THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CIVIL

DOMHMT2013/0045

BETWEEN:

CELIA ANGOL JOSEPH

Petitioner

AND

HILARY FELIX JOSEPH

Respondent

Appearances:

Mrs Singoalla Blomqvist Williams for the Petitioner/Applicant
Mr Tiyani Bahanzin for the Respondent

2016: March 25th

April 29th

Recall of Order

On March 24th, 2016 the court gave the Order in this case on account of the nature of the matter and the court's schedule in civil and criminal matters. The understanding then was that the full judgment would be given within a short time. This did not materialize and, as such, certain dates for actions on both sides were compromised. In the circumstances the court recalls the said order pursuant to the rule in the interest of justice pursuant to its powers in this regard and a new judgment rendered. The rule being that a judgment, and by extension an order, may be recalled before it is perfected.

CASE SUMMARY

At issue in this case is a former matrimonial home and the matter of property adjustment order under the **Matrimonial Causes Act 1973** (UK), as received in Dominica. The parties were married in 1998 and divorced in 2015. The union produced three children two of whom are adults.

The home was built in 2002 at Zicack on land owned by the applicant by virtue of a gift from her mother when the applicant was still single. A mortgage was secured by the applicant alone since at that time the respondent did not have a full-time job and earned about $1,580.00 per month; while the applicant's salary was close to $5,000.00 per month.

The unchallenged evidence, which the court accepted, is that the applicant, prior to being made redundant, paid all the expenses of the house, including repairs and of the then household consisting of a husband, wife and of 3 children, one as minor.

After the applicant was made redundant, the respondent agreed to pay 2/3 of the mortgage, being $3,342.90, from his salary of $10,000.00 per month. At that time the applicant operated a business which was not profitable; but her share is $898.00.

Based on all the detailed circumstances of the parties, and with no documentary evidence of spending on either side, the court did the best it can do as required by law by dividing equally the equity in the former matrimonial home, being $191,362.44, less the value of the land of $71,000.00.

Thus the applicant, being the title holder of the property, was ordered to pay the respondent the sum of $60,181.22 in 3 roughly equal instalments between July 2016 and March 2017.

The respondent's prayer for a share of the Picard property, purchased solely by the applicant, is rejected since no law rendering it to be community property was cited.

In terms of the minor child, the respondent having agreed to joint custody was ordered to pay monthly maintenance in the amount of $800.00 until attains the age of majority or completes her tertiary education, whichever is the later.

DECISION ON APPLICATION FOR ANCILLARY RELIEF

[1] **THOMAS. J.:[Ag]** On 19th May 2014 the Petitioner/ Applicant, Mrs. Celia Angol Joseph, filed notice of intention to proceed with ancillary relief. The notice is accompanied by affidavit in support for property adjustment order.

[2] In very broad outline the petitioner/applicant deposes to the following issues: events leading up to break-up of her marriage and her move out of the matrimonial household but remained in the same house; her employment with Cable and Wireless (Dominica) throughout the marriage; furthering of her tertiary education; her venture into her own business; her monthly expenses amounting to $2,810.26; the respondent's employment at Ross University School of Medicine; the history of the land on which the former matrimonial home was built, and financing of the building of the matrimonial home; the equity in the said home and the extent of the liability on it; and the payment of the utilities.

[3] In the premises the petitioner/applicant deposes that: "I asked that the Respondent's share in the house be determined and the same be transferred to me after the minor child obtains the age of 18 years.

[4] Under cross-examination the petitioner said that at Cable and Wireless she earned $4,900.00 per month and at Ross University $2,900.00 per month.

[5] With respect to the mortgage the petitioner said she cannot accept that her former husband paid more; and added that there were other contributors to the home. Still further, the witness said that her husband did not make contributions to food, and that she did not take notice of what she paid.

[6] In so far as the credit cards are concerned, the testimony of the witness is that her former husband is still paying, one of which was paid off and one is still being paid.

[7] Regarding the Picard property Mrs. Celia Joseph said that she purchased it by herself although her father offered to pay $3,000.00. However the witness ended up saying that her father contributed more than$3,000.00 to the final payment; but did not accept that her former husband contributed $6,500.00. The witness went on to say that when she purchased Picard she was unmarried; she

was not struggling as she worked at Cable and Wireless and did not receive any contribution from her former husband. She added that she took a loan from N.C.C.U

[8] With respect to the expenses respecting the home, Mrs. Joseph explained that she lived with the respondent before they got married. She added that at the time she did everything since at the time the respondent did not have a job and was instrumental in him getting a job by contacting persons.

[9] In so far as the payment of the mortgage is concerned, the petitioner denied that she paid less than one third and the respondent paid the rest. She added that the financial burden is not taking the financial burden and cannot accept that he did.

