IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS CIVIL DIVISION

CICA (Civil) Appeal No. 0026 of 2022
(Formerly Cause No. FAM 0143 of 2015)

BETWEEN

D.S.

APPELLANT

AND

N.J.

RESPONDENT

Before: **The Rt. Hon. Sir John Goldring (President)**
The Hon. John Martin KC, Justice of Appeal
The Rt. Hon. Sir Jack Beatson, Justice of Appeal

Hearing Date: **14 September 2023**

Judgment Circulated: **2 November 2023**

JUDGMENT

Goldring JA, President

Introduction

1. This appeal is brought by leave of the Chief Justice. The litigation between the parties, whom I shall refer to as husband and wife, has been acrimonious and prolonged and hardly reflects well on either party. No doubt, moreover, substantial legal costs have been and are being incurred. This is the second time the case has been before this Court. In its judgment of 10 December 2020, the Court found that "*at the time of separation the Husband should be considered to have a half share in Yates Drive*," which was the former matrimonial home. The first issue in the appeal concerns the proper date of valuation of Yates Drive. Mr Chapman on

behalf of the wife submits it should be valued as at the date of the parties' separation in July 2015, not when it was sold in May 2023 for $460,825 after repayment of the mortgage and associated costs. The second issue is a broader one. On allowing the appeal, this Court said that the "*parties should now seek urgently to agree what should happen in the light of this judgment. If (most unwisely) they cannot, the case will have to be remitted to the Grand Court for consideration of all the issues arising as a result of the judgment (including those relating to the rent paid by the Appellant until he left 45 Yates Drive).*" The second issue concerns how the Grand Court should approach the matter, the parties not having agreed.

2. The wife sought to appeal this Court's judgment. The Judicial Committee of the Privy Council refused leave, stating, among things, that the proposed appeal does not raise an arguable point of law.

3. This judgment should be read with the judgment of 10 December 2020.

The background

The marriage

4. The husband was previously married. Their relationship began in or around June 2002. They married on 24 June 2011. They separated on 23 July 2015. The Respondent filed her petition for dissolution of the marriage on 23 June 2015. The marriage was dissolved on 22 April 2020. There were no children of the marriage. Although each party had children, their ages are such that for present purposes it was not necessary for the judge to take them into account.

The litigation between the parties

5. In order to keep this judgment in bounds, I shall merely highlight some aspects.

6. On 13 January 2020 Justice Gunn (Acting) handed down her judgment. Among other things, she found that 45 Yates Drive, which was in the wife's sole name, was not a matrimonial asset but an asset of the wife. She said (§ 74 and following):

> "*74. As I have already stated, the husband asks that the court orders the transfer of 45 Yates Drive into his sole name. I find that such an order would be inequitable given that it is a non-matrimonial asset which the parties always intended to remain the wife's property.*

75. Instead I find that a lump sum payment by the wife to the husband together with his half share of the other matrimonial assets will provide him with the necessary funds to secure new accommodation and maintain himself until he secures new employment. Given the husband's current financial situation and their respective living arrangements, the husband has until 31 March 2020 to vacate the property by which time the wife shall have paid to him the sums ordered below.

76. I take into consideration that the husband is liable to pay the wife occupational rent since 1 October 2015. At the current rate of CI$2,000, up to, 31 December 2019 (51 months), the total amount due is CI$102,000. Even at the husband's "contribution" level (CI$1,500) the total due would be CI$76,500, which I accept the husband can ill afford, in part as a result of the criminal proceedings. Also, I accept that the husband paid approximately CI$9,000 per year towards maintenance of the house since the wife vacated the property. If the husband is required to pay the full occupation rent then he will be left with no funds with which to secure new accommodation. I am also mindful that the husband has had the benefit of the entire proceeds of the sale of the Range Rover.

77. Rather than specific set-offs, I will order that the wife pay a lump sum of CI$15,000 which together with his share of the matrimonial assets will give him the liquidity to start his journey to independent living.

78. Consequently, I order that -

(i) The wife shall pay the husband a lump sum of CI$15,000 on or before 31 March 2020. Any arrears of occupation rent accrued since the matter was heard in September 2019 shall be set-off.

(ii) The husband shall vacate 45 Yates Drive together with his personal possessions on or before 31 March 2020. Occupation rent at CI$2,000 per month shall be payable for January, February and March 2020 unless the husband provides a minimum of 14 days' written notice of his intention to vacate the premises sooner, in which case occupation rent shall be prorated.

(iii) The wife shall have the jewellery identified in paragraph 25(f) above appraised by a suitable individual/business agreed by the parties within 28 days of this judgment. If a suitable person cannot be agreed then the parties shall each provide the court with one proposed appraiser together with short submissions as to why that person/business is more suitable by 31 January 2020 and the court will select one for them. The cost of the appraisal shall be borne by the parties equally. The wife shall pay to the husband a lump sum of 50% of the current value said jewellery or, alternatively, transfer to the husband such of these items

that she wishes together with cash to the value of 50% of their total value on or before 31 March 2020.

