IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CICA (Civil) 13/2014

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
(FAM 84/2012)

BETWEEN

VALERIE AYALA GORDON

Appellant/Petitioner

-and-

JEFFERSON RAYMOND WATLER

Respondent/Respondent to Petition

Mr Connor Fee of Samson & McGrath appeared for the Appellant, Valerie Gordon
Mr Charles Clifford appeared for the Respondent, Jefferson Watler
Hearing: 20 August 2014
Oral Judgment delivered: 22 August 2014

JUDGMENT

Revised from transcript and Approved released 9 September 2014

Sir John Chadwick, President:

1 This is an appeal from an order made on 15th February 2014 by the Chief Magistrate, sitting as a Judge of the Grand Court, in ancillary relief proceedings between Valerie Ayala Gordon and Jefferson Raymond Watler.

2 The parties, to whom for convenience (and without intending discourtesy or disrespect) I shall refer respectively as “the wife” and “the husband”, were married on 5 December 2008. They had lived together for some two and a half years before that date. There were no children of the marriage. They separated in January 2012. The wife petitioned for divorce. That petition was found proved on 21 June 2012. The ancillary relief summons was filed on 16 October 2012. Directions for the filing of affidavits of means were given by Justice Williams on 18 January 2013. The matter came for determination before the Chief Magistrate at a hearing in January 2014.

3 By her order made on 15 February 2014 (filed on 15 April 2014), the judge ordered that the husband should pay to the wife the lump sum of CI$60,000 by 25 May 2014; such sum to be inclusive of the sum of CI$2,500 which the husband had been ordered to pay by way of interim relief in January 2014. We were told that CI$2,300 of that sum had been paid by the husband on account of the interim relief; but that no further payments, either in respect of interim relief or in respect of the final order, had been made.

4 The order of 25 February 2014 went onto provide, first, that all other assets and liabilities should remain the property of the party in whose name or possession they were at the date of the order; second, that there should be a clean break between the parties save as provided for in the order; third, that each party's claims against the other under the Matrimonial Causes Law (2005 Revision) should be dismissed and neither should make any further claim against the other; and, fourth, that the husband should pay the wife's costs of the summons to enforce the interim award.

5 In her written judgment dated 25 February 2014, the judge set out (at page 5) a schedule of assets which had been prepared on behalf of the wife. That schedule showed the parties to have or control assets (after deduction of liabilities) amounting in aggregate to CI$1,035,900. Of that sum, $912,000 was represented by real property - either property in the name of the husband, or property described as “to be transferred to the husband”, or property described as “beneficially owned by the husband” - CI$118,900 was represented by chattels, the bulk of which was plant and machinery employed in the husband's heavy equipment business; and the balance, CI$5,000, was cash in the husband's bank account.

6 The judge accepted the husband's contention that the only assets in the schedule which could properly be described as "matrimonial property" for the purposes of Article 21 of the Matrimonial Causes Law were, first, a duplex property known as Block 48E Parcel 105H Pease Bay; and, second, land known as Block 49B Parcel 213 at Splendid View Heights, North Side. The former property was valued at CI$279,000 subject to a mortgage encumbrance to secure a loan of CI$100,000 from Royal Bank of Canada. The property at Splendid View Heights was valued at CI$61,000. Taken together, after deduction of the mortgage loan, the value of those properties, the matrimonial property, was CI $240,000. The judge awarded the wife a 25% share of the matrimonial property - amounting to CI$60,000 - which she ordered the husband to pay in a lump sum. She made no further order. In particular, she made no order in respect of periodic payments.

7 By notice of appeal filed on 30 May 2014, the wife seeks an order from this Court that the judge's order of 25 February 2014 be set aside; that there be substituted for that order an order that the husband pay the wife a lump sum of CI$120,000; and that, further, the husband pay to the wife periodic payments at such level and for such duration as this Court thinks fit. The husband - who addressed the Court in person, notwithstanding that he was represented by counsel - asked the Court, by way of cross appeal, to reduce the lump sum payment from CI$60,000 to CI$15,000.

8 In reaching the conclusions that she did, the judge made a number of findings of fact which are not the subject of challenge in this Court. In particular, and so far as material in the context of this appeal, she made the following findings (adopting the numbered paragraphs in the list set out in her judgment):

> "9. The wife held part-time jobs in June 2010; between September 2010 to November 2010; between July 2011 to August 2011; and between August 2011 and April 2012.
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> 10. Jeff's Heavy Equipment is the current name of a heavy equipment business which was started by the husband years before he met the wife. He has a great deal of skill and experience in this business and has long held a good reputation for work in the Cayman Islands.
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> 11. The wife did not assist the husband in either the start or the expansion of Jeff's Heavy Equipment.
>
> . . .

