

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2021/0003

BETWEEN:

KENTY ROSHEMA WILLIAMS nee ANTOINE

Appellant

and

KYROL VALENTINO WILLIAMS

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mr. Trevor M. Ward

Justice of Appeal

The Hon. Mde. Cadie St. Rose-Albertini

Justice of Appeal [Ag.]

Appearances:

Ms. Noel Bruce holding papers for Mr. Israel Bruce for the Appellant

Ms. Tonya Da Silva for the Respondent

2025: November 14;

2026: January 27.

Matrimonial causes – Ancillary relief – Property adjustment and settlement – Sections 32 and 34 of the Matrimonial Causes Act (Saint Vincent and the Grenadines) – Discretion of trial judge – Assessment of parties' respective interests in matrimonial property – Whether interest must be calculated by reference to net equity or may be calculated by reference to assessed value – Treatment of outstanding mortgage liability – Financial and non-financial contributions – Fairness – Appellate restraint

In an application for ancillary relief filed in the court below, the appellant, who was the petitioner in those proceedings, sought property settlement, transfer or adjustment orders pursuant to section 32 of the **Matrimonial Causes Act** of Saint Vincent and the Grenadines. In support of that application, the appellant filed an affidavit of means in which she sought, inter alia, a declaration that the house situate at Ruthland Vale should belong to her solely and that the respondent should be entitled to the matrimonial home at Layou (Betremy), or in the alternative, 50% of all the assets of the marriage, together with an order for the payment of maintenance in the sum of \$400.00 for the minor child of the family.

Following the hearing of the application on 21st January 2021, the learned judge in the court below delivered a decision and made orders which included an award to the respondent of a 35% interest in the house at Ruthland Vale, calculated on the basis of the value stated in the valuation report of Franklyn Browne dated 7th July 2016.

Subsequently, on 7th April 2021, the appellant filed a notice of application seeking to correct the judgment of the learned judge. The appellant contended that the learned judge had erred by assessing the parties' respective interests in the Ruthland Vale Property by reference to its open market value rather than by reference to the net equity after deduction of the outstanding mortgage. However, on 14th May 2021, that application was withdrawn after the learned judge indicated that there was no error in the terms of the order. The court further

observed that counsel for the petitioner had failed to identify any precedent to support the correction sought.

Being dissatisfied with the decision of the learned judge, the appellant on 2nd March 2025 filed a notice of appeal challenging the award of a 35% interest to the respondent in the Ruthland Vale Property calculated on the basis of the valuation of Franklyn Browne dated 7th July 2016. The appellant contends that the learned trial judge erred in determining the respondent's interest by reference to the open market value rather than net equity, that the resulting award is unreasonable and unfair having regard to the overall circumstances of the case, and that insufficient weight was given to the fact that the appellant has solely serviced, and continues to service, the mortgage on the Ruthland Vale Property.

Held: allowing the appeal; setting aside the order of the learned judge in which she awarded the respondent 35% interest in the house at Ruthland Vale to be calculated on the open market value as stated in the valuation of Franklyn Browne dated 7th July 2016; and ordering costs to be assessed by a judge of the High Court if not agreed within 21 days;

1. In determining applications for ancillary relief, the court exercises a statutory discretion which must be exercised without discrimination and with the ultimate objective of achieving fairness. On appeal, an appellate court must be slow to interfere with the exercise of that discretion, having regard to the trial judge's advantage in seeing and evaluating the witnesses and assuming, unless demonstrated otherwise, that the judge properly directed herself as to the matters to be taken into account. Appellate intervention is justified only where there has been procedural irregularity, the consideration of irrelevant matters, the failure to consider relevant matters, or where the decision is plainly wrong, a threshold described as a high hurdle.

Piglowska v Piglowski [1999] 1 WLR 1360 applied; **Foster v Foster** [2003] EWCA Civ 565 applied.

