IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL NO 12 of 2008
Grand Court D122 OF 2007

BETWEEN:

Grace Margaret Wood

Appellant

AND

Shervin Ira Wood

Respondent

Before: **The Right Hon. Sir John Chadwick, President**
The Hon. Mr. Justice Forte, Justice of Appeal
The Hon. Dr. Justice Conteh, Justice of Appeal

Appearances: David McGrath of Samson & McGrath for the appellant and Anthony Akiwumi of Stuarts for the respondent.

Heard: 2nd April, 2009. Judgment delivered 8th April 2009

Chadwick, P.

Judgment & Reasons

1. This is an appeal from an order for ancillary relief made on 27 October 2008 by Justice Levers in matrimonial proceedings between Mr Shervin Wood and Mrs Margaret Wood. That order was made following a hearing in July 2008. Although the marriage between the parties was dissolved by a final decree pronounced on 7 November 2008, it will be convenient – and, I hope, will not cause offence – if I refer to them in this judgment as the husband and the wife.

2. The principal issue on the appeal is whether the judge erred (i) in identifying as non-matrimonial assets the interest of the husband in a business carried on through a company known as NWF Ltd and (ii) in deciding, on the basis of that categorisation, to leave that interest out of account in the property adjustment order which she made in relation to other assets.

3. The parties were married in Grand Cayman in December 1986. The husband was then 36 years of age: the wife was some eight years younger. There were two children of the marriage, Nicola who was born in December 1991 and Julian, born in July 1997. The husband had two children by a previous marriage.

4. At the time of the marriage the husband was carrying on a business, known as Tru-Valu Home and Auto Centre, at property on Shedden Road, George Town East, known as Block 20B, Parcel 91. That property – to which I shall refer as "the Shedden Road property" - had been acquired by the husband in 1979 for a consideration of CI$23,000. The business – which was that of a retail store selling household goods and appliances and hardware – had commenced in or about 1982. From April 1990 or thereabouts the business was carried on by a company incorporated in April 1990 under the name, Builders Club Tru-Valu Ltd for that purpose. In June 1993, the company's name was changed to NWF Ltd. At all material times the husband has owned 299,998 out of the 300,000 issued shares in that company. The company traded under the name "Deals". It is not clear whether the Shedden Road property was transferred to the company – or whether it remains in the husband's name – but nothing turns on that.

5. During the marriage the parties acquired a number of other properties. These are set out by the judge in the judgment which she delivered on 19 August 2008: (i) 4 Berman Lane, Block 27C Parcel 10; (ii) 12 Bergman Lane, Block 27C, Parcel 472; (iii) seafront land on St Patrick's Island, Block 24C, Parcel 14; (iv) undeveloped land on the Canal Front in Spotts, Block 24E, Parcel 341; (v) two apartments in Spotts, Block 25 B, Parcel 240; and (vi) a waterfront property in Florida. In so far as it was necessary to resolve any dispute as to the status of each those properties as matrimonial assets, the judge held that they were. She held, also, that certain chattels – three cars and a boat – were matrimonial assets. She made an order that those properties and those chattels were to be valued and sold; and that the proceeds were to be distributed to the parties equally.

6. The judge made an order that the husband pay CI$2,000 per month for each of the children: that sum to include "any school fees and miscellaneous expenses such as travelling whether they live in Jamaica, Cayman or the United States of America". She made no order for payment to the wife by way of spousal support. In assessing the wife's needs the judge described her as young and vibrant. She went on to say this:

> "She is capable of working and finding a job, either in the Cayman Islands or in Jamaica, and she is able to look after herself. However that is not to say that she is not entitled to a 50 per cent share of the matrimonial assets to which she clearly contributed during her marriage, either by work or by her contribution as a mother and housewife. . . ."

And she went on:

> "The [wife] has to find a home to live in and sufficient money to purchase that home. Having heard that she is capable of working and maintaining her own upkeep, I have now to consider whether, if all the properties that I hold as matrimonial assets are valued and sold, whether they would be sufficient for the [wife] to purchase a home and commence life. . . . At present the [husband] pays a substantial amount of money for the maintenance of the wife and the two children. I do not believe, however, that that sum will be required if the wife was working in the Cayman Islands. In those circumstances I must bear in mind that the welfare of the children is of paramount importance. I must also bear in mind that the wife will need to settle down somewhere once she knows the extent of her award and I must also bear in mind that the [husband] is unwell, and will be unable to work certainly for the next six to 12 months and that the business will not be run by him but by his son who is clearly less experienced."

