence upon which she should have exercised her discretion to enlarge the 12 month limitation period between the cohabitation and institution of proceedings on the basis of hardship in accordance with the 2014 amendment to the **Family Law Act, Cap. 214** under **section 39 (3)**.

DISCUSSION

[26] Ms. Dells sought to expand on these grounds in her written and oral submissions. Essentially, she is claiming that the learned trial judge drew the incorrect inferences from the evidence presented to her. This Court has already stated the ambit of such a claim, most recently in the eloquent dicta of **Burgess JA** (as he then was) in **CLICO International General Insurance Limited v Aubryn Bridgeman Civil Appeal No. 4 of 2015**

***(*28 December 2018)**; dicta relied on by learned counsel for the respondent in his reply. There, with respect to the drawing of inferences of fact, and citing the learning from the decision of this Court in **E Pihl & Sons A/S (Denmark) v Brondum A/S (Denmark), Civil Appeal No 24 of 2012**, he stated:

> *"While the appellate court is free to review a trial judges' findings and replace the opinion of the trial judge with its own to correct errors of law; appeals on questions of fact require a distinction to be drawn between the perception of facts [primary facts] and the evaluation of facts [inferences drawn from primary facts]. The former involves assessing the credibility of witnesses and, according to **Simmons CJ** in **Eudese Ramsay v St. James Hotels Services Ltd. MA No. 4 of 1999 (decided 26 June 2002),** this Court will only interfere with findings of fact where there was no evidence at all or only a scintilla of evidence to support the finding. As the Learned Chief Justice (as he then was) explained:*
>
> > *"The reason for the reluctance of an appellate court to interfere with findings of fact by a court below is that the judge was in a better position to assess the credibility of witnesses and the value of their evidence…"*

[27] The situation is more complex with respect to inferences from primary facts. While **section 61(e)** of **Cap. 117A** expressly empowers this Court to draw any inference from any fact that might have been drawn by the trial judge, no applicable standard for doing so is indicated. However, in **Gypsy International v Canadian Imperial Bank (Civil Appeal No. 27 of 2012**

this Court, on the basis of its earlier decisions in **Ward v Walsh, Civil Appeal No. 20 of 2005 (decided 28 November 2012)** reasoned that:

> "… *for this Court to interfere [with inferences drawn by the trial judge], not only must there be error by the trial judge in coming to a factual conclusion based on accepted fact, but that error must be clear and convincing. Such a standard is not only consistent with principles of appellate court deference but is also consistent with the basic purpose of appellate jurisdiction which is to correct lower court error [and] not to retry cases..*"

[28] Following these principles, we should differ from the inferences drawn by **Richards J** only if there is clear and convincing error in the inferences she drew from the facts as found by her. We do not so find. Indeed, from the evidence presented, we do not see at what other conclusions she might have arrived, in light of the standard of the balance of probabilities, despite the insistence of counsel for the appellant that she made no express assessment of the credibility of the witnesses.

[29] In her first affidavit, the appellant swore that she lived with the deceased in his residence in a union other than marriage from December 2006 to April 2012 when they went through a ceremony of marriage.

[30] The appellant's mother, Ms. Donna Quintyne, also provided an affidavit. In it, she avowed that she met the deceased in 2000 when she commenced working in the capacity of Auxiliary Nurse for his mother. She affirmed at para 6 of this document that it is [her] understanding that the appellant and

the deceased met at the home of an elderly and blind gentleman for whom the appellant had worked since 2000 and a friendship ensued that was to become intimate a short while thereafter. She further stated that the appellant confided in her that she slept at the home of the deceased on some nights.

[31] Paragraphs 7 and 8 were most revealing:

> "7. The [appellant] further informed me that [the deceased] had asked her to move into his residence for Christmas 2006 and she complied with his request. I was told by the deceased that I no longer had to perform certain domestic tasks for him because the [appellant] had moved in with him and she would undertake the said tasks.
>
> 8. Thereafter, the deceased and the [appellant] visited my home as a couple. All was well until the [appellant] became pregnant and 'started showing'".