2. In determining an application for ancillary relief under section 32 of the **Matrimonial Causes Act**, the court is required by section 34 to have regard to all circumstances of the case, including the parties' financial resources and needs, the standard of living during the marriage, and both financial and non-financial contributions to the welfare of the family. In exercising that discretion, the court must seek to achieve a fair outcome, must not discriminate between husband and wife, and must not favour the breadwinner over the spouse who looked after the home and children. As articulated in **White v White**, equality is not a rule but a yardstick, and the court may depart from equal division where there is good reason to do so. Where, having regard to these principles, the trial judge correctly identifies matrimonial property, considers the evidence relating to its acquisition and development, and evaluates both the financial contributions of one party and the non-pecuniary contributions of the other, the court is entitled to consider that there are ample reasons to depart from awarding an equal share. In such circumstances, an award of a lesser percentage interest to one spouse, resulting in the other spouse receiving the greater share, properly reflects the application of section 34 and the overarching requirement of fairness.

Sections 32 and 34 of the **Matrimonial Causes Act** applied; **White v White** [2001] 1 AC 596 applied.

3. In ancillary relief proceedings, a spouse's respective share in matrimonial property is generally calculated based on net equity, after the mortgage and other secured loans have been deducted from the current market value. Although there is a dearth of case law which expressly mandates this approach, local and regional authorities

are replete with examples of judges adopting and applying it. The use of net equity ensures a fair distribution based on the true value of the asset, taking into account outstanding debts or liabilities. Equity represents the difference between the current market value of the property and any secured liabilities and therefore reflects the portion of the asset actually available for division. Accordingly, the court and the parties should, unless there is a cogent explained reason otherwise, generally use the net value after liens, not the gross value of the property, when determining parties' respective interests in matrimonial property. The ultimate objective remains the achievement of a fair outcome, with net equity forming the proper basis upon which the court exercises its discretion under section 34 of the **Matrimonial Causes Act**, having regard to all the circumstances of the case.

4. From a practical standpoint, applying market value rather than net equity would undermine the result intended by the learned judge. On the stated valuation of \$293,000.00, a 35% interest would yield \$102,550.00 to the respondent and a 65% interest \$190,450.00 to the appellant. However, the property is encumbered by a secured mortgage which both parties are legally obliged to satisfy. If the property were sold in accordance with the clean break principle, repayment of the outstanding mortgage would result in negative equity, as the mortgage exceeds the property's value. This was a material factor which the learned judge was obliged to take into account.
5. Fairness required the court to consider the overall financial picture, including the property and the entire matrimonial pool of assets and liabilities. The learned judge failed to properly weigh the full implications of the outstanding mortgage on the Ruthland Vale Property. As a result, the appellant would be obliged to pay the respondent \$102,550.00 representing 35% of the open market value of the property, without regard to the existing mortgage which jointly encumbered it. This constituted an error of principle warranting appellate interference and the setting aside of the award.

JUDGMENT

[1] **ELLIS JA:** The appeal before this Court stems from an application for ancillary relief filed in the court below by the appellant (the petitioner in the court below) in which she sought a property settlement, transfer and/or adjustment order pursuant to section 32 of the **Matrimonial Causes Act** of Saint Vincent and the Grenadines (or "**the Act**").¹ In her affidavit of means filed in support of the said application, the appellant sought a declaration that the house at Ruthland Vale (or "the Ruthland Vale Property") should belong to her solely and a declaration that the respondent is entitled to the matrimonial home at Layou (Betremy) or, in the alternative, 50% of all the assets of the marriage and the sum of \$400.00 for the maintenance of the minor child of the family.

[2] Following the hearing of the application on 21st January 2021, the learned judge in the court below made the following orders:

- (1) The petitioner is awarded a 10% interest in the house at Betremy to be calculated on the value of the same as at the date of separation in 2017.