[10] In the final stages of her cross-examination the witness was questioned about the former matrimonial home and gave this testimony: "The house is a new house. It is 14 years old. I have done the maintenance in the 5 years- plumbing and electricity. I do other things. I do not provide any evidence."

[11] The witness ended by saying that:" What I do depends on the court I cannot say I plan to stay in the house."

[12] In re-examination Mrs. Celia Joseph said that the land on which the matrimonial home is constructed was valued in 2003 at $71,000.00. And on the issue of the house itself, the witness said that the kitchen cupboards were re-done and cracks in the house were fixed by her.

[13] The respondent in his affidavit in response[1] agrees with certain matters as deposed by the petitioner and disagrees with others as follows: paragraph 5 is not accurate and contends that the petitioner's position at Cable and Wireless was made redundant and that after she returned to school she was able to benefit from being the spouse of a Ross University employee; the petitioner's employment at Ross University during late 2011-2012; the petitioner's failed business venture; his contribution to the payment of the mortgage debt being greater than that of the petitioner; monthly expenses of $5,653.90; agrees that the land on which the matrimonial home was built was given to her by her relatives but disagrees on the value thereof; disagrees at to the security for the mortgage on the matrimonial home; disagrees with petitioner's stated value of the

[1] Filed on 5th August, 2014

former matrimonial home; has exhibited a value thereof in the amount of $550,00.00 by Gaetan Seaman, licensed surveyor and valuer; contends that based on his monthly contribution to the mortgage he is entitled to 65% of the equitable value of the former matrimonial home and would request 75% thereof; agrees on the petitioner's contention as to the payment of the utility bills and ownership of their respective vehicles.

[14] At paragraph 20 of his affidavit the respondent deposes as to the use of two credit cards and at paragraphs 21 to 24 the following is deposed:

> "21. I ask that this Honourable court assess my share of the equitable value of the former matrimonial home as 65%, taking into account my explanation paragraph 17 of the affidavit
>
> 22. I agree to vacate the home in 60 days after the receipt of my suggested share in the former matrimonial home as explained in this affidavit
>
> 23. I agree to joint custody of the minor child
>
> 24. costs "

[15] In a supplemental affidavit in response filed by the respondent on 5th August 2014 regarding the property adjustment order, of which the essence is contained in paragraphs 3 and 4 and reads thus:

> "3. The consequence of paragraphs 13, 14, 15, 16, and 17 of my Affidavit in Response to the Property Adjustment Order, is that this Honourable Court should consider the property in Picard as community property and it should form part of any property adjustment or final order. Due to the already documented low salary of the Petitioner, out of necessity I was required to make direct cash contributions to cover disproportionally service the mortgage. I hereby exhibit a true copy of the title in the name of Celia Felicia Angol.
>
> 4. I humbly as that this Honourable Court request a full explanation of the Petitioner's property in Picard in Titles, Register Book F9, Folio 85 to ensure the status of any encumbrances, mortgage or loans."

[16] Under cross-examination the Respondent, Mr. Hilary Felix Joseph, agreed that when the land which the matrimonial home is constructed, was purchased prior to the marriage. He added that the purchase price was between $16,000.00 to $17,000.00. And with the respect to his previous employment, the witness said that in 1990 he worked part-time at Geest Industries and at that time earned $740.00 per fortnight and $1,580.00 per month. He added that he maintained himself on

this amount. He said further that he worked for seven years part-time and also did tailoring. He continued thus:

> "At the time my wife received a bigger salary. She paid off for the land without any contribution from me. Money was spent in the house so that he did not pay for that land. I contributed to the house before marriage. There is a discrepancy with respect to the land. The land was paid for before the marriage. Her father contributed three thousand dollars."

[17] With respect to the land on which the former matrimonial home is constructed, the witness said that he accepted it was a gift to his former wife. He added that the title reflects her name. He continued thus:

> "My wife initiated the construction of the house while at Cable and Wireless and she approached the National Bank initially for a loan. This was in 2000 just 2 years after marriage. The Petitioner was paying the loan alone at the National Bank of Dominica. Initially I did not pay the loan. She was made redundant at Cable and Wireless and I agreed to pay two-thirds and she would pay one-third. My wife got a redundancy package from Cable and Wireless. It is nominal. She used it to pay towards the loan. After the redundancy my wife paid $895.00 and I paid about $1,800.00 [per fortnight]."

[18] Continuing his evidence the respondent said this:

> "My wife also contributed to the house hold. We had no helper. The girls are big I did what little I can. A home has to be looked after. It was not equal. It is not in all places that the husband takes care of the wife."

[19] When it was put to the respondent that he did not assist the caregiver this was denied, and he went on to say that he did all the laundry, he never learned to cook, he does the basic things and he and his wife looked after the need of the children. And further still, the respondent said that he disagreed that he did not help the children with their homework. He explained that he did math and english.

