IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

CICA 23 /2012
(FAM237/2010)

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

BETWEEN

NOEL BRYAN EBANKS

Petitioner/Appellant

-and-

DUNIA CAROLINA ZELAYA-EBANKS

Respondent

Mr Wood QC instructed by Hanson Phillip Ebanks for the Appellant
Ms Francesca Dowse of Samson & McGrath for the Respondent

Hearing date: 25 July 2013
Judgment: 25 July 2013

REASONS FOR JUDGMENT

Revised from transcript and Approved released 3 January 2014

Sir John Chadwick, President:

1. This is an appeal from part of an order made by the Chief Justice on 30 November 2012 in family proceedings between Noel Bryan Ebanks as petitioner and Dunia Carolina Zelaya-Ebanks as respondent. I will refer to them, for convenience, as "the husband" and "the wife".

2. The order was made on an application by the husband for ancillary relief orders pursuant to s.21 of the Matrimonial Causes Law (2005 Revision). The application, as originally made, did not specify what orders for ancillary relief were sought: the relief sought did not become clear until shortly before the hearing before the Chief Justice on 29 March

2012. In an affidavit sworn by the wife on the 19th March 2012, she said this at paragraphs 38 and 39:

> "38. In short I believe that I need a house for the children and I to live in. I append . . . some short property particulars of [a] suitable house. They range from about CI$170,000 to CI$220,000. I have tried to keep to the area of West Bay because that is where the [husband] will remain which makes access more practical but also because that is the area in which the children have grown up in and are used to.
>
> 39. I invite the Court to award me a lump sum payment to enable me to purchase a property outright in which I can house the children suitably."

That affidavit was followed, about a week later, by written submissions on behalf of the wife dated 27 March 2012. In those written submissions it was said, at paragraph 49:

> "49. In short, the Court is invited to make a minimum order that;
>
> > (i) She [the wife] receives 30% of the net value of the FMH [the former matrimonial home] and the land at Savannah [which was an asset of the husband] or in the alternative [the wife] shall receive a lump sum of CI$200,000 to meet her reasonable capital and housing needs."

3. When the matter came on for hearing before the Chief Justice on 29 March 2012, he was told that the husband had put forward a proposal that he would purchase a three-bedroom property for the wife and children to live in until the youngest child, (who was then aged 11 months), turned 18 years. The husband proposed was that the property should be placed in the wife's name; but should returned to him in about 18 years' time. The effect of that proposal, if it had been carried through, would have been that the wife and children would have had the security of a property in which they could reside during the period that the youngest child was under the age of 18; but that the ownership of the property, in an economic sense, would return to the husband at the end of that period. In other words, the wife would not have any capital interest in that property.

4. The wife rejected that proposal. Her position was that the property should be put into, and remain in, her name to meet the housing needs of herself and the children; and that she would ultimately put the property into the names of the children so that the husband would have no interest in the property. That was not acceptable to the husband. So the Chief Justice was faced with an application by the wife for a lump sum order to enable

her to buy a house outright; and there was no agreement as to the basis upon which a house might be purchased by the husband for occupation by the wife and children.

5. In those circumstances, the Chief Justice needed to consider the powers conferred on the Court by s.21 of the Matrimonial Causes Law. The section is in these terms:

> "21. At the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for-
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> (a) the custody, care and control of the children of the marriage;
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> (b) the disposition of matrimonial property, including the matrimonial home;
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> (c) varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty of the said marriage;
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> (d) varying any other settlement of matrimonial property;
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> (e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;
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> (f) providing for periodic payments to be made by either spouse for the benefit of the children of the marriage and for the other spouse; and
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> (g) costs."

In the present context, the relevant paragraphs were: "(b) disposition of the matrimonial property, including the matrimonial home;" and, "(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse". The powers under that section have to be exercised in accordance with section 19 of the Law, which is in these terms:

> "19. In dealing with all ancillary matters arising under this Law, the Court shall have regard first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties."