¹ Cap. 239 of the Revised Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

- (2) The respondent is awarded a 35% interest in the house at Ruthland Vale to be calculated on the value as stated in the valuation of Franklyn Browne dated 7th July 2016.
- (3) The respondent is entitled to a 15% interest in the vehicle registration number PQ576 to be calculated on the value of the said vehicle as of the date of separation in 2017.
- (4) The respondent is to pay the sum of \$200.00 for the maintenance of the child of the family and the respondent and the petitioner are to equally share the medical and educational expenses of the child until he shall reach the age of 16.
- (5) Liberty to apply.
- (6) Each party to bear their own costs.

[3] On 7th April 2021, the appellant filed a notice of application seeking to correct the judgment of the learned judge. The appellant contended that the judge's order incorrectly assessed the value of the parties' interest in the Ruthland Vale Property on the basis of its open market value rather than the net equity (after deducting the outstanding balance owed on the mortgage). However, on 14th May 2021, the application was withdrawn after the learned judge indicated that there was no error in the terms of the order. The court further noted that counsel for the petitioner had failed to identify any precedent supporting the proposed correction.

The appeal

[4] Dissatisfied with the decision of the learned judge, the appellant on 2nd March 2025 filed a notice of appeal challenging the learned judge's decision to award the respondent a 35% interest in the Ruthland Vale Property to be calculated on the basis of the value set out in the valuation of Franklyn Browne dated 7th July 2016. The appellant advanced the following grounds of appeal:

- (1) that the learned trial judge erred when she awarded the respondent 35% interest in the house at Ruthland Vale to be calculated on the value as stated in the valuation of Franklyn Browne dated the 7th July 2016 as opposed to 35% interest in the equity in the house at Ruthland Vale as of the date of separation in 2017;
- (2) that the learned trial judge erred when she decided that interest be determined against value as opposed to equity in the property;
- (3) that the award of 35% interest in the house at Ruthland Vale to be calculated on the value as stated in the valuation of Franklyn Browne dated 7th July 2016 is unreasonable and unfair in view of the overall circumstances prevailing; and
- (4) that the learned trial judge erred by failing to give due consideration that the appellant has been and continues to solely service the mortgage.

The Appellant's Submissions

- [5] Counsel for the appellant submitted that the principle of fairness dictates the approach to be adopted by a court in determining a party's interest in matrimonial property on an application for ancillary relief. In support of this contention, counsel cited the judgment of Saunders JA (as he then was) in **Stonich v Stonich**² where he stated:

“One of the useful features of the MPPA is that it gives the Court a broad discretion in apportioning assets built up over the course of the marriage. The ultimate and overriding objective that the Court must strive at is fairness. In apportioning the assets, the Court must consider the various factors the legislature has asked it to take into account and then arrive at a solution that is, in all the circumstances, fair to the parties. The wide discretion available permits the Court the ability to interpret fairness in light of prevailing societal standards.”

- [6] Counsel argued that attaching the ascribed percentage to the value of the property at the time of valuation, where the property is subject to a mortgage and the mortgage is not deducted, would result in grave unfairness to the appellant and would run counter to the determination that the respondent is entitled to a 35% interest in the property in question.
- [7] Counsel cited relevant case law³ which he submitted demonstrates that courts, whilst applying section 34 of the Act, adopted an established practice of ensuring that the existing mortgage value on any such matrimonial property is deducted from the property value, after which the allotted percentage interest is applied. He argued that if the judgment stands, the appellant will be unfairly left to pay the entire mortgage on the property whilst the respondent, gets 35% of the full market value of the property. This manner of application flies in the face of the principle of fairness espoused in **Stonich v Stonich**.
- [8] Counsel urged this Court to vary the order of the learned trial judge so that the 35% interest in the property which was assigned to the respondent is determined on the basis of the equity value of the property at the time of the judgment, that is, the property value as at 7th July 2016, less the mortgage amount as at the time of the filing of ancillary application is to be determined, and that the respondent entitlement be 35% of the difference of the two.

² BVI Civil Appeal No.17 of 2002 (delivered 29th September 2003, unreported) at paragraph 27.

³ *West v West* SVGHMT31/2004 (delivered 10th June 2005, unreported); *Campbell v Campbell* SVGHMT2019/0080 (delivered 22nd December 2020, unreported).