(iv) The wife shall obtain a calculation of the pension benefits accrued with her current pension provider between June 2011 and August 2015 and serve same on the husband by 31 January 2020. The wife shall pay to the husband a lump sum of 50% of the total benefits accrued under that plan on or before 31 March 2020. No allowance shall be made for the sums the wife subsequently withdrew from the account."

7. As I have said, this Court found that at the time of the separation 45 Yates Drive was jointly owned by the parties. It stated (at §§38 and 39), under the heading, "*What should happen now?*

> "*38. On 10 July 2020 the judge, among other things, ordered [the husband] to vacate 45 Yates Drive by 1 August 2020. He has done so. However, my conclusion means that he had the right to occupy the house without being liable to a mesne rent.*
>
> *39. The parties should now seek urgently to agree what should happen in the light of this judgment. If (most unwisely) they cannot, the case will have to be remitted to the Grand Court for consideration of all the issues arising as a result of the judgment (including those relating to the rent paid by the Appellant until he left 45 Yates Drive). If that has to happen, I think it sensible in all the circumstances, to order that the matter be remitted to Judge Williams for consideration. However, I emphasise that it really should be possible to avoid any further hearing*."

8. The parties did not agree. On 9 June 2022 the matter was before Justice Ramsay-Hale (as she then was) on the basis of the husband's summons to enforce the Court of Appeal's order. The parties were not represented. After some negotiation there was agreement, by which the husband agreed to a sum less than he had contended for. He subsequently changed his mind. The case was back before the judge on 22 June 2022. Again, an order was agreed (see §§3- 6 of Justice Ramsay-Hale's Reasons for Decision handed down on 28 March 2023). The order was in the following terms (as presently material):

> "*1. The…[wife] do pay the…[husband] the sum of $28,000 as and for a lump sum payment of $15,000 ordered to be paid by Gunn J(Ag) and repayment of the sum of*

$13,000 paid to her by the…[husband] as and for occupation rent, consequent upon the decision of the Court of Appeal;

2. With respect to the matrimonial home at 45 Yates Drive…BCQS to perform the valuation of the Property, the cost to be born equally…

3. The…[wife] shall purchase the…[husband's] half share of the net equity in the Property within 45 days of receipt of the valuation;

4. Thereafter the Property shall be placed on the market for sale by the…[wife]…;

…6. When sold, the proceeds of sale to be used as follows:

(a) to pay the existing mortgage at the RBC…and all associated fees;

(b) the balance of the proceeds of sale to be shared equally between the parties."

9. The wife refused to sign the order. On 28 October 2022 there was a further hearing before the learned justice. Mr Chapman was representing the wife. The husband was unrepresented. Mr Chapman sought to set aside and/or amend the previous order on the grounds that it was not workable and wrong in law. He submitted that the judge had failed to consider and apply the decision of this court, a matter which could only be determined on appeal. Following it, a further order (dated 28 October 2022) was made in the following terms [CB 6]:

"*1. THAT the…[wife's] summons be dismissed save in that the…[wife] is granted leave to appeal the Order of 22nd June 2022…with leave to extend time for so applying;*

2. THAT on the…[wife's] said summons: (a) the Order of 22nd June 2022…is varied to provide that the…[wife] has 30 days to pay monies due to the…[husband] pursuant to the terms of the said Order and (b) the…[husband's] summons is otherwise adjourned…"

10. In the Reasons for her Decision of 28 October 2022, handed down on 28 March 2023, the judge explained that the payment of $28,000 ordered to be paid under paragraph 1 of the order of 22 June 2022, reflected both the repayment of rent paid by the husband and the lump sum ordered to be paid under Gunn J's order. In response to the wife's submission that Gunn J ordered payment of $15,000 by way of a lump sum because she had found Yates Drive to be a non-matrimonial asset, the judge said (§28):

"*I explained to W that it was not open to me to go behind the Order for the lump sum to be paid in the circumstances where it had not been appealed or set aside by the*

Court of Appeal and that the decision of the Court of Appeal was that H had not been liable to pay any rent, and that the $15,000 which had been set off against the rent due under Gunn J's order had to be paid (repaid) to H."

11. As to the date of valuation of Yates Drive, the judge said that the date of separation was relevant to the question of what assets are considered matrimonial, but that it now had to be valued at the date of the Order of this Court for the sale of the property. She said (§§36-7):

> "*I considered that this was consistent with the principle that the passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property and is, therefore, subject to the sharing principle: see Moyston J [sic] in Rossi v Rossi [2007] 1 FLR 790 at [24.3] and in JL v SL (No. 2) at [41] and [42]: "obviously passive growth will not be shared other than equally…" In my view, it was inconsistent with the principle of fairness for H to be deprived of the benefit of the increased property values. The delay in valuing the property had, in any event, been brought about by W*."

12. The judge said she granted leave to appeal out of time on the basis that the Court of Appeal might disagree with her analysis.

