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Court of Appeal. 202.

1st November, 1996.

Before: Sir Godfray Le Quesne, Q.C., President,
R.C. Southwell, Esq., Q.C., and
P.D. Smith, Esq., Q.C.

Between	Cherry Charlotte Pinson (née Nicholls)	Appellant
And	André Ghislain Pinson	Respondent

Appeal from so much of the Judgment of the Royal Court (Matrimonial Causes Division) of 5th June, 1991, as ordered that:

(1) the profits of the "Floriana" Guest House for the years 1985 to 1990 be apportioned equally between the parties;

(2) the proceeds of the sale of the said Guest House be divided between the parties in equal shares; and

(3) each party bear their own costs.

Advocate C.J. Dorey for the Appellant.
The Respondent did not appear and was not represented.

JUDGMENT.

SMITH, JA: The Appellant and the Respondent were married on 7th April, 1966. On 16th May, 1990, the Royal Court pronounced a Decree Nisi dissolving the marriage on foot of a Petition presented by the Respondent. The Decree records that "*the Court has postponed the further consideration of ancillary matters*".

Those ancillary matters were litigated in a hearing before the Royal Court (Commissioner Hamon as he then was, Jurats Blampied and Orchard) which commenced on 15th April, 1991. The witnesses included both the Appellant and the Respondent and on 5th June, 1991, the Royal Court delivered its judgment.

In essence the matters before the Royal Court were:

(a) the apportionment between the parties of the net proceeds of sale of the "Floriana Guest House," Springfield Road,

St. Helier, which were retained in a bank account and totalled £218,295; and,

(b) the apportionment between the parties of the profits of the Guest House for the years 1985-1990 inclusive which had been retained by the Appellant.

The Guest House had been purchased by the parties on 5th September, 1975, initially in the sole name of the Appellant with the intention, which was carried into effect, of running it as a business.

On 7th April, 1978, it was transferred into the joint names of the parties. The Royal Court stated that it regarded the parties as being financially equal when the Guest House was purchased and that it was a jointly owned matrimonial asset from the moment it was purchased. Neither of these findings is challenged before this Court.

In the 1980s the marriage deteriorated culminating, as far as the Guest House was concerned, in the Appellant obtaining an Order of the Royal Court on 7th February, 1985, excluding the Respondent from it. From that date until the sale of the Guest House on 18th January, 1991, it was occupied by the Appellant (and, presumably, from time to time by the child of the parties) and the Appellant continued to run the business, albeit that the Guest House, according to the findings of the Royal Court, deteriorated during this period from ***"a reasonably well maintained Grade B Guest House"*** to a property which had taken on ***"the character of a lodging house".***

In reaching its decision the Royal Court considered the matters first approved by the Royal Court in Urquhart -v- Wallace (1973) JJ 2483. These I need not set out as it has been accepted that the Royal Court thereby adverted to the appropriate legal principles. The Royal Court scrutinised the evidence before it in some detail. It concluded that the proceeds of sale of the Guest House should be apportioned equally between the parties.

The Royal Court then considered the profits of the Guest House for the years 1985-1990 inclusive, a period during which the Appellant alone had carried on the business, in her own name, and during which the Respondent had been totally excluded. Accounts were available for the material period and the Royal Court concluded that the profits (including the proceeds of a small insurance claim) totalled £41,394 and apportioned this sum equally between the parties. Thus, the Respondent was to receive £129,844.50 (that is to say one half of the net proceeds of sale - £109,147.50, plus one half of the profits - £20,697) and the Appellant £88,450.50 (that is to say one half of the net proceeds of sale - £109,147.50 less one half of the profits - £20,697).

Against these apportionments the Appellant now appeals. She was represented by Advocate Dorey. The Respondent did not appear and was not represented. The arguments put forward on the Appellant's behalf may be summarised as follows:

(a) In calculating the profits of the Guest House for the period 1985-1990, allowance ought to have been made for tax, but was not made. At the hearing before the Royal Court Mr. Leonard Vandenborn, a senior manager of Reads & Co., Chartered Accountants, stated in evidence that the Comptroller of Income Tax had raised assessments totalling "a little over £4,000" which remained unpaid and that it was anticipated that an assessment of approximately £600 would be raised in respect of 1990. The assessment for the year 1990 is actually £1,142.60 but as it is dated 9th September, 1991, and, therefore, after the date of the hearing before the Royal Court, it would not be right to have regard to this actual higher figure;

(b) in calculating the profits for the period, allowance ought to have been made for accountancy fees but was not made. At the hearing Mr. Vandenborn explained that there were two accountant's fees accounts outstanding against the business which totalled £2,850. We have been informed that the actual sum is £1,600 and it is to this sum to which we should have regard;

(c) the Appellant ought to have been credited with remuneration in respect of her work in running the Guest House for the period 15th February, 1985, to 18th January, 1991, (309 weeks) at £150 per week, a total of £46,350;

(d) in considering the Appellant's capacity for work, insufficient account had been taken of her age and health. At the hearing evidence was given that there had been changes in the teaching profession since the Appellant's retirement from it eight years earlier and there was uncontroverted evidence from her doctor, Dr. J.S. Le Gresley, that she was suffering from degenerative osteo arthritis of her spine and shoulders;

(e) insufficient weight had been given to the imbalance between the pensions paid or payable to the parties. The Respondent, who was born on 17th March, 1940, was currently in receipt of an index-linked French army pension payable until death. At the date of the hearing this stood at £357.25 per month, when converted from French francs. He would become entitled to a Jersey pension at 65. The Appellant, who was born on 23rd September, 1938, would at 60 receive an annual pension in respect of her period of employment as a school teacher of £1,733.32 (assuming she made no further contributions) and a

Jersey pension of £24.82 per week (both figures as at the date of the hearing).

