12-04-02

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 28 of 1999
(Grand Court Cause No. D.1 of 1999)

BETWEEN:

SUSAN HARRIET DOAK

Petitioner/Appellant

- and -

JOHN CAMERON JACKSON DOAK
and JACQUELINE CLAIRE RIDLEY

Respondents

BEFORE: The Rt. Hon. Mr. Justice Zacca, President
The Honourable Mr. Justice Rowe, Justice of Appeal
The Honourable Mr. Justice Taylor, Justice of Appeal

Katharine Davidson and Charles Quin, instructed by Quin & Hampson, for the Appellant.
H. Delroy Murray, instructed by Karin M. Thompson, for the First Respondent.

Heard: November 26th, 2001

Reasons released: April 12th, 2002

REASONS FOR DECISION

TAYLOR, J.A.

After hearing this appeal we directed that the appellant have sole title to the matrimonial home with her former husband remaining responsible for the mortgage and

insurance payments for approximately six months, until their younger child completes secondary education, rather than that there be an equal sharing at that time of the proceeds of sale of the property, as directed by the Grand Court judge.

We said we would provide written reasons for our decision.

(a) **The Background**

Mr. Doak, an architect, was 47 at the hearing of the appeal, and Mrs. Doak, a midwife, 44. Their marriage had lasted 18 years when they separated, in 1997. The children of the marriage are a son, now aged 21, and a daughter, now 17.

Mr. and Mrs. Doak moved to the Cayman Islands from Scotland soon after their marriage, in 1979. Mr. Doak has since built up a successful architectural practice while Mrs. Doak has both cared for the home and children and, except around the time of birth of the children, has worked as a midwife at the George Town Hospital. The present home was purchased in 1991 and has been occupied by Mrs. Doak and the children since the break-up of the marriage, when Mr. Doak went to live with his present wife.

A decree of divorce was granted to Mrs. Doak on May 28, 1999. An order granting ancillary relief, including the distribution of assets under appeal, was made by Mr. Justice Murphy five months later, on October 21, 1999.

The trial court judge had before him affidavits of both parties as to their assets, debts, incomes and expenses, and also a report prepared by chartered accountants retained by Mrs. Doak containing an analysis of Mr. Doak's financial circumstances. These were complicated by several factors, including uncertainties regarding his interest in OBM (Cayman) Ltd., the architectural practice by which he was then employed as managing director, and the monies to be received by him from this source.

Since the making of the order under appeal Mr. Doak has resigned from that practice and become managing principal and senior architect in a new company, Cayman Style Ltd., to which he has been in the process of transferring his investment in OBM (Cayman) Ltd. In accordance with an order of this Court made April 17, 2001, Mr. Doak filed a further affidavit describing his circumstances at May 16, 2001.

This new information forms part of the basis on which counsel for Mrs. Doak recalculated his financial position for the purposes of the appeal, both as at the date of the order appealed from and that of Mr. Doak's later affidavit.

(b) **The Order Under Appeal**

In his oral reasons for judgment of October 21, 1999, the trial court judge found that the report of the chartered accountants added little to the evidence of Mr. Doak, and that it was based to such an extent on assumptions and subject to such caveats, disclaimers and reservations that he ought not to place any reliance on it.

With respect to the distribution of assets, the trial court judge referred to the "maintenance component" of his order, essentially for the benefit of the children, as a reason for rejecting any "rigid mathematical formula". He said:

> What I do not intend to do in a case like this is to apply some rigid mathematical formula of any kind, nor even the one third or fifty/fifty rule, however they may be applied – probably improperly in this day and age. I find that kind of approach difficult and misleading, where as here the order is going to be comprised of a substantial maintenance component, which may well be of uncertain duration, coupled with a property aspect. In that sort of scenario – which certainly does not arise in every case that comes to this Court – such mathematical approaches are quite inappropriate. What I am attempting to do is to decide what is fair in all the circumstances as I have set them out.

The judge referred also to Mr. Doak's prompt reaction to the marriage breakdown in making provision for the family, saying:

> What we have is, in my view, an exemplary reaction on the part of the Respondent in two respects: one, according to the evidence, immediately upon marital breakdown he set about to do whatever he could in a very significant way, in my view, to deal with the needs of the Petitioner and the children, see that they were looked after as best he could, consistent with his income level, and that included the mortgage payments and the various other expenses of maintaining what is a significant matrimonial home, contributing to the children's expenses in a very significant way. It simply cannot be ignored that his monthly income at the relevant times would be at least eight to eight and-a-half thousand CI, and at least half of that would have gone – on his evidence, which I accept – in support of those obligations from day one, and that is certainly laudable, and not something we see very often.