6. This Court had occasion to address the powers conferred by s.21 of the Matrimonial Causes Law in its judgment in *McTaggart v McTaggart* [2011] (2) CILR 366. At paragraph 34 of that judgment the Court drew attention to the difference between the legislative framework in this jurisdiction and the position in England and Wales under the Matrimonial Causes Act of 1973. It said this:

> "34. The 1973 Act does not (in terms) require the court to give separate consideration to the question - what order (if any) should be made for the disposition of matrimonial property? - although, in practice, the court will usually

> do so. Section 21 of the Matrimonial Causes Law, on the other hand, plainly does require the court to give separate consideration to that question. The court must do so in order to decide what order (if any) it is appropriate to make under s.21(b). The judge was correct, in my view, to reach the conclusion (at para. 39 of his judgment) that he did need to determine which of the parties' assets were to be treated as matrimonial property for the purposes of s.21 of the Law and which were not."

Then, after considering some of the English authorities dealing with the proper approach to the division of matrimonial property, this Court went on:

> "42. In this jurisdiction a court will need to consider whether—having proper regard to the s.19 factors—an order under s.21(b) of the Law for the disposition of the matrimonial property will make appropriate provision for the relevant party in respect of the three strands: need, compensation and sharing. If not, then the court will need to go on to consider whether to make an additional order under s.21(e): that is to say, an order making financial provision for that party out of the property of the other party."

The Court sought to emphasise that, under the Matrimonial Causes Law, there are, essentially, two stages in the process: first, what provision can be made under s.21(b) out of matrimonial property; and, second, whether if the provision that can be made under that paragraph does not make appropriate provision for the relevant party, then what further provision can be made under s.21(e) by way of an order out of the non-matrimonial assets of the other party?

7. The Chief Justice did not adopt that approach. Indeed, it is difficult to think that his attention was drawn to it; there is no reference to *McTaggart* in his judgment. His approach was this: first, he considered, and rejected, the husband's proposal as being a fair solution to the problem. He did that in the first 18 paragraphs of the judgment, addressing the question which he had identified at paragraph 1(iii): "Whether the housing needs of the children and the Respondent should be met by the purchase of a home by the Petitioner subject to a reversionary interest to him upon the youngest of the children attaining 18 years of ages." That, of course was the husband's proposal as put before him. At paragraph 19 he expressed the view that that would simply be unfair. He said that the wife's sacrifices and contributions as a mother must be given tangible value in the division of matrimonial assets in a way that recognised her real needs. And he went on, at paragraph 20, to observe that that was the basis on which it was accepted on both sides that he must proceed. That suggests that he intended to consider, under s.21(b) of the

Law, whether a division of matrimonial assets could be directed in a way that recognised the wife's needs. But he accepted that the bulk of the capital assets were not assets in relation to which the wife made any significant contribution during what he described as "the tumultuous decade or so of the relationship". The bulk of the capital assets were comprised in the business which the husband had built up before the marriage; and in properties, including the former matrimonial home, acquired by him before the marriage.

8. In those circumstances the Chief Justice reached the conclusion - without addressing (at least in terms) the issue that was really before him (what provision should be made out of the husband's assets under s.21(e) of the Law) that the husband should be required to buy a property, the economic interest in which should be split on the basis three quarters to the wife and one quarter to the husband. He reflected that decision in the order which he made at paragraphs 10, 11 and 12. Those paragraphs were in these terms:

> "10. The Petitioner shall purchase and [pay] the associated purchase costs of a three (3) bedroom house for the Respondent and children to live in until such time as the youngest child attains the age of 18. Such property shall have an open market value of between $185,000 - CI$190,000;
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> 11. The aforementioned property shall be registered one share to the Petitioner and three shares to the Respondent to be held as proprietors in common;
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> 12. Upon the youngest child attaining the age of 18, the Respondent shall be at liberty to purchase the Petitioner's quarter share in the aforementioned property at market value."