[20] In further evidence the respondent was cross-examined on money spent on food for himself and the children. His response was that he spent $650.00 on food but could not say how much he spent on food for the children. He added that he has no access to the kitchen, and cannot use the stove and only has access to where he sleeps and uses the landing as it is a public area.

[21] The witness was next cross-examined on alternate accommodation for himself and he explained that rent is between $900.00 to $2,000.00 for a room. He went on to say that it is difficult to get living accommodation in Portsmouth.

[22] With respect to transport the respondent said that with his residence in Portsmouth he spends $450.00. He added that he has a 1990 Toyota which consumes a lot of petrol and that because of its age he has to "baby it". The witness also said that public transport would be cheaper.

[23] In further evidence on his expenses, the respondent said that it was $450.00 of which $250.00 was to his son to resolve his problems. He also said that he buys his clothes in Portsmouth.

[24] At the end of his cross-examination the respondent revealed the following: the minor child gets her meals from the school, he can move out of the former matrimonial home if he can get a place and the retirement age at Ross University is sixty.

Findings of fact

[25] The court wishes to place on record the unique situation in this case in which both sides, except for a certificate of title and a valuation of the former matrimonial home, there are no documents to support claims for expenditure. This is the case with respect to money claimed to be paid towards the mortgage debt and other expenses by both parties even in the midst of a dispute as to how much each side paid, and when.

[26] The following are findings of fact by the court:

1. The matrimonial home was built on land given to the petitioner by her mother.
2. The matrimonial home was constructed in 2000. This is based on "the estimated year built" contained in Gaeton Seaman's valuation and the petitioner's evidence in cross-examination that the house is 15 years old. In addition the respondent testified that the petitioner approached the National Bank of Dominica for a mortgage in 2000, being two years after their marriage
3. The matrimonial home was initially mortgaged to the National Bank of Dominica and later to Bank of Nova Scotia.
4. When the mortgaged to the National Bank of Dominica, the petitioner was employed by Cable and Wireless but was made redundant sometime in 2011.
5. At the time of the mortgage of the matrimonial home, the petitioner's salary was in the vicinity of $5,000.00 per month.
6. At some point after the petitioner's redundancy the respondent began to contribute to the mortgage debt at which time his salary was $10,000.00 per month.

7. At the point when the respondent's salary was $1,580.00 per month, the petitioner's salary was $5,000.00 per month and she paid most of the domestic expenses.
8. The evidence accepted is that the equity in the matrimonial home stands at $191,362.44
9. There is no direct evidence as to when the respondent started working at Ross University, but he did say that in 1990 he worked part-time with Geest Industries and did tailoring. This was for a period if seven years. However there is no dispute that the respondent started paying a portion of the mortgage in 2011. The exact month of such commencement is not in evidence.

ISSUES

[27] The issues for determination are:

1. **Whether the property situate at Picard and owned by the petitioner is community property so as to be subject to any property adjustment order in these proceedings?**
2. **What are terms of any property adjustment order with respect to the petitioner and the respondent in relation to the former matrimonial home?**
3. **The quantum of maintenance with respect to the minor child of the marriage**
4. **Who is liable in costs?**

Issue No 1

Whether the property situate at Picard and owned by the petitioner is community property so as to be subject to any property adjustment order in these proceedings?

[28] The respondent in two of his affidavits deposes as to the property situate at Picard. The first is his affidavit filed on 5th August 2014. He deposes as follows at paragraph 13:

> "13. The petitioner's paragraph 13 is grossly inaccurate in that the mortgage was secured from collateral from two pieces of property one in Picard and the other where the property now sits in Portsmouth. The property in Picard became available when the petitioner then managed at Cable and Wireless, Portsmouth; Merril Wallace was purchasing property, but was not able to purchase the entire acre, so she offered it to the petitioner. The petitioner is well aware that the original intention was to build on that parcel of land. The original decision was based on the fact that the building in Picard may mean additional costs due to the location of the children's school. The petitioner's salary at the time was only about $5,000.00 (confirmed by her paragraph 19); therefore I had no chance to assist her with the loan payments and meet the household commitments and regular outgoings."

[29] And at paragraph 3 of his supplemental affidavit in response to property adjustment order the respondent advances the following:

> "3. The consequence of paragraphs 13, 14, 15, 16 and 17 of my Affidavit in Response to the Property Adjustment Order, is that this Honourable Court should consider the property in Picard as community property and it should form part of any adjustment on final settlement. Due to the already documented low salary of the petitioner, out of necessity I was required to make direct cash contributions to cover the loans on the land at Picard, household outgoings and disproportionally service the mortgage. I hereby exhibit a true copy of the title in the name of Celia Felina Angol, Titles, Register Book FG, Folio 85...."

