

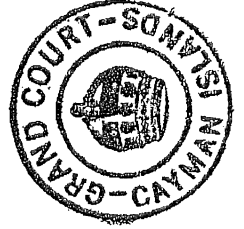
13-9-10
Henderson.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. FAM 220 OF 2009

BETWEEN:	ERVIN ERIMANDO EBANKS	Petitioner
AND:	JODY BARBARA WEECH EBANKS	Respondent

Appearances:	Ms. Vanessa Allard of Brooks & Brooks for the Petitioner Ms. Margeta Facey-Clarke of Facey-Clarke & Associates for the Respondent
--------------	---



RULING

1. In this ruling I am called upon to classify the assets of the parties as matrimonial or non-matrimonial for the purpose of disclosure as the case proceeds.
2. In attempting to determine whether each of the assets is matrimonial property, I have followed the law as set out by our Court of Appeal in *Wight vs. Wight* (unreported) November 30th 2007, cause 6/96; in *W vs. W*, 2009 CILR 255 (Court of Appeal); and in *BH vs. H* 2009 CILR 185, Foster, J.

3. The *W* decision is the most recent pronouncement from our Court of Appeal. At paragraph 12 the Court addressed how assets should be characterised and classified. The Court quoted from its own earlier judgment in *Wight vs. Wight* and said: "Each therefore would be entitled to an equal share of the assets acquired in the marriage, unless there is good reason to depart from that principle." I take that to be the general rule. If an asset has been acquired in the marriage, that is to say, during the course of the marriage when the parties were together, it is considered to be a matrimonial asset unless there is good reason to depart from that principle.
4. In paragraph 13, our Court of Appeal quoted a phrase used by Lord Nicholls in his decision in *Miller No. 2* [2006] 2 AC 618. Lord Nicholls described non-matrimonial assets as items of property which are not "the financial product of the parties' common endeavour". The phrase "common endeavour" cannot be taken to refer only to business dealings or the earning of income. The common endeavour is the maintaining of a joint household, the raising of a family, the earning of income to support that family, and the acquisition of material goods and services needed by the family.
5. The Court then addressed the question of property brought into the marriage by one of the parties and quoted Lord Nicholls again, this time taking the quote from his decision in *White*, as follows:

“Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property and the time when and circumstances in which the property was acquired are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the family’s financial needs cannot be met without recourse to this property.”

6. Later, our Court of Appeal quoted the passage in which Lord Nicholls addressed the question of the duration of the marriage. He said:

“With longer marriages the position is not so straight forward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage, the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained *in specie*. Some of the matters to be taken into account in this regard were mentioned in the above citation from the *White* case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organise their financial affairs.”

7. As these passages make clear, even property brought into the marriage by one of the parties and which is not the financial product of the parties’ common endeavour may become, with the passage of time, matrimonial property. Much depends upon the circumstances. One relevant circumstance is whether recourse must be had to that particular item of property to support the family’s needs going forward.

8. Finally, it is relevant to consider, together with the other factors, the way in which the parties have organised their financial affairs.

9. Mrs. Ebanks does not address these relevant classification criteria at all in her affidavit evidence. Mr. Ebanks does, but in very broad, brief and conclusory terms without condescending to detail. The most pertinent passage from the evidence of Mr. Ebanks is paragraph 49 from his first affidavit in which he says:

"that as her affidavits and other documents filed herein also suggest, she conducted her own affairs separately while I did the same and she always looked to me to take the lion's share of the burden of paying for and maintaining the family while never using her salary or earnings for the family. So, for instance, we have never had any joint account of any kind throughout the time that we have been married, nor did we ever acquire a property jointly in our names".

10. Even in that passage, there is an internal inconsistency. He speaks of his taking the "lion's share of the burden" of paying for and maintaining the family, thereby implying that Mrs. Ebanks also took on some share, albeit a lesser share, but in the very same sentence asserts that she "never" used her salary or earnings for the family. Both cannot be correct.

11. The result is that there is a lack of reliable evidence which would permit a considered decision on classification of some of the assets.

12. I will now attempt a classification.

13. The parties were married in 2000 and separated in mid-2007. I would characterise this as a marriage of medium duration -- neither short term nor long term.

14. Mrs. Ebanks is employed as an assistant manager at the Royal Bank. She earns \$4,018 per month in salary and in addition the bank makes a pension contribution for her and pays her health insurance. She has been to the Bahamas several times in recent months on vacation, which tends to cast some doubt on her assertion that her monthly expenses are well in excess of her income.