The Respondent's Submissions

- [9] The respondent trenchantly opposes the appellant's proposal arguing that the trial judge did not err in applying the respondent's 35% interest on the value as stated in the valuation of Franklyn Browne dated 7th July 2016, rather than 35% interest in the equity in the house at Ruthland Vale. Rather, in doing so, the court acted in accordance with established legal principles and exercised its judicial discretion in a manner which was both appropriate and reasonable in light of all of the surrounding facts of the matter. Counsel submitted that the trial judge carefully considered all relevant factors including: the respondent's non-financial contributions (construction, family life, cohabitation); the appellant's financial contributions including mortgage payments; the joint borrowing and intention behind the property purchase; and the relative needs and earning capacities of the parties, and concluded that awarding 35% on the value as stated in the valuation of Franklyn Browne dated 7th July 2016 was fair.
- [10] Furthermore, the trial judge clearly considered the mortgage in her determination of the respondent's share in the Ruthland Vale Property. Counsel pointed out that at paragraph 20 of the judgment, the trial judge specifically recognized that:
- (1) The appellant's salary was predominantly used to service the mortgage loan, underscoring the financial input from her earnings.
 - (2) The respondent was formally joined as co-mortgagor when additional funds of \$232,000.00 were advanced to enable construction, demonstrating joint responsibility for the mortgage.
 - (3) Both parties jointly benefited from the mortgage as it funded the construction of their family home.
- [11] Counsel for the respondent further submitted that there is no legal or statutory obligation requiring that a party's interest be applied only on the basis of equity. Instead, the law prioritizes fairness, not formulaic approach to property division. Counsel argued that the appellant's submission places undue emphasis solely on financial contributions such as mortgage payments when section 34(1)(f) of the Act explicitly requires the court to also give weight to a party's non-financial contributions.
- [12] Counsel for the respondent concluded that in this case, the learned trial judge correctly accepted the evidence that the respondent contributed to the building works on the Ruthland Vale Property by applying his labour, talents and personal contacts during the construction of the home and also assisted in its upkeep. The learned trial judge found these non-financial contributions to be equally relevant in assessing the parties' respective interest in the matrimonial property. Having

weighed these contributions, the court reasonably concluded that a 35% interest fairly represented the respondent's stake in the property.

- [13] Turning to the case law referenced by the appellant, counsel for the respondent submitted that while the cases of **West v West** and **Campbell v Campbell** did base division on the basis of net equity, they do not establish a mandatory rule that equity must be used in every case. Counsel submitted that each case turns on its own facts. Counsel also commended to the Court the judgment in **Elizabeth E Joseph v Maynard Joseph**⁴ where the Court underscored the broad discretion of trial judges in dividing matrimonial property, emphasizing that the determination of a property adjustment order requires consideration of all contributions both direct and indirect and the full circumstances of the parties. The Court recognized that the intention of the parties, as demonstrated by joint ownership and their contributions towards the acquisition and repayment of the matrimonial home, was a key factor in deciding the fair division. Importantly, the Court held that it was not necessary to quantify which party contributed more but rather to consider the overall fairness in light of the parties' actions and intentions.
- [14] Counsel submitted that this approach supports the proposition that a trial judge may lawfully apportion property based on its gross value, taking into account the totality of circumstances, rather than relying solely on a mechanical or equal division. Such discretion enables the Court to tailor its order to achieve justice between the parties.
- [15] In support of this submission, counsel cited the judgment in the Trinidad and Tobago case of **Persad v Persad**⁵ which she submitted recognises that there is no fixed rule mandating division strictly on net equity alone. Instead, the court must look beyond mechanical calculations and consider the entirety of the parties' contributions and circumstances to achieve fairness. At paragraph 55 and in the overall reasoning, the judge in **Persad v Persad** emphasizes that the court's approach is to achieve fairness rather than adhere to any rigid formula based purely on net equity values. The judge noted that even if certain properties were excluded or values reduced, the division of assets giving the wife only about 23% of the estimated \$7 million matrimonial assets would be unfair. This reflects the broader principle that courts look beyond mere numbers and consider all relevant circumstances when deciding how to divide matrimonial assets equitably.
- [16] It follows that in the present case, the learned trial judge correctly exercised her

⁴ DOMHMT2004/0026 (delivered 12th May 2010, unreported).