12. The wife made no contribution either directly or indirectly towards acquiring any of the assets of the business.

13. At times prior to the marriage, during the marriage, and after separation, the wife applied her administrative and computer skills to working in Jeff's Heavy Equipment. Her duties, however, did not extend on a regular basis to organising the location of the builders, pricing the materials, and other tasks such as she described in her testimony.

14. When the wife did work in the business it was not on a daily basis or for long periods of time in a day. She was paid a salary when she worked.

. . .

20. The wife did not play a major role in decision making for the business.

21. The wife played a major role between 2008 and 2009 when she assisted Ms. Debbie Lee of Lee's Accounting Services in the preparation of a financial report on the husband's financial status in order for him to obtain a loan. She provided records which she had prepared to Ms. Lee and worked with her to prepare the final documents.

. . .

24. The land on which the duplex, that is, lot 48E parcel 105H, was built, was purchased by the husband using his own funds prior to the marriage although the property was not transferred to his name until after the marriage.

. . .

26. The wife played a part in assisting the husband to obtain the loan to build the duplex from Royal Bank of Canada by preparation of paper work and accompanying him to the bank. 27. The wife made no direct contribution towards the payment of the loan obtained from Royal Bank of Canada by the husband. 28. A substantial portion of the duplex had been completed prior to the marriage between parties.

. . .

29. The wife did not contribute any physical labour towards the construction of the duplex.

30. The wife was aware of and was part of the plans to purchase the property at Splendid View Heights.

31. The wife made no financial contribution towards the purchase of the land at Splendid View Heights.

32. The husband's monthly salary from his business and the rental income that he receives averages $9,000 per month."

9 In relation to the duplex, lot 48E parcel 105H, and the property at Splendid View Heights – which, together, she found to constitute the matrimonial property, the judge had said this (earlier in her judgment at pages 28 and 29):

"It was submitted [on behalf of the husband] that lot 48E parcel 105H had been paid for and developed prior to the marriage. There had been initial difficulties transferring the property into the husband's name because of planning requirements, but it was eventually transferred to the husband's sole name during the marriage. Having purchased the property from his cousin Chester Watler, a duplex was commenced on the property and it was partially completed prior to the marriage. During the course of the marriage the husband obtained a loan in his sole name to complete the duplex and he has made all payments on the loan. Half of the duplex was sold in order to offset the mortgage and to purchase other things. It was submitted on behalf of the husband that the wife had not been employed at the time save for assisting at times in the husband's business. The property still has a mortgage against it of approximately $100,000 and it is valued at $279,000.

According to the wife, in early 2009 she went to several banks seeking financing for the construction of the duplex and the couple received it from Royal Bank of Canada, RBC. She claimed that they were advised by the bank that since they were both self-employed only one of them could assume responsibility for the loan. That person was the husband.

According to the wife, the husband started the foundation of the duplex in November 2008 when she was away from the Cayman Islands. However, they both poured a foundation of the duplex and continued the construction in 2009 together. She claimed that the materials were paid for from the process of their business, Jeff's Heavy Equipment, and from rental income. She further claimed that the building had only reached up to the first floor when they received the loan from Royal Bank of Canada.

There is no dispute that the property at Splendid View Heights was purchased during the course of the marriage. It is agreed that the funds for purchase were derived partially from funds from the bank loan to build the duplex and funds received from the sale of half the duplex. Wife claimed 'they made payments on this property'; on behalf of the husband, it was submitted that he had made substantial improvements to the property since its purchase by filling it, and further that the wife had no direct contributions towards obtaining this property."

10 The judge directed herself, correctly, that the applicable legislation in relation to ancillary matters is set out in Articles 19 and 21 of the Matrimonial Causes Law (2005 Revision). Article 19 requires that:

"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 the marriage, and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the desserts of the parties."

Article 21, so as far as material, is in these terms:

"21. At the time of pronouncing a decree under this law, the court shall, as appropriate, make orders for:

. . .

(b) the disposition of matrimonial property including the matrimonial home;

. . .

(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse:

(f) . . ."