9. The proposal that the Petitioner should purchase a three-bed roomed property for the wife and the children to live in until such time as the youngest child attain the age of 18 on the basis that the property should be registered in joint names, one share to the husband and three shares to the wife, was not a proposal which either party had advanced or to which either consented. As I have explained, their proposals were, in the case of the husband, that a property should be purchased on the basis that he was the owner of it; and, on the wife's side, that a property should be purchased on the basis that she would be the owner of it. So, the order which the judge made could not be said to be an order made by consent. It was surprising therefore to find that, on this appeal, counsel for the wife maintained that the judge was entitled to make a purchase order by consent. That was what the Chief Justice did.

10. In those circumstances, the appeal is brought by the husband on the ground that the order made was an order which the judge had no power to make under s.21 of the Law. That proposition was accepted behalf of the wife; once her counsel appreciated that this could not be said to be an order made by consent. If authority be needed for the proposition, that there was no power under s,21 of the Law to order that the husband purchase a property, it is unnecessary to look beyond the section itself. There is nothing in the section which empowers the court to order the purchase of some new property (not, at the time, comprised in the assets available for distribution under the section) for occupation or ownership by the party seeking ancillary relief: the powers conferred by the section are restricted to the disposition of existing property, whether that be matrimonial assets or assets belonging to one party or the other.

11. The issue has been considered, in somewhat different contexts, in two cases in England and Wales. In *Milne v Milne,* [1981] WL 186725, 3 February 1981 reported at (1981) 125 S.J. 375, the Court of Appeal held that the judge below had had no power to order that the husband should purchase an insurance policy to make capital provision for the wife; notwithstanding that that might have been a perfectly sensible solution to the problems which they confronted. As Lord Justice Shaw put it in a short judgment, agreeing with Mr. Justice Purchas:

> ". . . section 23(1)(c) of the Act of 1973 confers a power to direct the payment of a lump sum out of assets vested in or accruing to the respondent. It does not confer jurisdiction to direct the creation of an asset not hitherto in existence in order to provide for such a payment."

Lord Justice Ormrod agreed. He said:

> "Section 23(1) specifically provides that the orders to be made by the court are orders that one party to the marriage shall make payments to the other party. There is no power to order payments to third parties, apart from children. I entirely agree the learned judge had no jurisdiction to make that part of his order relating to the life insurance policy."

The analogy in this case, of course, is that in paragraph 10 of the order which the judge made, h sought to require the husband to make a payment to the vendor of a property not yet identified.

12. The approach in *Mylne* was followed by Mrs. Justice Butler-Sloss in *Burton v Burton* [1986] 2 FLR 419, and, in my view, having regard to the provisions of s.21 of the Matrimonial Causes Law, it represents the law in these Islands.

13. In those circumstances, the appeal must be allowed. The Chief Justice has made an order in terms which the law does not permit. Paragraphs 10, 11 and 12 must be set aside.

14. I should add that, if – in a future case - a court is required to consider the question of whether or not a lump sum payment should be made to the wife either under s.21(b) or s.21(e) of the Law, counsel might think it sensible to invite attention to the guidelines laid down by this Court in *McTaggart.*

15. The interim position is that for which paragraph 13 in the Chief Justice's order provides: until the wife moves into a newly purchased property the husband remains responsible for the payment of rent for the accommodation for the wife and children. The husband is responsible for that rent under an order made on, I think, 6 January 2012; which requires him to pay the rent for the accommodation in which the wife and the children are now living. Nothing in the decision of this Court on this appeal alters or affects that position.

16. Accordingly I would allow this appeal, set aside paragraphs 10, 11 and 12 of the order of 30 November 2012, and remit the application for a lump sum order, made by the wife, for further consideration by the Family Division of the Grand Court.

17. The husband, through his counsel, has indicated that he does not seek any order for costs on this appeal.

Elliott Mottley, Justice of Appeal:

18. I agree.

Ian Forte, Justice of Appeal:

19. For the reasons given by the learned President, I would also remit this matter for consideration by the Family Division of the Grand Court.