The judge noted that Mr. Doak had been spending "arguably close to CI $50,000 a year" on those obligations, and that this was of significance. The judge then set out a number of factors which he had particularly taken into account:

> The particular circumstances that I focused on here in this particular case are: the age of the Petitioner, the needs of the child who is still at school, lifestyle, length of the marriage, and as a result of those main factors amongst others, it is going to be my intention to structure this order around the Petitioner's right to retain possession of the matrimonial home at least until the daughter goes to university. That is one of the overriding considerations.
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> The others are these: One, the consciousness on my part of the relatively heavy burden that this Respondent has borne and is going to continue to bear; maintaining the home and the children in financial terms – effectively in terms of maintenance payments however they are structured. In addition, the inappropriateness and difficulty of dealing with some of the other perhaps lesser assets.

On the basis of these considerations the judge ordered: (i) that Mr. Doak pay reasonable education expenses of the daughter to age 21, maintenance of CI $750 a month for the daughter until age 17, or 21 if she continued formal education to that age, and one-half of the daughter's medical, dental or optical expenses not otherwise covered by any plan; (ii) that Mr. Doak pay reasonable education expenses of the son to age 21; and (iii) that the matrimonial home be sold so soon as the daughter completed her secondary education and the net proceeds of sale equally divided between the parties, with Mr. Doak meanwhile making the mortgage and insurance payments.

The judge ordered joint custody of the daughter, with Mrs. Doak having immediate care and control, and that Mr. Doak keep current an existing life insurance policy under which Mrs. Doak is named beneficiary. He made no order as to costs.

Calculations presented on appeal by counsel for Mrs. Doak show that Mr. Doak's yearly earnings at the time of the trial court order were in excess of CI $116,000, and hers slightly over CI $42,000, and that at the time of Mr. Doak's May 2001 affidavit the figures were approximately CI $106,000 and CI $42,000 respectively, so that at both dates Mr. Doak's income amounted to at least 2½ times that of his former wife. He was also said to have pension plans worth CI $58,000 at the time of the trial judge's order and CI $57,000 at the time of his May 2001 affidavit, while she had no pension entitlement at

the time of the trial judge's order and had only recently commenced paying into a new contributory government employees' pension fund at the May 2001 valuation date.

While the husband's expenses were greater than those of the wife, these included their son's school fees and mortgage payments on the matrimonial home, both of which would shortly cease, as well as an annual pension contribution.

The calculations show that the former husband's net assets less liabilities at the time of the trial court order, including the value of the matrimonial home held in his name, amounted to CI $422,000, while the wife had liabilities of CI $3,000. The corresponding figures at May 2001 were CI $450,000 and minus CI $8,000 respectively. Taking the net value of the equity in the home at CI $215,000, as submitted on behalf of Mr. Doak, the effect of the trial judge's order at the time it was made would be to leave him with approximately 75 per-cent of the total net assets and his former wife with approximately 25 per-cent. According to the appellant's figures a similar result would be arrived at applying the trial judge's order as at May 2001.

The figures presented by counsel for Mrs. Doak in our view sufficiently demonstrate the circumstances of the parties and the effect of the order under appeal.

(c) **The Decision in *White v. White***

Between the hearing in the Grand Court and the appeal hearing, the House of Lords delivered its decision in *White v. White* [2001] 1 A.C. 596, which was particularly relied on by counsel for Mrs. Doak in argument before us.

White v. White is described as a 'big money' case, in which available assets exceeded the parties' reasonable needs. While the present case does not fall within that class, much of what is said in the speech of Lord Nicholls of Birkenhead, which was unanimously adopted by the House, has obvious relevance in the present context. Counsel for Mr. Doak contended, indeed, that the principles in *White v. White* had properly been anticipated and applied by the Grand Court judge in this case.

The speech of Lord Nicholls in *White v. White* places particular emphasis on the usefulness of applying an 'equality test' to any proposed division of assets between former spouses. This appears from the following passages (p. 605):

> In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work.

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> If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer.

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> A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share then the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.

Lord Nicholls cautions (pp. 605-6) against the introduction of any presumption of equal division, as being beyond the permissible bounds of the English legislation which, unlike that for Scotland, makes no reference to equal sharing even of marriage-related assets. Equality should not be used as a "starting point" but rather as "a form of check" to ensure that any order for unequal distribution is soundly based.

Lord Nicholls makes the following observation regarding the contribution of the principal child-caring or home-keeping spouse (p. 606):

> There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years. There is increased recognition that, by being at home and having and looking after young children, a wife may lose for ever the opportunity to acquire and develop her own money-earning qualifications and skills.

That observation seems to have much force where, as here, the principal child-carer and homekeeper has also worked and applied her wages to the family needs, while the other spouse has been able to establish a successful business or practice.

The decision in *White v. White* has already been relied on in the Grand Court, in *Barrett v. Barrett* 2001 CILR 56 and *Uzzell v. Uzzell* (D97/97).