11 The judge noted, in the course of her judgment, that she had been referred by counsel for the wife to the decisions of this court in *McTaggart v McTaggart* (2011) 2 CILR 366 and in *Wight v Wight*, (CICA No. 6 of 2006). She was referred, also. to the decisions of the United Kingdom House of Lords in *White v White* [2001] 1 AC 596, and in *Miller v Miller; McFarlane v McFarlane* [2006] 2 AC 618; substantial portions of the judgments in which were cited by this Court in its judgment in *McTaggart*. And she was referred to the decision of the Court of Appeal England and Wales in *Charman v Charman (No. 4)* [2007] 1 Fam LR 1246. She was referred by counsel to the husband to a number of decisions in this jurisdiction: including, in particular, the decision of Justice Henderson in *Frazier v Frazier* (2006) CILR 112.

12 The correct approach to the division of property in ancillary relief cases was set out by this Court in *McTaggart*. At paragraph 40 of the judgment in that case the Court said this:

"40. We were referred by the parties, both in the skeleton arguments lodged on their behalf and in oral submissions made in the course of the hearing, to a plethora of judicial decisions in England and Wales and to a few decisions in this jurisdiction. Observations made by experienced judges are, of course, of assistance to an understanding of the application of the section 19 factors; but it must be kept in mind that most cases in this field are decided on their own facts and that there is a risk that extensive citation may confuse rather than illuminate. It is not necessary, I think, to look further than the decision of the House of Lords in *Miller* - and in particular the speeches of Lord Nichols and Baroness Hale - in order to identify the principles. Leaving aside, in this context, the best interest of the children, which (as I said) are paramount, there are three strands: need, compensation and sharing [2006] 2 AC 618 at paragraphs [10]-[16] *per* Lord Nichols and at paragraphs [138]-[143] *per* Baroness Hale. The ultimate objective, as Baroness Hale explained at paragraph [144], is to give each party an equal start on the road to independent living. She said this:

'[144] Thus far, in common with my neighbour and learned friend Lord Nichols of Birkenhead, I have identified three principles which might guide the court in making an award: need, generously interpreted, compensation and sharing. I agree that there cannot be a hard and fast rule, but whether one starts with equal sharing and departs when need or compensation supplied a reason to do so, or whether one starts with need and compensation and shares the balance, much will depend on how far future income is to be shared as well as current assets. In general, it

> can be assumed that the marital partnership does not stay alive for the purpose of sharing future resources unless this is justified by need or compensation. The ultimate objective is to give each party an equal share start on the road to independent living.'"

When Baroness Hale referred to "sharing" in that context, she had in mind - as her speech demonstrates - sharing of all the assets; not simply sharing the assets which could be classified as matrimonial property. This court went on in *McTaggart* to say this, at paragraphs 42 and 43:

> "42. In this jurisdiction a court will need to consider whether, having proper regard to the section 19 factors, an order under section 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 section 21(e), that is to say, an order making financial provision for that party out of property of the other party.
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> 43. It seems to me reasonably clear - and I would so hold – that, if satisfied that an order under section 21(b) of the Law, or the combination of orders under section 21(b) and (e), would make appropriate provision for the relevant party in respect of the three strands of need, compensation and sharing, the court should not, without good reason, make an order for periodic payments under section 21(f). To make an order for periodic payments in circumstances where such an order is unnecessary because appropriate provision can be made by the disposition of matrimonial property either under section 21(b) or by a capital adjustment from the separate property of the other party under section 21(e) would be inconsistent with the principles of clean break to which Lord Scarman referred in *Minton v. Minton*, [1979] AC at 608.
>
> > 'There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children, that the other of equal importance is the principle of clean break, the law now encourages spouses to encourage bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order.'"

Those observations must be read in the light of the observations in *Miller* - and in particular those in the speech of Baroness Hale to which I have referred - that the ultimate objective is to give each party an equal start on the road to independent living.

13 The judge did not approach her task in that way. She made no reference to the principles set out in *McTaggart*: principles which were intended to assist the courts in this jurisdiction in the approach to ancillary relief claims. For reasons which she set out in her judgement, she

left out of account - without any regard to need, compensation or sharing - all assets other than the two properties which she identified as matrimonial property; and she divided the matrimonial property not by reference to need or compensation, nor by reference to sharing on the basis of equality, but by a 75/25 percent split. She did so on the basis that she thought the husband had made a special contribution to acquisition of the matrimonial property in the circumstances which she described in her judgment: namely that in relation to the duplex he had, to some extent, brought it into the marriage.