Subsequent events

13. 45 Yates Drive has been sold for $975,000. The net sum after re-payment of the mortgage and associated costs is $460,825, which is currently held in court pending resolution of this litigation.

The date when 45 Yates Drive should be valued

14. Before turning to Mr Chapman's more general ground, I can deal quickly with his argument that the judge was wrong as to the right date to value 45 Yates Drive. If I may say so, it is a hopeless argument. The judge was plainly right for the reasons she gave. In its comment at §34 of its judgment, this Court was merely describing the interest the husband had in the property when the parties separated. It was saying no more than that. It was not saying that that is the date upon which the valuation of the property should be fixed. As at the date of separation the husband had a half interest in the property. That remained so until it was sold. The value of that interest fluctuated with the value of the property. Had the property reduced

in value between the separation and sale, the husband would have had to bear the loss. On the face of it, the husband's share is now represented by his half interest in the net proceeds of sale, namely $230,412.

15. Mr Chapman submits however, that it is not as straightforward as that. From 1 August 2020 until 31 May 2023, when the property was sold, the wife was living there. She alone was paying the mortgage. She also was paying for the upkeep of the property. She should, he submits, be credited with those, or some of those, sums. Had she not continued to pay the mortgage, there would, submits Mr Chapman, have been a 'fire sale.' Had she not maintained the property, its value on sale would be less. The husband has accordingly benefitted from those actions of the wife. She is entitled to something in respect of that. The merits of that argument are not for now.

16. As well as arguing that the judge was wrong about 45 Yates Drive, Mr Chapman submits that she failed to have regard to *all the issues arising as a result of the judgment*, as this court put it in §39 of the judgment. That required, submits Mr Chapman, that the Court considered whether the orders made by Gunn J could stand, they having been made on the mistaken basis that the wife had the entire interest in 45 Yates Drive. An example of that is the judge's failure, as he submits, to have regard to the fact that the judge ordered the wife to make a lump sum payment to the husband on the basis that he had no interest in 45 Yates Drive. It is inconceivable, submits Mr Chapman, Gunn J would have ordered payment of that lump sum had she found the husband had a half interest in 45 Yates Drive. The judge was wrong to think she could not reconsider that. It was plainly an issue, submits Mr Chapman, which arises as a result of the judgment.

17. The husband submits that the judge was right to limit the scope of her decision in the way she did. She rightly limited them to issues surrounding valuation, sale of property and things around that. The wife is seeking to open the whole matter. The wife is seeking to open issues which were well known the Court of Appeal. It is clear the Court would not have intended such a wide investigation. Had it, it would not have said what it did in the last sentence of §39.

18. I agree that Mr Chapman's argument has some force in respect of the lump sum. §§75-77 of Gunn's J's judgment do suggest that had her finding in respect of 45 Yates Drive been different, she would not have made the lump sum order. Reconsideration of that order is

something that arises as a result of the Court of Appeal's judgment. It did not require the wife to appeal Gunn J's judgment, as the judge suggested in her Reasons.

19. Mr Chapman's submission goes further, however. He submits that as a result of the Court of Appeal's decision, the husband would be leaving the marriage with a substantially greater sum than awarded to him by Gunn J, the wife with substantially less. He submitted that required the judge to reconsider whether such an outcome was consistent with the requirements of fairness as set out in the authorities. It required, in other words, the judge to consider sharing, compensation and need. Such consideration also arises as a result of the Court of Appeal's decision, submits Mr Chapman.

20. Mr Chapman has set out in schedule form, as he submits, the unfair consequences of the judge's approach. While the husband disputes the schedules, and they do not on any view set out the entire position, they are illustrative of the broad-reaching consequences of the judge's approach.

21. Not without considerable regret, I have been driven to conclude Mr Chapman is right. This court remitted the case to the Grand Court for that court to consider all the issues arising from its finding in respect of the matrimonial home, a finding which on any view must stand. Had it been a simple of matter of the mathematics, as the husband submits, the Court would no doubt have decided the issue itself. While I can well understand why the judge sought to restrict the scope of her approach, such a restriction does not reflect the judgment and subsequent order of this Court. Her approach to the topic of the lump sum illustrates the problem arising from such a limited approach. What is necessary is consideration in the round of the consequences of the order of this Court.

22. In the circumstances therefore, I have concluded that the matter must, once again, be remitted to the Grand Court for it to consider all the issues which arise as a result of this court's original order. In doing so it has to abide by the Court of Appeal's ruling that 45 Yates Drive was matrimonial property held in equal shares. While in my view there is no alternative but to order a further remission to the Grand Court, I make such an order with considerable regret. It fear it will result in further, prolonged and bitter litigation, something it is clear the judge was doing her best to avoid. I fear too that legal costs will soon substantially diminish the sum available to the parties, a sum which is not large in the first place. This case cries out for compromise.

23. For the reasons I have given I would allow this appeal.

24. While the wife has failed in respect of the date of valuation of the matrimonial home, her appeal in the main has been successful. She should in my judgment have the costs of this appeal.