[32] Nonetheless, as the learned trial judge subsequently observed, and correctly so in our view, this affidavit contained no eyewitness details of the alleged domestic arrangement between the deceased and the appellant at the home of the deceased post December 2006. This she found "a surprising omission", given that Ms. Quintyne alleged that she worked as a nurse with the ageing mother of the deceased, at his home, until his mother died in October 2007. As **Richards J** pointed out, "this would have allowed Ms. Quintyne approximately ten months to observe any domestic arrangements between the [appellant] and the deceased."

[33] The respondent also deposed that she did not see or believe that the appellant and the deceased lived together at the property in 2006 and 2007. Nor had either of them indicated during the court action initiated by the deceased against her for avoidance of the conveyance of the property to her, that they had lived together, before their formal marriage, in a union other than marriage.

[34] Dr. Malcolm Howitt, a medical doctor and the son-in-law of the respondent, also gave evidence. He was a frequent visitor to the deceased's home both in his professional and familial capacities. He attested that the appellant was not living at the home of the deceased in 2006 or 2007. He averred that he visited the deceased's household "intensely" between 2006 and 2013 in a medical capacity. And while he conceded that the appellant "could have been around", he did not think that there was "any permanence there" since he would have expected to see some evidence that she was there and, presumably, saw none to suggest that someone else was there.

[35] Most damning of all was the evidence of Ms. Diane Yearwood, who worked as a helper for the mother of the deceased from 2001 until her death in October 2007. She also later worked for the deceased from July 2008 until October 2017. In her affidavit filed on 19 October 2017, she deposed that

during those two periods, she "had never known the [appellant] to be living in the house with the deceased."

[36] The appellant filed a second affidavit on 6 September 2017 in which she claimed that Dr. Howitt did not often visit the home of the deceased, and that when he did visit, these calls lasted no longer than 10 to 15 minutes. She also insisted that she had moved in with the deceased in 2006.

CONCLUSION

[37] Given the state of the evidence presented to **Richards J**, we are of the view that she correctly drew the inference that there was no cohabitation between the parties and, moreover, that there was no cohabitation within the year immediately preceding the institution of the claim by the appellant in the proceedings brought by the respondent for the recovery of her property.

[38] We also agree with the learned judge that the failure of the appellant to adhere to the timeline set by **section 39** of **Cap. 214** was fatal to her claim and we do not dissent from her finding that the appellant was not competent to take advantage of the legislative amendment that permits the court to extend the 12 month period, since she offered no evidence of hardship to herself or her son, who, while conceived out of wedlock, was properly to be considered a child of the subsequent marriage between the appellant and the deceased.

[39] At the hearing of the appeal, Ms. Dells for the appellant strove mightily to persuade us that the omission of the learned judge to state explicitly the reasons for her acceptance of the affidavit evidence of the respondent's witnesses over that of the witnesses for the appellant was a reversible error. In support of this argument, she cited the cases of **Flannery v Halifax Estates Agencies Ltd. T/A Colleys Professional Services [2000] 1 All E.R. 373** where *Henry LJ* expounded on the duty of the judge to give reasons for his or her findings. We note however, that among his general propositions on the nature of this duty, *Henry LJ* included the following:

> *"The extent of the duty, or rather the reach of what is required to fulfill it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having no doubt summarized the evidence) to indicate simply that he believes X rather than Y. Indeed there may be nothing else to say …"*

[40] We consider this dictum to be sufficient answer to the concern expressed by learned counsel and we endorse it as applicable to the present case.

[41] In his oral submissions, Mr. Weekes relied entirely on the analysis and findings of **Richards J**, referenced the near inviolability of findings of fact by the trial judge, and drew our attention to the reality that the conveyance of the property by the deceased to the respondent had been found to be valid. He also observed that the claim of the appellant before the court was simply

to assert the existence of a union other than a marriage to which she was a party, with no substantive relief being sought. And, so far as that assertion was concerned, counsel further reasoned:-

> *"There was simply not enough provided to Her Ladyship below to have assisted the defendant in any material way whatsoever".*

[42] We are in full agreement with that statement.

DISPOSAL

[43] For these reasons, we dismiss the appeal and uphold the judgment of the learned trial judge. Costs are awarded to the respondent. These are to be agreed or, failing such agreement, to be assessed.

Justice of Appeal

Justice of Appeal **Justice of Appeal**