In the latter case Mr. Justice Sanderson compared the provisions of ss. 19 and 22 of the *Matrimonial Causes Law* of the Islands with those of s. 25(1) and (2) of the *Matrimonial Causes Act, 1973*, dealt with by the House of Lords in *White*, and concluded that the discretion given to the court by the Cayman legislation is in balance even broader than that granted by the English statute. Mr. Justice Sanderson referred particularly to the requirement of s. 19 of the Cayman statute that in all "ancillary matters" regard be

had to "the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties". Included in s. 22 among such ancillary matters is:

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

We agree that principles established by English authorities, and particularly the decision of the House of Lords in *White v. White*, are applicable here.

(d) **The *White* Test Applied**

Applying the test in *White v. White* to the decision of the trial court judge, we must ask whether there is in the facts of this case sufficient justification for the marked departure from equality involved in an order granting the former wife 25 per-cent of the total assets and the former husband 75 per-cent.

The Grand Court judge, who did not have the benefit of the decision in *White v. White*, does not directly address this question. It seems, however, from his reasons for judgment that his decision as to the appropriateness of unequal division in favour of the former husband was particularly influenced by the extent by which Mr. Doak had contributed, and would contribute, to the cost of preserving the matrimonial home for a

time and the support and the education of the children. This is apparent from the above excerpts from his reasons for judgment, and also the following further observation:

> In those myriad of other cases where the husband is not so forthcoming, the Court, invariably, when dealing say with property division has to take into account the fact that the wife has gone for some months, if not years, without proper support and that has to be factored in and, in my view, it has to be factored in in a case like this, which is the other side of the coin, where the husband, after marital breakdown and after leaving the matrimonial home, has been spending arguably close to CI $50,000 a year on those obligations. So that is a significant factor.

After the rejecting the contention that the former husband had failed to make full and timely disclosure of his financial circumstances, the trial judge went on to say:

> If, at the end of the day, after we have made our order for ancillary relief one spouse is perceived as coming out ahead of the position that he or she might have been in before marriage, then obviously we have applied the wrong criteria, and that is something that we always have in our minds, and I mention it because, as I say, I sense on the face of this material that perception may not pervade these proceedings.

This last observation suggests that the judge considered that the unequal division could be supported by the fact that it would not result in either spouse being "ahead of the position that he or she might have been in before the marriage".

We were of the view that the factors mentioned by the trial court judge cannot justify unequal distribution of assets in favour of the former husband. We concluded that application of the equality test as a "form of check", as advocated in the speech of Lord Nicholls in *White v. White*, demonstrates that there is, indeed, no sound basis in this case for any disparity as against the former wife in the distribution of assets accumulated during the relatively long period of the marriage.

Applying the law laid down in *White v. White*, we were of the view that the Grand Court judge erred in principle in making what is effectively a 75-25 per-cent distribution of assets in favour of the former husband.

It seemed to us of particular importance that the appellant worked and devoted her earnings to family needs, rather than acquiring assets of her own, while the respondent built up a valuable practice, that the former husband now enjoys a much larger earning capacity than his former wife, and that while he has a significant pension fund, she has almost none. These are among factors which persuaded us that an unequal distribution of assets in favour of the former husband must in this case be regarded as unfair. That Mr. Doak made prompt and generous arrangements for the support and education of the children, and has continued to make the payments on the family home, cannot in our view justify the allocation to Mrs. Doak of a less than equal share in their total assets.

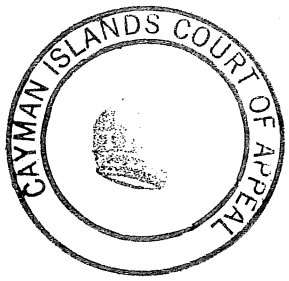
We were satisfied from the figures advanced by counsel for the appellant that the effect of granting the appellant title to the matrimonial home would be an approximately equal division of assets between the parties.

This disposition would enable the former wife, by realizing the value of the equity in the home, to pay off her debts and purchase an apartment suited to her needs, and have some assurance of housing both before and after retirement. With his remaining assets and substantial earning capacity – having in mind that his obligations in respect of the elder child have ended and those in respect of mortgage and house insurance will shortly end – the former husband should be able to finance the purchase of his own home.

(e) **Conclusion**

It was for these reasons that at the conclusion of the hearing we allowed the appeal, ordered the transfer of title to the matrimonial home to the appellant and directed that the respondent bear mortgage and home insurance costs for approximately six months until the daughter ceases full-time secondary education. We granted the appellant her costs of the appeal, to be taxed if not agreed. Because the appellant's litigation costs in the Grand Court were included in her liabilities for the purposes of the accountings relied on before us by her counsel, we made no order as to costs below.

In all other respects we affirmed the order of the Grand Court.



Zacca, P.

Rowe, J.A.

Taylor, J.A.