IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: FAM 232 OF 2020

BETWEEN:

ALBERT STANFORD SCOTT

PETITIONER

AND:

INDIANA MATILDA WATSON-SCOTT

RESPONDENT

IN CHAMBERS

Appearances: Mr. James Kennedy for the Petitioner
Mr. Clyde Allen for the Respondent

Before: Hon. Justice Margaret Ramsay-Hale

Heard: 8 December 2021, 11 January 2022, 3 -4 February 2022

Written Closing Submissions: 21 February 2022.

Draft circulated: 1 March 2023

Judgment Delivered: 10 March 2023

HEADNOTE

Ancillary Relief - whether matrimonial home property brought into the marriage by one party a marital asset - whether departure from principle of equality justified - dissipation of assets - principles on which dissipated assets may be added back to the marital estate

Costs - indemnity costs - GCR O 62. r.11 - knowingly false case advanced - whether abuse of the court's process justifying indemnity cost award - conduct unravels all

JUDGMENT

Introduction

1. Before the celebration of their marriage on 10 April 2004 and at all times thereafter until their separation, the parties, to whom I shall refer as husband and wife for convenience, lived at premises at a Tropical Gardens address in George Town, Grand Cayman, which was owned by the wife before the marriage and was subject to an existing mortgage.

2. The husband, a Jamaican national, is a construction worker who has lived in the Cayman Islands since 1994. At the time the parties met, he was employed with the well-known local construction company of Arch and Godfrey. The wife was a civil servant, working at the Legislative Assembly. During the course of the marriage, the husband and wife acquired a piece of land in Breakers for the sum of $50,000 (the "Land"). It was financed with a loan from the Credit Union and was registered in both their names as joint proprietors.

3. There were no children of the marriage but they each had children who lived, for different periods, with the husband and wife in the former matrimonial home (the "FMH").

4. In 2016, the wife travelled to the United States while the husband remained in the FMH with one of her adult sons. In 2018, while the wife remained overseas, the husband left the former matrimonial home and moved into rented premises. The wife eventually returned to the Cayman Islands and to the FMH. It appears from the evidence that they remained cordial.

5. In September 2020, the husband was approached by a prospective purchaser for the Land who later advised him that the Land had been sold. The husband made his own inquiries and discovered that the Land had been sold to a purchaser for value for $70,000 in March 2020. On the heels of that discovery, he filed a Petition for Divorce on the ground that the wife, among other allegations, had behaved unreasonably in selling the Land without his knowledge or consent.

6. Given that the wife contends that the husband had consented to the sale of the Land, the Petition was proved on 3 May 2021 on the grounds that there were fundamental and irreconcilable differences between them as a result of the wife's unreasonable behaviour and that the parties have been separated since 2018, the wife consenting, in any event, to the divorce.

7. It is not necessary to take the children into account in these proceedings because of their ages. The only issues for resolution are the extent to which the assets of the parties are to be treated as matrimonial assets and, if so, the extent to which those assets should be divided on anything but an equal basis.

The Husband's Position

8. The husband's position is that FMH which they shared from 2000 until 2018 and the Land which was registered in their joint names and was acquired during the marriage were both marital assets at the date of separation. The husband contends that the proceeds of the sale of the Land should be added back to the marital pot as an asset available for distribution and that the marital assets be divided between them equally to effect a clean break.

The Wife's Position

9. The wife's position is that the FMH is not a marital asset as it was not the product of the parties' common endeavour but was non-matrimonial property brought into the marriage by her to which the husband contributed nothing. She contends that there was never a shared intention that the FMH would become matrimonial property as the husband had always understood and agreed that the property was intended to benefit her sons after her death.

10. The wife's position with respect to the Land is that it was purchased in the husband's name and was always intended to be the husband's property. Her name was added to the Title because it was required by the Credit Union from whom he had borrowed the money to pay for the Land (the "Loan"). She later became beneficially entitled to an unequal share of the property having paid the greater portion of the Loan. In consideration of her contribution to the Land and the further sum of $10,000 which she had lent him to develop a property owned by him in Jamaica

which he had not repaid, they had agreed that she should sell the Land and keep proceeds of the sale and he would keep the property in Jamaica.