Reasoning

[30] The contradiction in the respondent's contentions is that he seeks to exhibit a copy of a Certificate of Title of Celia Felicia Angol, being the petitioner's maiden name, and the title is dated 14th November 1991, being several years prior to the marriage. But beyond the foregoing, a Certificate of Title is indefeasible[2]. The consequence is that the claims of contribution for the purchase are not documented in any form or to any extent.

[31] The further point is that the respondent has not given any authority to show that community property forms part of the laws of the Commonwealth of Dominica.

Issue No 2

What are terms of any property adjustment order with respect to the petitioner and the respondent in relation to the former matrimonial home?

[32] In the Commonwealth of Dominica the law respecting divorce and matrimonial causes is governed by the English statute bearing the short title of **Matrimonial Causes Act 1973.**

[33] In terms of matrimonial causes, section 23 relates to the payment of a lump sum, section 24 is concerned with property adjustment or transfer orders and section 25 speaks to the matter of the award of ancillary relief.

[34] In this case before the court, both parties are of one mind with respect to the former matrimonial home in saying that there should be a property adjustment order.

[2] Chap. 56:50, section 8

Submissions

[35] The following represents extracts from the salient aspects of the submissions on behalf of the applicant:

> The Applicant continues to pay $898.92 monthly towards the loan.
>
> The property value at $493,413.86 the bank is owed $302,051.42.
>
> The equity on the property is therefore $191,362.44. The land is valued at $71,000.00. Hence the Respondent's claim ought to be on $121,362.44 as he did not contribute to the acquisition of the land.
>
> We submit that the Respondent is entitled to a portion of the equity and an equitable sum ought to be 50%.
>
> The rationale being, the Petitioner made lump sum payments towards the loan when she received her gratuity from Cable & Wireless in 2011. She paid all the payments prior to being made redundant. After the redundancy she continues to pay 1/3 of the loan additional she maintains the home and is the primary care giver at the home. She stated in cross examination that she is the one solely responsible for the repairs of the home. We refer to the principles in **Gissing v Gissing 1970 2 ALL ER page 780.**
>
> We however ask that the Respondent continues to pay his portion of the loan until the last child of the family attains the age of 18 at which time the property can be sold to the Applicant.
>
> In a supplemental affidavit, the Respondent claims that he is entitled a share in a property in Picard on the grounds that it forms part of matrimonial property.
>
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>
> The property in question is registered in Book F9 folio 85 in the sole name of the Applicant containing 0.50 acres.

It was purchased in 1981 surveyed in 1991. The parties got married in August, 1998. According to the Applicant's evidence she said I paid for the piece of property at Picard by myself. My dad offered to pay off the balance. "I do not accept that he contributed anything because before we got married I paid everything because he did not have a job"

In cross examination, the Respondent admitted that he made no direct contribution and that the property was purchased prior to the marriage.

The Applicant's version is corroborated by the fact that the Respondent was employed only part time as a tailor for 7 years prior to the marriage and all the bills were being paid for by the Applicant.

1. We submit therefore that the Respondent is not entitled to a share neither has he requested a share in his prayer. The principles in **Petite v Petite 1969 2 ALL ER page 385** supports the Applicant's case.

We therefore submit that the court ought to award the Applicant a lump sum to enable her to continue to live at the standard at which she has grown accustomed to taking into account the Applicants age, the length of the marriage namely 17 years, the fact that the Applicant is unemployed and has the responsibility of caregiver to the child of the family and that the marriage lasted for upwards 15 years.

That the Respondent is now earning much more than the Petitioner and that the Petitioner ought to be kept at the same standard she enjoyed prior to the breakup of the marriage. I refer to the case of **White v White 1 ALL ER (2001) All England Law Reports.**

We also submit that an order be made similar to that granted in the case of **Mervin Birmingham and Nesha Birmingham 0025/2013."**

[36] As far as the respondent is concerned, the following represent extracts from the extensive submissions:

"32. The Respondent has requested a sum of money equivalent to the applicant's beneficial interest in the matrimonial home or alternatively such lump sum as the court deems just. It was held in **Wachtel v Wachtel** that:

> "No order should be made for a lump sum unless the husband has capital assets out of which to pay it without crippling his earning capacity...when the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum... the wife should be compensated for the loss of her share by being awarded a lump sum. It should be a sum sufficient to enable her to get settled in a place of her own, such as putting down a deposit on a flat or house." All of which applies to the Respondent

33. To this end, the Respondent has put the Petitioner to strike proof of the property in Picard (paragraph 4 of the Supplemental Affidavit in Response to Property Adjustment), income and any other third party contributions. It is submitted that the Petitioner has available assets from which to compensate the Respondent for the loss of his lump sum.

Direct Financial Contribution

47. The sum claimed by the Respondent in his application represents the direct financial contributions that he made to the home, in pursuit of that common intention, exhibited as 'HFJ 1' of the Affidavit in Response to Property Adjustment Order deposed by the Respondent in support of her Application for Ancillary Relief.