15. In his first affidavit, Mr. Ebanks claimed in paragraph 52: "that presently I only receive an income of approximately \$5,000 per month from Cayman Dispatch Services and no more". He also claims to have expenses well in excess of his monthly income. As recently as February 20th 2008, Mr. Ebanks represented in writing to the Secretary of the Permanent Residency Board that: "My annual salary is in the six-digit range". Mrs. Ebanks, who appended that letter to one of her affidavits, exaggerates its effect by suggesting that it was a representation of an annual salary in the "high" six-figure range. I would take the phrase "the high six-figure range" to mean a salary between \$500,000 and \$1,000,000 per annum, whereas a salary in the "six-digit range" might well be little more than \$100,000 per year, so the difference is highly significant.

16. In any event, Mr. Ebanks' assertion of an annual salary of just \$5,000 per month was misleading. In fact, as he concedes in his second affidavit, he also

receives \$5,250 per month paid on his behalf directly into his mortgage account. That is the account with respect to the Spotts property to which I will turn shortly. He explains his failure to mention this earlier by pointing out that the payment "goes directly to the bank" and is "not paid directly to me": see paragraph 43.

17. Attached to his second affidavit is a letter from his business partner (Lewis M. Ebanks) on the letterhead of Empire Development asserting that the "salary" of \$5,250 per month which is paid directly to the mortgage account "is the total sum from the group including the subsidiary companies". That assertion also would appear doubtful in light of documentary evidence which I will describe below.

18. I turn to the assets in the name of Mrs. Ebanks.

19. Mrs. Ebanks acquired a piece of land at Breakers in 2006 during the marriage. There is a mortgage on the property which is in her name. She also has a pension contributed to by her employer. She maintains two investment deposit accounts at the Royal Bank, a savings account and a chequing account at the same institution, and a credit card. The property at Breakers, having been acquired during the marriage, is a matrimonial asset. There is no evidence before me which would justify treating it otherwise.

20. Insofar as the two deposit accounts and the savings account were contributed to during the marriage, they too are matrimonial assets. As for the chequing

account and the credit card, their balances as at the date of separation constitute either matrimonial assets or matrimonial liabilities as the case may be. The proportionate value of Mrs. Ebanks' pension, which has been built up by contributions during the term of the marriage, is a matrimonial asset.

21. I turn to assets registered in the name of Mr. Ebanks.
22. Mr. Ebanks owns a piece of real property in West Bay jointly with his aunt. This property was given to him by his grandmother after he separated from his wife. It is not a matrimonial asset.
23. Well before the date of the marriage, Mr. Ebanks purchased a piece of land in Spotts. In 2003, he obtained a mortgage on this property from First Caribbean International Bank in his own name for the purpose of building a residence upon it. There is a dispute as to whether this is a matrimonial asset. I will return to that subject below.
24. Mr. Ebanks also owns 50 percent of the issued and outstanding shares in Irvin Lewis Inc. He acquired his shares during the marriage in 2004. Irvin Lewis Inc. is a holding company which owns 100 percent of Midas Touch Development, Auric Investments Ltd. and Empire Development. There is a dispute as to whether the shares in Irvin Lewis Inc. are matrimonial assets. Again, I will return to that subject below.

25. Mr. Ebanks owns 50 percent of the shares in Travel City, a travel agency business. He acquired these shares six months prior to separation from his wife, but the company did not start operations until one year after separation. There is reliable evidence to that effect. I am satisfied that any value which these shares might have was created after the couple separated and the shares are, for that reason, not to be regarded as a matrimonial asset.

26. In the letter dated February 20th 2008 and mentioned above, Mr. Ebanks asserted that he is the "owner" of Cayman Dispatch Services Ltd. In his affidavit evidence he says he is a "shareholder" but does not disclose the percentage of shares that he owns. Attached to his affidavit is a register of members for the company which shows him owning one share of a total of two shares issued and outstanding. The share register suggests that Mr. Ebanks acquired his share originally in 1992.

27. Cayman Dispatch contributes to his pension and has paid maintenance on his behalf since separation. It may well have debited the payments against his salary entitlement but there is no documentary evidence of that. I am satisfied that the portion of the value of Mr. Ebanks' pension which was built up and contributed to during the course of the marriage is a matrimonial asset. A determination of whether or not the share in Cayman Dispatch is a matrimonial asset will have to be made later when the evidence is complete.