It was argued on the Appellant's behalf that on the basis of points (a), (b) and (c) she should not have been required to account for any sum in respect of profits and that, on the basis of (d) and (e), the proceeds of sale of the Guest House ought to have been apportioned 60/40 in the Appellant's favour.

In my view, both the income tax liability and the accountancy fees ought to have been subtracted from the figure for Guest House profits before it was apportioned between the parties thereby reducing the figure taken by the Royal Court to £35,015.40. Further, I have been persuaded that the work done by the Appellant in running the Guest House for the years 1985-1990 ought to have been taken into account in apportioning the profits and not just set off against the value of the Appellant's keep and her use of the profits during the period. However, I do not consider it fair or reasonable that £150 per week be attributed to this work, particularly in the light of the fact that in only one year would the profits have supported such remuneration and even then would have left only a very small surplus. In my judgment the Appellant's work and the parties' interests in the Guest House would be fairly reflected if two-thirds of the profits were to be attributed to the Appellant and one-third to the Respondent.

The effect of making the adjustments consequent upon the above would be to reduce the Respondent's entitlement to £120,819.30 (that is £109,147.50 plus £11,671.80) or £9,025.20 less than he has actually received.

Turning to the issue of the Appellant's working capacity it is observed that the Royal Court found it to be true that there had been great changes in the teaching profession since the Appellant retired. Further, the finding of the Royal Court in relation to the Appellant's health (***"We can only say that [the appellant] suffered from osteo arthritis, it causes her pain and there is no cure for what is a continuing degeneration"***) was somewhat delphic in the sense that although it was concluded that ***"It is inconceivable that [the appellant] with her deep knowledge of the French language could not find herself gainful employment in some capacity or other"*** it is not clear what estimate the Royal Court actually made of the Appellant's capacity to earn her living in comparison with the standard of income she was able to generate when she was younger and healthier.

As far as the pension issue is concerned the Royal Court set out in its judgment the evidence which demonstrated the disparity between the parties but made no further comment. Presumably this was one of the many factors which it considered on its way to concluding that the net proceeds of sale of the Guest House should be apportioned equally.

I have not been persuaded that there are grounds for substituting a 60/40 split for the 50/50 conclusion of the Royal Court. However, I do consider that significantly greater weight ought to have been attached to the earning capacity and pension factors than appears to have been the case. In my view, the way to rectify the imbalance thus created is to make up the figure of £9,025.20 to £15,000 and to order that the Appellant is entitled to recover this sum from the Respondent.

Interest at Court rate is claimed on the Appellant's behalf. It appears that during the period 30th January, 1992, to 12th July, 1993, the Appellant herself was responsible for the progress of this appeal being stalled. The Appellant ought not to have interest in respect of this period but is otherwise entitled to interest at Court rate from the date of the judgment of the Royal Court on 5th June, 1991.

We have been asked to vary the Order of the Royal Court that each party bear its own costs. I would not be prepared to disturb that Order. It arguably favoured the Appellant and my adjustment of the division of the Guest House proceeds does not fully redress this imbalance in the Appellant's favour.

The Appellant is, however, entitled to her costs of this appeal against the Respondent. She has sought them on an indemnity basis. She argues that this is an appropriate basis because of the Respondent's misconduct in proceedings between the parties which took place shortly after, and followed on from, the judgment of the Royal Court of 5th June, 1991. Without going into detail, those proceedings involved an attempt by the Appellant to obtain a stay of execution pending the hearing of the present appeal. In this she failed, but it is argued that the Respondent misled the Court by averring in an affidavit sworn on 11th July, 1991, that he intended to reside in Jersey indefinitely. Counsel for the Appellant informed this Court that she had been instructed by the Appellant that the Respondent had in fact left the Island shortly after he had received the monies he was entitled to on foot of the judgment of the Royal Court and that he has never returned. There was, however, no evidence before this Court in support of these assertions.

It is clear from its judgment of 11th July, 1991, that the Royal Court was influenced by the averment to which I have referred. However, even on the assumption that counsel's instructions are correct and the Respondent did leave Jersey for good shortly after 11th July, 1991, these factors alone do not enable me to draw the inference that the Respondent deliberately misled the Court.

It follows that I need not consider whether such misconduct, if it had been proven, would have justified an award of costs on

the basis sought. Suffice to say that I do not consider it appropriate to make an order for costs on an indemnity basis in this case.

SOUTHWELL, JA: I agree.

THE PRESIDENT: I agree.

Authorities

Urquhart -v- Wallace (1973) JJ 2483.