⁵ TT 2008 HC 134.

discretion by balancing the appellant's sole mortgage payments against the respondent's other contributions, including being a co-mortgagor and participating in the acquisition and construction of the family home. The appellant's argument that sole mortgage payments should disproportionately affect the respondent's 35% interest ignores the discretionary nature of matrimonial property division as recognized in **Persad v Persad**.

- [17] Counsel for the respondent concluded that there is no legal or procedural error in the manner in which the mortgage considerations were factored into the property division. The trial judge's decision on this point was sound, well-reasoned, and consistent with both statutory provisions and the relevant case law.

Appellant's reply

- [18] In reply, the appellant did not dispute that the judge has discretion in arriving at her ruling. However, counsel submitted that the ruling must not be unreasonable and must be mindful of the overall circumstances of the case at hand. Counsel submitted that it is very clear that the trial judge did not take fully into account or accorded too little weight to the fact that the property was the subject of a mortgage loan and that the appellant had the sole responsibility of paying the outstanding mortgage, which at the material time remained in the region of \$296,871.69.
- [19] Applying the judgment in **Anjie Investments Ltd v Cheng Nga Yee et al**,⁶ counsel submitted that the principles of reasonableness and fairness could not apply where the judge determined the respondent's interest in the property on the basis of 35% on the open market value as opposed to 35% on the net equity in the property.
- [20] Counsel further submitted that rather than asking this Court to adopt a formulaic approach, the appellant is instead inviting the Court to apply longstanding principles of consistency and reliability in judicial decision making. Counsel criticized the scant regard paid by the respondent to the judgments in **West v West** and **Campbell v Campbell** stating that these settled cases were rendered 15 years apart, are grounded in accepted principles and give consistency and reliability to the law and practice.
- [21] Counsel further submitted that none of the cases cited by the respondent actually provide any true assistance. In respect of **Joseph v Joseph**, the respondent ignored the critical fact that Cottle J ultimately awarded each spouse an equal share

⁶ BVIHCP2016/0003 (delivered 24th November 2016, unreported).

in the property and they were both equally responsible for repaying the mortgage.
At paragraph 7 the court held:

“I therefore decline to make any property adjustment order as prayed by either [parties]. I declare that the land (and matrimonial home which stands on it) is owned by both parties jointly in equal shares subject to the subsisting mortgage for which both parties are now equally responsible to repay.”

[22] Counsel for the appellant was equally critical of the respondent’s reliance on **Persad v Persad**, noting that in that case the court had to determine issues of jurisdiction and distribution in accordance with the agreement between the parties. Further distinguishing that judgment is the fact that there was no mortgage facility on any of the properties to be distributed between the parties.

[23] Counsel for the appellant reiterated unfairness which obtains in this appeal arises from the fact the appellant is compelled to solely bear the financial burden of the mortgage whilst the respondent secures 35% of the market value of the property. He argued that had there been an order to sell the property, the outstanding amount owed on the mortgage would have to be paid leaving only the difference available for distribution. He concluded that this represents manifest unfairness which forms a basis upon which this appellate court ought to interfere.

ANALYSIS AND CONCLUSION

Principle of appellate restraint

[24] The court is required to have regard to the factors stated in the Act when determining applications for ancillary relief. That Act confers a discretion upon the court, which must be exercised without discrimination and to the ultimate end of achieving fairness.⁷

[25] In **Piglowska v Piglowski**,⁸ the leading case on appeals, the House of Lords laid down clear guidance for an appellate court when reviewing a judge’s exercise of discretion. The House of Lords emphasized the width of discretion conferred on trial judges in ancillary relief proceedings and made plain that the appellate court should be slow to interfere. At paragraph 1 of the holding their Lordships prescribed the correct approach:

“...that where the question arose as to whether the exercise of a judicial discretion such as was involved in section 25(2) was plainly wrong, the appellate court was to have regard to the advantage which the trial judge

⁷ *White v White* [2001] 1 AC 596.