The Law

11. The relevant legislation in the Cayman Islands is contained in sections 19 and 21 of the **Matrimonial Causes Act.** Section 19 provides that:

> *"...in dealing with all ancillary matters arising under this Law, the Court shall have regard, first of all to the best interests of any children of a marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties."*

12. Section 21 provides that:

> *"...[T]he Court shall, as appropriate, make orders for*
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> *...*
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> *(b) the disposition of matrimonial property, including the matrimonial home..."*

13. In *NJ v DS* CICA 0003 of 2020, the Court of Appeal observed that the law in this area is well-settled following the decision of the House of Lords in *White v White* [2001] 1 AC 596 and that the primary aim of the Court in is to achieve fairness, taking all circumstances of the case into account.

14. Goldring P., who gave the judgment on behalf of the Court, reviewed the leading cases commencing with the case of *White* which changed the of landscape on how property is dealt with on divorce. The learned President of Appeal cited the well-known passage from the opinion of Lord Nicholls of Birkenhead who stated at page 605 that:

> *"...whatever the division of labour chosen by the husband and wife...fairness requires that this should not prejudice or advantage either party when considering para. (f) of section 25(2) of the [Matrimonial Causes Act] 1973 [of England and Wales]. This is implicit in the very language of para. (f):...the contribution which each of the parties has made or is likely...to make to the welfare of the family...If in their different spheres, each contributed equally to the family, then in principle*

it matters not which of them earned the money or built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer....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."

15. The learned President also considered the conjoined appeals of *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 in which Lord Nicholls gave further guidance on financial remedy cases introducing three strands of fairness. Goldring said this at para 6 of the judgment:

> *"6. In Miller v Miller and McFarlane v McFarlane [2006] 2 AC 618, Lord Nicholls identified three elements of fairness: financial need, compensation and, as presently relevant, sharing. As to that, Lord Nicholls said (paragraphs 16 and 17):*
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> > *"16 ...[The] "equal sharing" principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals...The parties commit themselves to sharing their lives. They live and work together. When their partnership ends, each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary. Fairness requires no less. But I emphasis the qualifying phrase: "unless there is good reason to the contrary." The yardstick of equality is to be applied as an aid, not a rule.*
> >
> > *17. This principle is applicable as much to short marriages as to long marriages...A short marriage is no less a partnership of equals than a long marriage. The difference is that a short marriage has been less enduring. In the nature of things this will affect the quantum of the financial fruits of the partnership."*
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> > ...
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> > ...
> >
> > *"22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other*

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> *property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle, the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been."*

16. Turning to the Cayman authorities, Goldring P cited the summary of the Cayman position set out by Chadwick P, then President of the Court of Appeal, at paragraph 31 of *Wight v Wight* [2010] (1) CILR 60 who said this at paragraph 31 of the judgment:

> *"The Matrimonial Causes Law, unlike the English statute, does not mention "the contribution of the parties." It speaks [in section 19] of "the deserts of the parties." This does not affect the principle to be considered in ancillary relief proceedings in the Cayman Islands. The courts in the Cayman Islands have always taken into account the contribution of each party in deciding on the division of assets."*

17. Goldring P also cited the decision of the Court of Appeal in *McTaggart v McTaggart* [2011] (2) CILR 366, where Chadwick P said at para 33 et seq:

> *"33. It is...important to keep in mind when considering observations made by judges in England and Wales...that the underlying statutory provisions here, although similar to, are not the same as those in England and Wales. Section 23(1) of the Matrimonial Causes Act 1973 provides that, on granting a decree of divorce or at any time thereafter, the court may make..."(a) an order that either party to the marriage shall make to the other such periodical payments...as may be specified in the order; (b) an order that either party...shall pay to the other such lump sum or sums as may be so specified." Section 24(1) provides that the court may make a property adjustment order, that is to say..."(a) an order that a party to the marriage shall transfer to the other party... property to which the first-mentioned party is entitled..."*
>
> *34. The 1973 [Matrimonial Causes] Act [of England and Wales] does not (in terms) require the court to give separate consideration to the question- What order (if any) should be made for the disposition of matrimonial property? - although, in practice, the court will usually do so. Section 21 of the Matrimonial Causes Law, on the other hand, plainly does require the court to give separate*

consideration to that question. The court must do so in order to decide what order (if any) it is appropriate to make under section 21(b)...