7. The judge held that the business was not a matrimonial asset. She said this:

> "I bear in mind that this is a twenty year old marriage but I do not believe that the [wife] contributed in any way to upliftment enhancement of the business. I also believe that the husband commenced this business and continued it for several years on his own with his own ideas.
>
> . . . Based on the facts and applying the law I hold that it is not a matrimonial asset. It is an asset which will bring income to the

[husband] in the future to support his family and I do not believe this need to be touched to meet the requirements and the needs of the wife."

Earlier in her judgment, she had made the following findings of fact in relation to the business:

> "This business was commenced prior to marriage by the [husband]. A Mr Ezzard Miller, the [husband] and another were joint partners in this venture. It was initially called "Deals" and the [husband] purchased the land. He built a small building on the premises and commenced business. The [wife] claims that when she got married in 1986 she commenced working at the business as a sales clerk. The [husband] submits that this does not give her a right to the business, as she was paid for the work. . . . The business initially was not doing very well but subsequently blossomed and was indeed the fountain for all the subsequent purchases, which are substantial, made by the parties during the course of the marriage. *The question I have to ask myself is: the business having been commenced prior to the marriage and the marriage being a long one, does the [wife] have a claim to 50 per cent of this business, or even a lesser share?* The business funded the [wife's] education, it funded various purchases from which the [wife] will benefit and it funded the [wife's] lifestyle and the childrens' lifestyle subsequent to separation."
> [emphasis added]

I have omitted words which rehearse the sterile argument as to whether what the wife was paid was a salary.

8. The answer which the judge gave to the question which she had posed was "No". The business was to be regarded as a non-matrimonial asset and the wife was entitled to no part of it. I am satisfied that, in reaching her conclusion on that basis, the judge erred in law. She failed to have proper regard to the principles explained by this Court in *Wight v Wight* (CICA No 6 of 2006: 30 November 2007) following examination of the English authorities of *White v White* [2001] 1 AC 596, *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 and *Charman v Charman* [2007] EWCA (Civ) 503.

9. The task of the Court in this jurisdiction is to deal with ancillary matters arising in matrimonial proceedings in accordance with section 19 of the Matrimonial Causes Law (2005 Revision). That section requires that:

> "In dealing with 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 just deserts of the parties".

Although, as Justice Forte, Justice of Appeal, pointed out (at paragraph 62 of his judgment in *Wight*), it might be said that that section in the Matrimonial Causes Law - with its reference to "the just deserts of the parties" - gives a discretion which is, on balance, even broader than that in the equivalent provision (section 25(2) of the Matrimonial Causes Act 1973) in the English legislation, this Court should construe section 19 "on the basis of the new approach to the institution of marriage and the fact that it is a union of equal partners". He went on:

> "Each therefore would be entitled to an equal share of the assets acquired in the marriage, unless there is a good reason to depart from that principle".

He emphasised that:

> "In coming to this conclusion I would reiterate that the principles espoused in the cases of *White v White*, *Charman v Charman* and *Miller v Miller (supra)* are as applicable to this jurisdiction as they are to the English jurisdiction."

10. It is pertinent, therefore, to note the guidance given in the English cases in respect of property which has been brought into the marriage by one of the parties: that is to say property which is not "the financial product of the parties' common endeavour": to adopt a phrase used by Lord Nicholls of Birkenhead in *Miller* (*ibid,* [22]) In relation to property of that nature Lord Nicholls had said

This, in *White* (*ibid,* 14*a-b*):

> "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."

11. Lord Nicholls cited that passage in his speech in *Miller* (*ibid*, [23]). He went on to observe that, in the case of a short marriage, fairness may well require that the claimant should not be entitled to a share of property ("non-matrimonial property") which has been brought into the marriage (or acquired during the marriage by inheritance or gift) by the other party. That, as he put it, reflected "the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage". But what of property brought by one party into what has turned out to be a long marriage? Lord Nicholls said this (*Miller, ibid*, [25]:

> "[25] With longer marriages the position is not so straightforward. 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 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 organised their financial affairs".

12. Lord Nicholls went on (*ibid,* [26] and [27]) to point out that it was wrong to think that, in every case, a clear and precise boundary should be drawn between the categories of matrimonial property and non-matrimonial property. As he observed: "Fairness has a broad horizon". Nor did the 'equal sharing' principle require that, in every case, each of the party's assets must be separately and exactly valued. The costs involved could quickly become disproportionate. Where it became necessary to distinguish matrimonial property from non-matrimonial property the court could do so with a degree of particularity or generality appropriate in the case. And the judge may then give to the contribution made by one party's non-matrimonial property the weight he considers just, with such generality or particularity as he considers appropriate in the circumstances of the case.