⁸ [1999] 1 WLR 1360.

had in seeing the witnesses both in respect of his findings of primary fact and his evaluation of them, and should assume unless demonstrated to the contrary that he knew how to perform his functions and which matters he should take into account; that where the exercise of discretion involved value judgments on which reasonable people might differ a degree of diversity was inevitable”.

[26] The House of Lords determined that appeals against the exercise of a trial judge’s discretion are only possible if there has been procedural irregularity, irrelevant matters have been considered, relevant matters have been ignored, or the decision is plainly wrong. In **Foster v Foster**⁹ the English Court of Appeal (applying the decision in **Piglowska v Piglowski**) described this as a high hurdle. I bear these principles in mind in disposing of the present appeal.

[27] It is clear that although the appellant cited 4 separate grounds of appeal the dispute between the parties stems from the learned trial judge’s decision to apportion the respective shares in the Ruthland Vale Property between the parties [appellant - 65%: respondent -35%] on the basis of the market value assessed by the valuer, Mr. Franklyn Browne, as opposed to the value of the net equity.

[28] As indicated earlier, this order arose out of an application for ancillary relief filed by the appellant in which she sought property settlement, transfer and/or adjustment orders pursuant to section 32 of the Act. Section 34 of the Act outlines the matters that the Court must take into account in deciding how to exercise the powers conferred upon it by the Legislature. It provides:

“It shall be the duty of the Court in deciding whether to exercise its powers under Section 31 ... 32 or 33 in relation to a party to a 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 resources 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) the physical or mental disability of either of the parties to the marriage;
- (f) the contribution made by each of the parties to the welfare of the

⁹ [2003] EWCA Civ 565.

family, including any contribution made by looking after the home or caring for the family;

- (g) in the case of proceedings for divorce ..., the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution ... of the marriage, that party will lose the chance of acquiring; ..."

[29] In addition to applying the criteria and considering whether to effect a clean break, it is also clear that the court must seek to achieve a fair outcome between the parties and must not discriminate between husband and wife or favour the breadwinner over the spouse who looks after the home and the children. In **White v White**, Lord Nicholls laid down the following statements of principle:

"Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses: see Thorpe LJ in *Dart v Dart* [1996] 2 FLR 286, 294. The powers must always be exercised with this objective in view, giving first consideration to the welfare of the children.

Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in *Dart v Dart* [1996] 2 FLR 286, 303, the statutory jurisdiction provides for all applications for ancillary financial relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. ...whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering paragraph (f), relating to the parties' contributions. This is implicit in the very language of paragraph (f): "the contributions which each ... has made or is likely ... to make to the welfare of the family, including any contribution by looking after the home or caring for the family"....

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 than 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."

[30] A wide variety of reported cases has now been generated on this issue, although the basic principles remain the same. It is also clear that the court does not apply a fractional approach,¹⁰ although the court should check any proposed capital result

¹⁰ See eg *Dart v Dart* [1997] 1 FCR 21, [1996] 2 FLR 286, CA, although there has been a greater trend towards equality since the case of *White v White* [2001] 1 AC 596, [2001] 1 All ER 1, HL: see *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] Fam 103, [2003]

against the yardstick of equality: See **White v White**.

[31] A review of the learned judge's reasoning in the court below reveals that she was well seised of these relevant legal principles. After concluding that the Ruthland Vale Property was indeed matrimonial property, she considered the evidence surrounding the acquisition and development of the property. The appellant takes no issue with this assessment. The learned judge clearly accepted that the appellant was the initial mortgagor for the purchase of the land in April 2015 and that by August 2015 the respondent was joined as a co-mortgagor for the advancement of a further \$232,000.00 for the construction of the home. She further accepted that the mortgage was serviced through the monthly deductions from the appellant's salary (representing 80% of her salary). The learned judge however also accepted that the respondent would have contributed his talents and contacts to assist in the construction of the home and would have assisted in the upkeep of the home allowing the appellant to service the mortgage payments.