28. Mr. Ebanks has a credit card and a chequing account at the Royal Bank. These are matrimonial assets or liabilities and the balances in these accounts as at the date of separation should be treated as such.
29. Mr. Ebanks obtained a mortgage upon the Spotts property in his own name in 2003 for the purpose of building a residence on it. He maintains that "the house was and remains a personal project and has nothing to do either with the respondent or even my business partner". He says the house "has never been the subject of a charge or a mortgage or a loan of any kind for funds that benefitted the respondent or family generally, nor was it ever looked upon by me as an item to be shared by myself and the respondent".
30. The mortgage account is account number 1574115 at the First Caribbean International Bank. The account statements have not been disclosed. As at July 21st 2010, the balance payable on the mortgage was US \$1,300,375.
31. Mr. Ebanks also maintains an account at First Caribbean numbered 1576770. His affidavit evidence does not explain the purpose of this account, but he has disclosed a series of account statements commencing in January 2007. These statements show the account was in overdraft in the amount of \$467,375 in December 2006 and in the amount of \$475,286 at the end of June 2007. Each month the bank debited the overdraft in the amount of \$5242.78 and transferred that sum to the mortgage account number 1574115. Additional sums in the amount of \$942.01 were debited to the account for the servicing of

another undisclosed loan account at First Caribbean, account number 1004799. These sums were debited on a more or less monthly basis.

32. There were regular deposits of large amounts into account number 1576770 during the time for which statements have been entered in evidence. On January 5th 2007, a "customer deposit" in the amount of \$50,000 was made. On February 15th, the sum of \$25,000 was deposited. On February 26th, a further \$25,000 was deposited, and on February 28th the same amount was deposited. \$25,000 deposits were made again on March 5th and March 12th. The next \$25,000 deposit was on April 18th followed by customer deposits of \$10,000 on May 8th and \$15,000 on May 15th. On May 29th the sum of \$10,000 was deposited followed by the same amount on June 7th and a deposit of \$5,000 on June 13th. The sum of \$7,500 was deposited on June 25th and again on June 28th. That same amount was deposited July 5th, July 13th, July 25th and July 30th. These deposits are entirely unexplained by the evidence.

33. Empire Developments, the wholly-owned subsidiary of Irvin Lewis Inc., was engaged in several large property developments. In the absence of any evidence from Mr. Ebanks, it seems reasonable to infer that these large deposits represented salary or dividend income to him from Irvin Lewis. Certainly the size of the overdraft would suggest that Mr. Ebanks had, to the knowledge of the bank, an income far in excess of his declared income of \$10,250. If that was his entire income, I do not believe the bank would have permitted such a large personal overdraft without security. There is no evidence that the account was secured in any way.

34. Account number 1576770 evidences a large number of transactions in the period from January to June 2007. There are many debits to the account ranging in size from a few dollars to \$10,000 or more. Mr. Ebanks has offered no explanation for these transactions.

35. The other accounts which he has disclosed do not seem to show enough activity to account for the daily living expenses of the family. In the absence of evidence to the contrary, I think it reasonable to infer that the debits to account number 1576770 were at least partly for payment of family expenses.

36. The conclusion, which is a preliminary one at this stage, is that Mr. Ebanks has earned a considerable amount of undisclosed income which was deposited into this account and has used the proceeds, at least in part, to support his family and pay its monthly expenses. In addition, the money apparently earned by him and deposited into this account has been used to service the mortgage on the Spotts property.

37. Although I was invited during this hearing to determine which assets are matrimonial assets, the real purpose of that determination was to reach a decision as to the extent of the financial disclosure required of Mr. Ebanks. The evidence is not sufficient to permit any final determination as to whether the Spotts residence and the shares in Irvin Lewis Inc. are matrimonial assets. However, the evidence I have described above is more than sufficient to give rise to a reasonable suspicion that they are indeed matrimonial assets. For that

reason, complete financial disclosure must be made by Mr. Ebanks concerning the Spotts residence and the source of funding for it. In addition, he must make full financial disclosure of his income, whether by way of salary, director's fees, dividend, or loan to a shareholder, from Irvin Lewis Inc. There will have to be an appraisal of the value of his shareholding in that company as at mid-2007.

38. As for Cayman Dispatch Services, Mr. Ebanks' shareholding in that company may be a matrimonial asset even though it was acquired in 1992. He has acquired income from it during the marriage which he has used for the support of his family and, since separation, Cayman Dispatch has made maintenance payments on his behalf. He must now make full financial disclosure of his earnings from that company and an appraisal of the value of his share in it must be obtained.

39. In addition, a full explanation regarding the overdraft in account number 1576770 is needed as it may have to be taken into account in appraising the value of the Irvin Lewis shares.

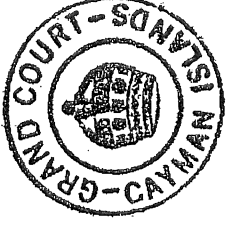
40. Finally, I should mention that Mr. Ebanks has a US dollar account at Scotia Bank which is in overdraft at present in the amount of approximately \$100,000. An explanation for the purpose of this account is needed also.

41. Nothing I have said should be taken to indicate any settled view as to the percentage division between the parties of the matrimonial assets.

Dated this 13th Day of September, 2010

Henderson, J.

Henderson, J.
Judge of the Grand Court



COURTS OFFICE LIBRARY