13. As I have said, the judge's approach was to categorise the husband's interest in the company and whatever assets it had as non-matrimonial property and to hold that, on the basis of that categorisation the wife could have no claim upon that interest: her

needs having been provided for from matrimonial property. That is not the correct approach. This was not a short marriage: as the judge recognised. The judge needed to give much closer attention to the source of the various assets owned by the company; and to the way in which the parties had treated those assets during the marriage.

14. There was little evidence before the judge as to the true value of the company – or of the husband's interest in the company – at the time of the hearing in July 2008. In particular, there was no balance sheet showing assets and liabilities. As I have said, it is not clear whether the Shedden Road property was transferred to the company – or whether it remains in the husband's name. It has been treated in these proceedings as an asset of the company. It was valued in December 2007 at CI$485,000. In an affidavit sworn on 11 July 2008 the wife expressed doubt as to that figure: she suggested that the value of the Shedden Road property was closer to CI$600,000. The judge did not find it necessary to resolve that issue.

15. The assets of the company at the date of the hearing in July 2008 included, in addition to the Shedden Road property: a certificate of deposit issued by Scotia Bank which had a face value of US$250,000 (CI$ 205,000, equivalent): an inventory of stock having an at cost value of about CI$93,000; some handling equipment (comprising a truck, forklift and motor vehicle) having a value of about CI$26,000; cash at bank (some CI$22,000 equivalent); and a debt of US$100,000 (CI$82,000, equivalent) owed by the husband on loan account. Evidence of those assets - and their respective values - are found in the affidavit of Mr Ezzard Miller, sworn on 27 May 2008. He stated, in that affidavit, that the funds in its current accounts were insufficient to meet the company's current liabilities. Nevertheless, other than current liabilities to trade creditors, there is nothing to suggest that the company had any significant debts.

16. It is clear from a letter dated 9 October 2007 from Rankin Berkower (Cayman) Ltd, the company's accountants and from the income and expenditure accounts in respect of the years to 29 September 2005, 2006 and 2007 that the company had not traded profitably for some time prior to the July 2008 hearing. The income and expenditure accounts show a net profit in the year to 29 September 2005 of CI$380,736, a much reduced net

profit in the following year of CI$13,883 and a loss in the year to 29 September 2007 of CI$27,638. But those figures do not include cash introduced into the business from other sources or cash withdrawn from the business by way of dividend to fund personal expenditure. The position is explained in the accountant's letter:

> "During our audit of Deals Statement of Income and expenses for the years ended September 29, 2007, 2006 and 2005, we discussed with you various infusions of cash injected into the business over the years and also cash withdrawn from the business as dividends to shareholder do not form part of your operating statement and as such are not reported therein.
>
> The following represents our findings in regards to cash infusion and cash withdrawals for dividends:
>
> **CASH INFUSION**
>
> - Funds from Insurance claims between October 4, 2004, thru September 22, 2005 amounted to $286,720.
> - Funds transferred from fixed deposits between April 2006 thru September 2007, to the operating accounts of Deals amounted to $255,588.
>
> **CASH WITHDRAWALS (DIVIDENDS)**
>
> - Cash dividends withdrawn during 2005 totalled $247,043.53
> - Cash dividends withdrawn during 2006 totalled $195,248.64
> - Cash dividends withdrawn during 2007 totalled $134,229.48
>
> The above cash dividends for 2005 were possible due to the extraordinary profits generated from the business as a result of sales following Hurricane Ivan in September 2004. The dividends from the fiscal years 2006 and 2007 were possible only from the cash infusions into the business since profits were minimal in 2006 and resulted in an operating loss in 2007.
>
> Based on our overview of Deals, the store is in dire need of renovations and, in our opinion, a cash infusion of approximately $300K to $400K would be required to properly restock the store with sufficient inventory to generate the level of sales to make the business somewhat profitable.
>
> In addition to the renovations and inventory replenishment as discussed above, it would in our opinion, take an extraordinary effort on the part of yourself or a good manager to help generate the necessary sales level to achieve any profitability. Due to the small size of Deals in comparison to the wholesale/retail competition giants of Cox Lumber, A.L.Thompson's Home Depot and Kirks, the profitable continuation of this business is questionable"

But the writer went on to pay tribute to the husband's abilities:

> "Despite the competition as noted above and the extraordinary effort needed to revive this business, I am not discounting your abilities in once again making this venture a profitable one. For the past twenty-four (24) years, due to your personality and dedication, you were able to sustain a profitable business and maintain a loyal customer base against those same competitors."