48. Schedule of Respondent's Expenditure

Monthly expenses:-

Mortgage	$3,342.90
School	$125.00 (shared with petitioner)
Cable	$56.00 (5 or 6 times per year)
Internet	$125.00 (6 or 7 times per year)
Electric Bill	$320.00 (admitted to by petitioner at para. 17)
Food	$650
Transportation	$450
Insurance Automobile	$40.00

Service	$35.00
Clothing	$60.00
Other	$450.00
	$5,653.90

Indirect Contributions

49. The Respondent submits that in reliance of the common intention, she has made both significant financial contributions to the matrimonial home and indirect contributions by way of service and work in the house to create a resulting and/or constructive trust in his favor, in accordance with the decision in **Hack v Rahieman, Gissing v Gissing and Abbott v Abbot.**

Quantifying the beneficial Interest

50. In the case of **White v White,** it was said by Nicholls L.J., that in arriving at a distribution of the matrimonial asset, "as a general guide, equality (between parties) should be departed from only if, and to the extent that, there is a 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. The case brought a change in direction as where in the past similar cases were decided on a 'need requirement', i.e. the need of the party claiming ancillary relief, the court would now decide causes using equal division of assets as a convenient starting point quantifying the beneficial interest.

51. Each party to a marriage is entitled to a fair share of the available assets on divorce. If the concept of equal sharing has become the starting point, the court will then need to go on to how to exercise their powers under **section 25 (2) of the MCA.**

52. In particular, by virtue of **section 25(2)(b) of the MCA**, the court will need to consider the financial needs, obligation and responsibilities which each party to the marriage has or is likely to have in the future."

53. Added to the list of factors to consider would be the way in which the parties organized their financed during the marriage, which in this case would require consideration of

- The non-matrimonial property contributed by the Respondent to the marriage at the outset; and
- The sayings introduced by the Respondent to the marriage at the outset and regularly throughout the marriage.

54. A division of the assets should allow for the parties housing and financial need to be addressed, taking into account such matters as the parties' age, future earning capacity, standard of living and any disability of either party.

Conduct

55. In **Wachtel v Wachtel, (1973) EWCA Civ. 10,** Lord denning confined 'relevant misconduct' to those cases where the conduct was obvious and gross'. More recently, in the English **Family and Matrimonial Proceeding Act 1984, Section 25 (A)** provides that, one of the matters to which the court should have regard is the conduct of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it. Conduct which does not fall within this description should, therefore, not be taken into account. As regards conduct, it I submitted that the parties have, by the conduct referred to the paragraph 32 above, clearly demonstrates by the way in which they arranged their finances, shared the responsibilities for the bills and that the Respondent made a significant contribution to the maintenance, up keeping and improvement of the family home and that it would be inequitable of the court to disregard.

Conclusion

56. The Respondent prays to this Honourable Court to grant the relief sought. In light of the submissions supported by the evidence in the affidavit and additional evidence at oral hearing, it submitted that the respondent has made significant contributions to the matrimonial property, the serving of the various debts of the Petitioner, financial support of the Respondent in clearing credit card loans, disproportionate paying of the mortgage, more than two thirds for an extended period, longer than any contribution that the petitioner had made. It was clear that the Respondent provided the financial backbone and had always intended for the investment in the matrimonial property would be treated as community property.

57. It is submitted that the respondent has a beneficial interest in the matrimonial property and that apportionment should be 65% of the stated value of the property in question. The second property in Picard, where the former couple were intended to build, not only was almost completely financed by the Respondent, but he continued to clear that loan while the petitioner was overburdened with loans for her businesses, which ultimately failed and additionally joint credit cards were used exclusively by the petitioner but serviced by the respondent.

58. This Honourable Court is encouraged to make a Property Adjustment Order which seeks to change the owner of the property in Picard from the Petitioner's name to the Respondent's sole if the Petitioner cannot sell the former matrimonial property, due to the sentiment family value."

Reasoning and conclusion

[37] As noted above, section 25 of the **Matrimonial Causes Act 1973** outlines a procedure to be followed by the court when the court proposes to exercise its power under section 23 or 24 of the said Act: Section 25 provides as follows:

"25. (1) It shall be the duty of the court in deciding whether to exercise its power under section 23 (1) (a) (b) or (e) or 24 above in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say-

a) The income , earning capacity, property and other financial re-sources which each of the parties to the marriage has or is likely to have in the foreseeable future;
b) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
c) The standard of living enjoyed by the family before the breakdown of the marriage;
d) The age of each party to the marriage and the duration of the marriage;
e) Any physical or mental disability of either of the parties to the marriage;
f) The contribution made by looking after the home or caring for the family;
g) In the case of proceeding for divorce of nullity of marriage, the value to either of the parties of the marriage of any benefit (for example, a pension) which, by reason of the dissolution of annulment of the marriage, that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligation and responsibilities towards the other..."