[32] At paragraph 23, 25 and 27 of the judgment the judge makes the following critical findings:

"[23] ...the case law has seen this principle of equality as merely a yardstick for the assessment that is to be undertaken by the court. Having said so, in this case I am satisfied that there are "ample reasons to depart from awarding an equal share". As the case of *Jacqueline Cowan v Michael Cowan* clearly indicated, "the consistent theme is the search for the goal of a fair outcome...the decision in *White v White* clearly does not introduce a rule of equality. The yardstick of equality is a cross check against discrimination. Fairness is the rule ..."

[25] In agreeing with these propositions of the law and in considering the provisions of section 34(1), I am satisfied that I must take into consideration that even on the respondent's own evidence his contribution to the construction of the home was only for a specific period. In the evidence elicited on cross examination he had this to say:

'When the Ruthland Vale Property was being constructed I was paid at the rate of \$200.00 per day. With that money I would pay utilities at Ruthland Vale and contribute towards groceries...I paid the workers for a period of two weeks who were doing the finishing...I bought BRC and I bought steel and I bought cement.'

[27] In this court's mind this was a clear acceptance by the petitioner herself to the contribution made by the respondent, and when 'the marriage ends fairness requires that the assets of the parties should be divided so as to make provision for the parties' housing and financial needs taking into account the factors set out in the legislation.' Therefore, when this court considers all the circumstances of the case and the relative positions of

4 All ER 342; and *H-J v H-J* (financial provision: equality) [2002] 1 FLR 415. See also *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 3 All ER 1.

both parties and the contribution made by the respondent, this court finds that the respondent is entitled to a 35% interest in the value of the Ruthland Vale property.”

[33] It bears repeating that the appellant takes no issue with these findings.

[34] These findings clearly demonstrate the following:

- (1) That the learned judge was well aware of the relevant legal principles adumbrated in the Act and applied in the case law.
- (2) That the learned judge was aware that there was an existing mortgage on the property which was being solely serviced by the appellant.
- (3) That although the learned judge acknowledged the non-pecuniary contributions of the respondent, she was very satisfied that it did not equate to or outweigh the appellant’s contribution.
- (4) That in awarding the respondent only a 35% interest in the property, the natural consequence would be that the appellant would be entitled to the greater share i.e. 65% interest.

[35] There can be no doubt that in ancillary relief proceedings a spouse’s respective share in matrimonial property is generally calculated based on net equity after the mortgage and other secured loans have been deducted from the current market value. Although, there appears to be a dearth of case law which specifically mandates or prescribes this approach, local and regional case law is replete with examples of judges adopting and applying this process. Courts use net equity to apportion shares in matrimonial property during divorce proceedings to ensure a fair distribution based on the true value of the asset. This method considers the actual value of the assets, including any outstanding debts or liabilities, to determine the fair share each spouse should receive. The principle of equitable distribution aims to provide a fair and just division of marital property, which is not necessarily equal but rather reflects the true value of the assets acquired during the marriage. In fact, despite diligent searches, I have been unable to find one example where a court considering an ancillary relief application would have consciously calculated a party’s share in matrimonial property purely on the basis of market value when there is an outstanding mortgage or other secured debts against the property.

[36] The apparent dearth in legal authority may well be attributable to the fact that the rationale for this approach is perhaps too obvious to state. Equity refers to the difference between the current market value of an asset and any outstanding debts or liabilities associated with that asset. In simpler terms, equity is the portion of the asset’s value that one actually “owns” after subtracting any loans or mortgages. Equity matters in ancillary relief proceedings because it represents the true value of

an asset, which must be divided between the spouses.