14 In adopting that approach, she erred in principle. The correct approach, as I have indicated, was to ask what provision should be made for the wife in order to recognise the three strands of need, compensation and sharing. If a division of the matrimonial property could meet those needs, then it was unnecessary to go further. But, if and so far as a division of the matrimonial property could not meet those needs, then it would have been necessary to consider whether to make an order under section 21(e) in respect of the husband's other assets.

15 The judge must have thought – in the absence of explanation - that it was sufficient to concentrate only on the matrimonial assets. In deciding how to meet the requirements of needs, compensation and sharing objections out of those assets, she applied what she identified as a special contribution rule.

16 If she were going to take that course, she needed to have in mind the observations of the Court of Appeal of England and Wales in *Charman v Charman (No 4).* In the judgment of the court, delivered by Sir Mark Potter, President of the Family Division, it was explained (at paragraphs [78]-[80]) that special contribution cases were really limited to circumstances in which the wealth was so large that there could be no question but that equal division would more than provide for the elements of need and compensation. In such a case it might be appropriate to depart from the principle of equal sharing which would govern normally the approach to the sharing element of the three strands in circumstances where equity required some recognition to be given to the special contribution made by one party or the other. The court referred to the decision of Lord Justice Thorpe in *Lambert v. Lambert* [2002] EWCA Civil 1685, 2003, 1 Fam LR 139 at para. [52]; in which it had been pointed

out that there may be cases where the product alone justifies the conclusion of a special contribution, but that, absent some exceptional and individual quality in the generator of the fortune, a case for special contribution must be hard to establish. The President, Sir Mark Potter, went onto say this (at paragraph [80] of his judgment in *Charman*):

> "[80] In such cases, therefore, the court will no doubt have regard to the amount of the wealth, and in some cases, including the present, its amount will be so extraordinary as to make it easy for the party who generated it to claim an exceptional and individual quality which deserves special treatment. Often, however, he or she will need independently to establish such quality whether by genius in business or in some other field. Sometimes, by contrast, it will be immediately obvious that the substantial wealth generated during the marriage was a windfall. The proceeds, for example, of an anticipated sale of land for development or an embattled takeover of the parties' ailing company which is not the product of a special contribution."

The President went on (at paragraph [81]) to refer to the observations of Baroness Hale in *Miller* (at paragraph [146]), in which she had indicated that it was only if there is such a disparity in their respective contributions to the welfare of the family that it would be inequitable to disregard it that this should be taken into account in determining their shares.

17 The judge's approach was to leave out of account, in relation to sharing, all property other than the matrimonial property; and then to award the husband a 75% share in the matrimonial property on the grounds that he had made a special contribution which deserved that recognition. That approach was inconsistent with the modern authorities; and, in adopting that approach, the judge fell into error. She did so in reliance on the decision in *Frazier* which pre-dated the modern authorities - and, in particular, predated both *Miller* and *McTaggart* - in which Justice Henderson had come to the conclusion that an appropriate recognition of the husband's contribution in bringing property into account was a 60/40 split.

18 Because the judge has fallen into error, this Court is required to intervene. She has not merely gone outside the generous ambit of discretion which is allowed to judges dealing with cases of this nature: she has approached the matter in the wrong way.

19 If this matter were being dealt with *de novo* there would be strong grounds in support of the view that – in order to give proper weight to the three strands of need, compensation and sharing – an award to the wife should exceed 50% of the matrimonial property; and might extend to some part of the husband's other wealth; which as, I have indicated, is not

insubstantial. But, on this appeal, the wife limits her claim to no more than one half of the matrimonial assets; that is to say, CI$120,000. In those circumstances, I would set aside the judge's order and replace it with an order that the husband pay to the wife the lump sum of CI$120,000.

20 This is a case which cries out for a "clean break". The wife has left this jurisdiction and returned to Colombia. It seems to me that a periodic payments order would be likely, in practice, to produce little benefit for her in the future. And, in principle, that is not an appropriate order to make in this case. If the wife had taken the view that a lump sum payment equal to 50% of the aggregate value of the matrimonial assets was insufficient to meet her needs and to give proper recognition to the elements of compensation and sharing, it would have been open to her to seek an order for a larger lump sum. There were ample assets out of which to make such an order. But she has chosen not to take that course.

21 In those circumstances, I would set aside the order, order the payment of a lump sum of CI$120,000 - less the amount of CI$2,300, which we were told, has already been paid by the husband - and make no further order.

Elliott Mottley, Justice of Appeal:

22 I agree with the judgment.

Sir George Newman, Justice of Appeal:

23 I also agree.