It is of some interest that the writer of that letter does not seem to regard the "funds transferred from fixed deposits" by way of cash infusion as a transfer from reserves. He treats those funds as coming from a source outside the company.

17. The accountant's assessment of the viability of the business is confirmed by Mr Miller in his affidavit of 27 May 2008. Following the statement to which I have already referred – that the funds in the company's current accounts were insufficient to meet its current obligations - Mr Miller went on to say this:

> "16. . . . using the remaining funds in the CD would at best allow a very slow economic recovery and I am unsure if it is even possible at this stage. If the current accounts become overdrawn at the bank, or the remaining funds in the Capital Account are diverted for other purposes this will result in a shutdown of the company.
>
> 17. My personal observation of the current situation is that in its present state the company cannot earn enough to cover its operational costs. If thousands of dollars are further removed from the assets of the company on a monthly basis, there will be no option but to liquidate the company."

18. If the company were to cease business, Mr Miller would expect to receive compensation out of its assets. In an earlier affidavit, sworn on 6 May 2008, he had explained that he was one of the founding members of the company, a director and the holder of one share. As I have said, the judge accepted that Mr Miller had some part in the establishment and operation of the business. From 1996 to 2000 – a period during which the husband and wife were living in Florida - the business was carried on by Mr Miller under some form of lease. He had (as he said) "always actively participated in the operation of the business including obtaining and guaranteeing loans on several

occasions, and participating in important decisions in relation to the business". In his affidavit of 27 May 2008 he put his claim to compensation in these terms:

> "17. . . . In the event of a shutdown I would expect to receive compensation for my role as a Director and for my 25 years of contribution into the company and its predecessor. At a minimum I believe that a reasonable level of compensation would be CI$1,000 per month from January 1985 to the present. This totals approximately CI$276,000."

It is, of course, impossible for this Court, on this appeal, to make any assessment of the strength – or the likely outcome in terms of quantum – of any claim which Mr Miller might bring in the event that the company ceased to trade: but the possibility that such a claim might be made cannot be ignored.

18. With these matters in mind, it is clear that the value of the company cannot exceed the value of its assets. Realistically, there can be no additional value to be attributed to the company as a trading concern. Further, as it seems to me, the only assets of any substantial value on a realisation are the Shedden Road property, the Certificate of Deposit and the debt owed by the husband on his loan account. Inventory stock is notoriously difficult to realise when trading has ceased; there is little real value in the handling equipment; and as Mr Miller has explained, cash balances on current account are insufficient to meet the company's current liabilities.

19. It is material, therefore, to consider the source of the asset represented by the Certificate of Deposit. As to that, the wife's evidence, in an affidavit sworn on 11 July 2008, was this:

> "24 Certificate of Deposit Account
> The Certificate of Deposit at its height contained US$600,000 as per the disclosure of the petitioner in 2006. This money came from a variety of sources. Firstly we re-mortgaged the property in Florida and this money was put into the account. This was US$176,000. Secondly after Ivan we received a payout for 4 Bergman Lane, the duplex at Spotts and the Store. All monies from these insurance payouts were deposited into the certificate of deposit in the name of NWF Ltd. The Petitioner in his audit from Rankin Bergman (*sic*) dated 9th October 2007 . . . shows that

> US$286,720 of insurance monies were put into the business between October 2004 and September 2005. These monies inputted into the business are monies from our insurance payouts on our properties."

The husband had the opportunity to challenge that evidence in the affidavit which he swore on 14 July 2008. He did not do so. He had already acknowledged the payment to the company of insurance monies amounting to $286,720 in 2004 and 2005 in his own affidavit 7 May 2008; and he had accepted that those monies were placed on deposit against a Certificate. The judge made no finding as the source of the monies represented by the Certificate of Deposit.

20. It is material, also, to have in mind the circumstances in which the husband became indebted to the company on loan account. The loan was authorised at a meeting of the directors held on 11 October 2007 by a resolution in these terms:

> "An authorization was made for Mr Wood to borrow US$100,000 from the Capital Assets of the Company to cover his medical and personal expenses, and this is based on the condition that the loan is repaid to the Company within a year of his recovery."

The husband refers to this loan in his affidavit of 7 May 2008:

> "29. . . . At Court hearings in September and October 2007, all of the evidence and my Affidavits clearly pointed to the fact that neither the company nor I had an income. In order to comply with these orders and pay the additional matrimonial expenses I had no choice but to secure a loan for the interim period. That loan was duly authorized to be US$100,000 and came from the capital assets of the Company's CD account."