[37] The court and the parties should, unless there is a cogent explained reason otherwise, generally use the net value after liens, not the gross value of the property. A house worth \$100,000.00 that has a mortgage of \$80,000.00 remaining is, by way of example, only worth \$20,000.00 in divisible marital equity. It follows that the ultimate goal of the court is to achieve a fair outcome that meets the needs of both parties, using net equity as the basis for calculating the value of property interests. The process involves:

- (1) Valuation – determining the property's current market value usually through professional appraisal or valuations.
- (2) Deductions – subtracting the outstanding mortgage balance and other debts secured against the property from the market value.
- (3) Net equity – the remaining amount is the net equity which is the amount considered the matrimonial asset available for division between the parties. The court would then apply its broad discretion to determine this net equity considering the factors outlined in section 34 of the Act. The final proportions would be adjusted to achieve a fair outcome based on all of the relevant circumstances.

[38] Moreover, from a practical standpoint, applying market value rather than net equity would effectively derail the result intended by the learned judge in her ruling as the following mathematical will demonstrate. Utilizing the stated value of the Ruthland Vale Property, the respondent's 35% interest would be calculated at \$102, 550.00 (35% of \$293,000.00). The natural consequence of this would mean that the appellant's 65% interest would be calculated at \$190,450.00 (65% of \$293,000.00).

[39] However, the property is encumbered by a secured mortgage which both parties are currently legally obliged to satisfy. If, consistent with the clean break principle, the appellant is unable to buy out the respondent and the property has to be sold (utilizing the open market value as at 2016), after outstanding balance on the mortgage is repaid, there would be negative equity ($\$293,000.00 - \$297,122.00 = -\$4122.00$). This is an important factor which, in my view, the learned judge was obliged to take into account because negative equity in the matrimonial property means the mortgage exceeds the property's value.

[40] Negative equity makes asset division more complex and presents a challenge requiring judges to come up with creative solutions to meet fairness. Courts will usually address this issue by aiming for a fair split. If neither party can afford the property or the associated debt, or if there are insufficient other assets to offset the negative equity, the court may order the sale of the home. Both parties would then

typically be ordered to split the remaining mortgage shortfall as a marital debt. Alternatively, one spouse might take full ownership, but this usually means they take on the entire mortgage, which may prove difficult. Another alternative may be a deferred sale, but the maintenance of the mortgage would need to be addressed, and arrangements made for who is responsible for payments and how any future (positive) equity or remaining debt would be handled perhaps through a lump sum or share of other assets. A further alternative may involve offsetting the debt so that the spouse who keeps the property may be awarded a larger share of other marital assets (such as savings, investments, or a larger share of pensions) to compensate for taking on the full liability of the negative equity.

- [41] Ultimately, fairness is key and the court was required to look at the overall financial picture as it relates to the Property and the entire matrimonial pool (assets and liabilities) as a whole. It is clear from the learned judge's reasoning that the full implications of the outstanding mortgage on the Ruthland Vale Property were not considered or properly weighed. Applying the learned judge's order, the appellant would be obliged to pay the respondent the sum of \$102, 550.00 representing the value of his 35% share of the open market value of the Ruthland Vale Property ignoring the existing mortgage which encumbers the Ruthland Vale Property as well the parties jointly (and presumably severally). To the extent that this was done, I am satisfied that this was an error of principle which warrants the court's interference and the setting aside of this award.

Disposition

[42] In light of the foregoing, I make the following orders:

- (1) The appeal is allowed.
- (2) The order of the learned judge in which she awarded the respondent a 35% interest in the house at Ruthland Vale to be calculated on the value as stated in the valuation of Franklyn Browne dated 7th July 2016 is set aside.
- (3) The respondent is entitled to a 35% interest in the net equity of the Property at Ruthland Vale.
- (4) The appellant will have its costs to be assessed by a judge of the High Court if not agreed within 21 days.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Cadie St. Rose-Albertini
Justice of Appeal [Ag.]

By The Court

Chief Registrar