Examination of the circumstances of the parties

a) The applicant since her redundancy established a business which thus far has not been very successful. On the other hand, respondent is still earning $10,000.00 per month. And in terms of other property owned, the applicant owns a parcel of land situate at Picard and measures 0.50 acre. There is no evidence of property owned by the respondent
b) The financial needs of the applicant are high since she and her children must exist which involves expenses. The mortgage debt has to be satisfied. As far as the respondent is concerned he also has living expenses and the monthly mortgage payments.
c) It is not in doubt that the parties enjoyed a reasonable standard of living with the applicant leading the way, as the evidence which the court accept, suggests.
d) The applicant is now 50 years old and the respondent is 56. The marriage lasted 15 years.
e) In terms of the contribution of each party to the welfare of the family the respondent has not doubted that applicant's contribution prior to her redundancy.
f) The respondent also does not seek to contradict the applicant's evidence that she has been paying the household living expenses, she also maintained the property.

[38] The court has already determined the respondent has no claim to the Picard property. Thus the focus is on the Zicack property in respect of which the respondent since 2011 has been paying $3,342.00 per month on the mortgage debt. As such his claim rests on this contribution and what 'little' he did.

[39] Learned counsel for the respondent places heavy emphasis on the respondent's contribution to the matrimonial home in the years prior to 2011 at which time the respondent had monthly income of $1,500.00 and as, by definition, could only make a minor contribution to the domestic expenses.

The Law relating to matrimonial property

[40] It will be recalled that the respondent has requested a sum of money equivalent to the beneficial interest in the matrimonial home or alternatively such lump sum as the court deems just. It is also contended that the applicant has available assets from which to compensate the respondent.

[41] On the other hand, the prayer on behalf of the applicant is that she be awarded a lump sum. The further prayer is that the respondent vacates the matrimonial home within 3 months and the applicant continues to live in the former matrimonial home until the minor child ceases to be a minor. And even further that the applicant shall have an option to purchase the respondent's share of the former matrimonial home.

[42] The court has issues with both submissions against the backdrop of sections 22 and 23 of the **Matrimonial Causes Act, 1973**. To begin with it cannot be reasonable to have the respondent to leave the home within 3 months while at the same time there is no suggestion that he should cease payment of the mortgage. On the other hand, while the respondent's contributions to the former matrimonial home were minimal up to mid-2011, they became greater thereafter. This rests on the absence of evidence regarding the commencement of the respondent's employment with Ross University and his commencement salary leading up to $10,000.00 per month.

[43] In recent times the question of matrimonial property has received much examination and analysis by the Courts in England and, by extension, the Commonwealth Caribbean. In one instance in a

case from Antigua and Barbuda, being **Abbott v Abbott**[3], Baroness Hale of Richmond speaking for the Board referred to her earlier reasoning in another case when she said as follows:

> "6. Lord Walker, Lord Hoffman and Lord Hope of Craighead all agreed with my own opinion in which I summed up the matter thus at para 60:
>
> 'The law has indeed moved on in response to the changing social and economic conditions. The search is to ascertain the parties shared intentions, actual, inferred or imputed with respect to the property in the light of their whole course of conduct in relation to it'. "

The house also approved a passage from the Law Commission's discussion paper ob Sharing Homes (2002, Law Com No. 278, para. 4 27)

> 'If the question is one of the parties is one of the parties common intention, we believe that there is much to be said for adopting what has been called a 'holistic approach' to the quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct throws light on the question what shows are intended'."

[44] The evidence accepted by the court reveals the following with respect to the former matrimonial home:

"1. The land on which the home was constructed is situate at Zicack, Portsmouth. The area is 3,733 sq. ft.

2. The applicant made an application to the National Bank of Dominica for a mortgage which was granted. In this regard the court draws the inference that the application was made late 2001 or early 2002, given the date of the construction of the matrimonial home of 2002

3. Up until 2011, when the applicant was made redundant she looked after the financial affairs of the family with little or no help from the respondent.

4. The applicant applied part of her redundancy payment to the mortgage debt.

5. There is no evidence as to when the respondent moved from $1,580.00 per month to $10,000.00 per month, as salary

6. The respondent, in agreement with the applicant, paid $3,342.90 towards the mortgage while the applicant paid $898.00 from July 2011, as inferred by the court in absence of direct evidence in this regard.

[3] [2007] UKPC 53

7. As a married couple the applicant and the respondent lived in the former matrimonial home. They continued to live in the said home but different households.

[45] It is the determination of the court that any common intention regarding the former matrimonial home did not arise *ab initio* but in July 2011 when the respondent agreed to pay $3,342.90 per month towards the mortgage which payments are still being made.