21. The wife's reference to a Certificate of Deposit in the amount of US$600,000 in 2006 is borne out by an examination of the documents exhibited to the husband's affidavit of 3 October 2007. It seems clear that it was the company's practice to invest funds on deposit with Scotiabank on the security of monthly Certificate of Deposit; and to reduce the amount so invested as circumstances required when each Certificate of Deposit matured. By the middle of 2007 the amount so invested was down to US $400,000; and by November 2007 the amount had been further reduced to US$250.000. The husband's

evidence, to which I have just referred, indicates that US$100,000 of the monies (US$150,000) not reinvested in November 2007 was lent to him.

22. It is clear, also, that the company was used as a source of funds for his – and his family's - general expenditure. Drawings were accounted for under the description "shareholder loans" or "shareholder dividends and loans". This appears from the comprehensive record of payments from 1 January 2004 which is exhibit DEM/7 to Mr Miller's affidavit of 27 May 2008. One of the wife's complaints, following the commencement of the divorce proceedings, was that the facility of drawing cheques on the company's accounts was withdrawn.

23. In the light of the wife's evidence as to the source of funds invested on deposit –and represented from time to time by Certificates of Deposit – it is plain that the judge was wrong to treat the Certificate of Deposit current at the date of the hearing before her as exclusively non-matrimonial property. I put it that way because some part of the funding seems to have been the insurance proceeds of damage suffered by the company in respect of Shedden Road property or stock at that property. But part of the funding was from a mortgage on the Florida property and part was the insurance proceeds of the other properties in the Cayman Islands; which were, themselves treated as matrimonial properties. Further, in so far as part of the funding of the deposit monies was derived either from insurance proceeds of damage to the Company's assets, or was derived from the profits of the business, the manner in which the parties dealt with those funds and the deposit monies points strongly towards them having been treated as matrimonial property.

24. In my view, the appropriate course in this case is to treat monies represented by the Certificate of Deposit current at the date of the hearing in July 2008 and the monies represented by the loan to the husband (which were, themselves, derived from the proceeds of an earlier Certificate of Deposit) as matrimonial assets in which the wife should have an equal share. I would round the aggregate of those monies to CI$300,000 and direct that that sum be brought into account by the husband in the distribution of the proceeds of the matrimonial properties which are to be sold under the order of 27

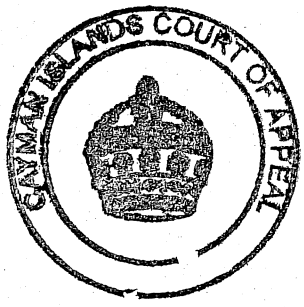
October 2008. In deference to the judge's findings of fact I would treat the Shedden Road property as non-matrimonial property and reject the wife's claim to a share in that property. That property is then available as an asset of the company to meet any claim which Mr Miller may bring if the company ceases to trade. I would disregard the other assets of the business as being of no realisable value.

25. On that basis – and subject to any representations which the parties may wish to make as to the form of the order in the light of this judgment - I would vary the order of 27 October 2008 by deleting paragraph 10 and the heading "Non-Matrimonial Property". In place of that paragraph and heading the Order I would include the following:

> "8A. On the distribution of the proceeds of sale of the properties directed to be sold under paragraph 8, the husband is to bring into account, prior to equal division of those properties) the sum of CI$300,000.
>
> . . . .
>
> **Other property**
>
> 10. On the husband bringing into account the sum of CI$300,000 as directed in paragraph 8A, no order is made in respect of the husband's interest in, or assets held by or on behalf of, NWF Ltd"

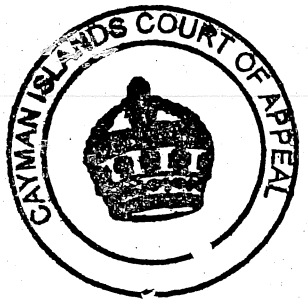
For the avoidance of doubt I make it plain that I intend the effect of the order as varied to be that the wife receives from the husband the sum of CI$150,000 (being one half of the sum of CI$300,000 to be brought into account) in addition to her one half share of the proceeds of sale of the properties listed at paragraph 7 of the order of 27 October 2008.

Chadwick P.



Justice Forte, Justice of Appeal

26. I agree that we should allow the appeal and vary the order of 27 October 2008 as proposed by the President.



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Forte, J.A.

Justice Dr Conteh, Justice of Appeal

27. I agree with the conclusion in the judgment of the President which I have had the benefit to read in draft.

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Conteh, J.A.