[46] The equation comes down to what the applicant did in relation to the building of the matrimonial home including the application for and the payment on the said home and spending on the care of the family until May 2011 when she moved out of the matrimonial bedroom; so that she lived in the same house with the respondent but in different households. On the other hand, there is no evidence to show that the respondent was engaged in activity in the matrimonial home, other than the laundry, until he began paying a substantial part of the mortgage in 2011. However the court notes that at paragraph 10 of his affidavit in response the respondent's lists expenses which he shares with the applicant. These are "school $125.00, cable $56.00 5 or 6 times per year, internet $125.00 (6 or 7 times per year. Electric bill $320.00 admitted by the petitioner at paragraph 17."

[47] In her affidavit in support the applicant deposes the following at paragraph 19:

> "19. During the early years, we lived a comfortable standard of living, my salary was almost $5,000.00 monthly and I basically supported the house and paid the bills. This gradually improved and in the later years we were able to enjoy short trips abroad and maintain our house at a reasonable standard of living."

[48] The respondent in his affidavit in response say this in relation to the said paragraph 19:

> "The Petitioner's paragraph 19 is partly agreed in [that] we had a reasonable standard of living, but we only went on two trips, both church trips. I only travelled on Ross University business."

[49] The case of **Mervin Birmingaham Petiioner/Applicant and Nesha Birmingham, Respondent and Donan Jervier, Co- Respondent**[4], decided by this court involved a matrimonial home in which the Petitioner/Applicant paid the mortgage on the house but the respondent paid for

[4] DOMHMT2013/0025

improvements to the said house at her expense. She also cared for the child of the marriage. The petitioner did not live in the house.

[50] The court in making an award under the **Matrimonial Causes Act 1973** reasoned thus:

> "It is therefore the conclusion of the court that the applicant is not entitled to sole ownership of the home because of the totality of contributions made to the home by the respondent which has been doubted or contradicted. In the circumstances of the respondent, she is awarded a ¼ share of the equity in the matrimonial home which amounts to $6,078.33 to be paid by the applicant. The respondent must give up possession of the matrimonial home no later than 90 clear days after the said sum of $6,078.33 is paid; but if the money is not paid after 90 days possession must be given up 30 days after payment."

[51] It is the determination of the court that similar reasoning applies in this case based on the contributions on both sides.

[52] It is the further determination of the court that similar reasoning applies in this case with a lump sum payment to the respondent based on the equity in the former matrimonial home, as distinct from the total value of the home, which is $191,362.44. The award is 50% of the equity, less the value of the land, being $71,000.00. The quantum of the award is made based on the following:

(1) a) The petitioner was the sole applicant for and was granted a mortgage on the land situate at Zicack.

b) The mortgage involved payment of the usual taxes and legal expenses and there is no evidence that the respondent paid any of the taxes and legal expenses; and at this time the respondent did not have full-time employment.

c) The petitioner is the fee simple owner of the land situate at Zicack on which the former matrimonial home was built

d) The respondent by his own admission was not a major contributor to the living expenses of the family until 2011 when he agreed to pay 2/3 of the monthly mortgage payment, being $3,342.90.

e) The payment of the mortgage by the petitioner from 2002 when the house was built, including lump sum payments, up to the redundancy in 2011 means the petitioner would have paid the mortgage for more than 8 years between 2002 and June 2011; while the respondent has been paying between July 2011 to date, a total of 4 years and 8 months. It is to be noted in this regard that the valuation on the property done by Gaeton Seaman gives the estimated date of construction as 2002 and the petitioner also testified that the house is 15 years old. These are inferences drawn by the court.

f) While the respondent is single, the petitioner has the 3 children of the marriage living with her with the last child still being a minor.
g) The case made for the respondent to be given legal rights to both parcels of land owned by the petitioner is not grounded in law and is overstated and imaginary.
h) The petitioner's ownership of a 0.50 acre lot of land situate at Picard gives her flexibility in terms of her finances since that parcel is more than 5 times the size of the parcel situate at Zicack, being 21,780 sq. ft. as opposed to 3,753 sq. ft.
i) While the court accepts that the respondent made payments to the jointly owned credit cards and other payments this would have been from July 2011; but in any event there are no receipts in evidence to permit the court to make accurate calculations. As such the court must do the best it can.
j) By definition, it must be easier for the respondent, being single to find suitable accommodation when compared with the petitioner with three adults and one minor.
k) When prior to July 2011 the petitioner paid all or most of the expenses including the mortgage, the respondent enjoyed the benefits of living in the matrimonial home with little or no expenditure comparable with those of the petitioner.
l) It would be patently unjust to order the respondent to continue paying 2/3 of the mortgage and at the same time exclude him from the matrimonial home.

(2) The lump sum payment rests on the equity in the matrimonial home, being $191,362.44, less the value of the land on which the former matrimonial home was built, being $71,000.00 which leaves a residue of $120,362.44 of which the respondent is awarded 50% to be paid to the respondent by the petitioner as follows:

a)$20,000.00 on or before 29th July 2016;

b)$20,000.00 on or before 30th November 2016;

c)$20,181.22 on or before 31st March, 2017.

(3) The respondent shall vacate the former matrimonial home on or before 30th June 2016; and no further payment of the mortgage debt shall be made after the payment for June 2016, unless otherwise agreed.

[53] Apart from the foregoing the court is also guided by the clear mandate of the **Matrimonial Causes Act, 1973** which is that the division of property should not lead to the demise of one party to benefit the other.

Issue No. 3

The quantum of maintenance with respect to the minor child of the marriage

[54] It is deposed by the respondent at paragraph 23 of his affidavit in response that he agrees to joint custody of the minor. With that comes a strengthening of his legal obligation to pay maintenance which the court fixes at $800.00 per month having regard to her age and stage in life. The payment shall continue until she attains the age of majority or until her tertiary education is completed, which even is later.

Issue No. 4

Who is liable in costs?

[55] The court makes no order as to costs and, as such, the parties must bear their own costs.

Operative date

[56] It is common ground that the order in this case was given on 24th March 2016 in the interest of time. However, for the purposes of further proceedings in this case, the operative date is the date of the delivery of the entire judgment, being 29th April 2016.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. The property situate at Picard, being part of Lot 28 registered in Book of Titles A8 Folio 41 in the Parish of St. John, is owned by the Petitioner as the sole proprietor thereof and does not form part of any notion of community property so as to be subject to any property adjustment order, or otherwise on the evidence:

2. (1) It is the determination of the court that only a lump sum award to the respondent is justified based on his contributions to the former matrimonial home before and after the petitioner was made redundant plus the following:

a. The petitioner was the sole applicant for and was granted a mortgage on the land situate at Zicack.

b. It is common ground that a mortgage granted involves the payment of taxes and legal expenses and there is no evidence that the respondent paid any of the taxes and legal expenses; and at this time the respondent did not have full-time employment.

c. The petitioner is the sole-owner in fee simple of the land situate at Zicack; upon which the former matrimonial home is built.

d. The respondent by his own admission was not a major contributor to the living expenses of the family until 2011 when he agreed to pay 2/3 of the monthly mortgage payment, being $3,342.90.

e. The payment of the mortgage by the petitioner from 2002 when the house was built, including lump sum payments, up to the redundancy in 2011 means the Petitioner would have paid the mortgage for more than 8 years between 2002 and June 2011; while the respondent has been paying between July 2011 to date, a total of 4 years and 8 months.

f. While the respondent is single, the petitioner has the 3 children of the marriage living with her with the last child still being a minor.

g. The case made for the respondent to be given legal rights to both parcels of land owned by the petitioner is not grounded in law and is overstated.

h. The petitioner's ownership of a 0.50 acre lot of land situate at Picard gives her flexibility in terms of her finances since that parcel is more than 5 times the size of the parcel situate at Zicack, being 21,780 sq. ft. as opposed to 3,753 sq. ft.

i. While the court accepts that the respondent made payments to the jointly owned credit cards and other payments this would have been from July 2011; but in any event there are no receipts in evidence to permit the court to make accurate calculations.

j. By definition, it must be easier for the respondent, being single to find suitable accommodation when compared with the petitioner with two adults and one minor.

k. When prior to July 2011 the petitioner paid all or most of the expenses including the mortgage, the respondent enjoyed the benefit and comfort of living in the matrimonial home with little or no expenditure comparable with those of the petitioner.

l. It would be patently unjust to order the respondent to continue paying 2/3 of the mortgage and at the same time exclude him from the matrimonial home.

(2.) The lump sum payment rests on the equity in the matrimonial home, as distinct from the total value. This is $191, 362.44 less the value of the land on which the former matrimonial home was built, being $71,000.00, which leaves a residue of $120,362.44 of which the respondent is awarded 50% (or $60,181.22) which shall be paid to the respondent by the petitioner as follows:

a. $20,000.00 on or before 29th July 2016;
b. $20,000.00 on or before 30th November 2016;
c. $20,181.22 on or before 31st March, 2017.

3. The respondent shall vacate the former matrimonial home on or before 30th June 2016 and no further payment of the mortgage debt shall be made by the respondent after the payment for June 2016, unless otherwise agreed.

4. The respondent shall pay monthly maintenance to the petitioner with respect to the minor child in the sum of $800.00 until she attains the age of majority or until she has completed her tertiary education, whichever is later.

5. Both parties must bear their own costs

6. Both parties have leave to apply to the court with respect to paragraphs 2 (2) and (3) of this Order.

Errol L. Thomas
High Court Judge (Ag)