35. The need to determine which of the parties' assets are to be treated as matrimonial property invites the question: As at what date is that determination to be made? As I have said, "matrimonial property" is not a concept which is defined in the Law. But it is, I think, generally accepted that- as Lord Nicholls observed in Miller...- its distinguishing feature is that it is the "financial product of the parties' common endeavour..." On that basis, it may be expected that a line can be drawn at the date of final separation..."

18. Goldring P highlighted the decision of the Grand Court in *B-H v H* [2009 CICR 185] in which Acting Judge Foster observed at para 23 of the judgment:

"23 ... in determining whether particular property is to be considered matrimonial property or separate property of one of the spouses...the court must have regard to all the circumstances relating to the property concerned. Such circumstances include, but are not confined to, the circumstances and timing of its initial acquisition, the party by whom and how it was acquired, the apparent intentions of the parties with regard to and the use of the property during marriage amongst other factors. For example, it does not, in my opinion, automatically follow that just because the property concerned was acquired solely by one spouse prior to the marriage, whether by purchase, gift or inheritance, and the title remained throughout the marriage in the name of that spouse, the property may not nonetheless in some circumstances be considered to have become matrimonial property -"put into the melting pot of the marriage...."

19. In *NJ v DS,* the wife had purchased the land on which the matrimonial home was built from her own resources. The property was registered in her name only and she was solely responsible for the mortgage which had financed the construction of the dwelling. In the divorce proceedings, the husband put his claim to a half share of the matrimonial home on the footing that he had contributed significantly to the construction costs of the matrimonial home and, thereafter, to the mortgage. The Judge at first instance accepted that the husband had made some contribution to the household but held that he had not acquired a beneficial interest in the matrimonial home.

20. In allowing the husband's appeal and finding that, at the date of separation, the husband was entitled to an equal share in the matrimonial home, Goldring P observed that that there was no requirement for a spouse to have acquired a beneficial interest in property. The learned President summed up the proper weight to be given to evidence of contribution when determining whether property was a matrimonial asset:

> *"31. ... The position in short appears to have been this. The Appellant and Respondent were living together as husband and wife in their matrimonial home. The Wife was paying the mortgage. The Husband was contributing something towards the running costs. That, as it seems to me, was clear evidence that they were, in the language of Lord Nicholls, engaged in a 'common endeavour' as far as their home concerned. The fact that the Husband's contribution may have been less than that of the Wife's does not change that. Be that as it may, the Husband's contribution towards the matrimonial home's upkeep must have eased the financial burden upon the Wife of paying the mortgage."*

21. The principles to be derived from the judgment of the Court of Appeal in *NJ v DS* and the cases reviewed by the learned President may be summarised as follows:

(i) Marriage is a partnership of equals: *Miller;McFarlane;*

(ii) Property jointly acquired during a marriage is matrimonial property: *Miller: McFarlane.*

(iii) If in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money or built up the assets*: White v White*

(iv) When the marriage ends, each is entitled to an equal share of the assets of the partnership: *Miller;McFarlane;*

(v) A short marriage is no less a partnership of equals than a long marriage: *Miller;McFarlane*

(vi) As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so*: White v White*

(vii) The courts in the Cayman Islands have always taken into account the contribution of each party in deciding on the division of assets*: Wight v Wight*

(viii) whether property acquired before marriage is matrimonial property depends on a number of matters including the nature and value of the property: *White v White*

(ix) Property which was acquired by one party before the marriage and the title remained in the name of the party may become matrimonial property: *B-H v. H*

(x) The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage and should normally be treated as matrimonial property for this purpose: *Miller; McFarlane.*

The Husband's Evidence

22. The husband's evidence is that from the time he moved into the FMH he undertook many building projects. The first among these was a project to expand the home, originally a three bed two and half bathroom house, which he did by converting the garage and one of the dining rooms into two self-contained units for rent. His evidence was that he did most of the work himself and paid for the electrical, plumbing and tiling work that he could not do. He said he paid her cousin, Colin, for work done in converting the garage. The cousin had done the measuring, decided where the kitchen would go, and did all the electrical and plumbing work which he paid for. He said in all he paid Colin between $10,000 and $11,000.

23. He continued to do work on the FMH after the marriage. After the house was damaged, during the passage of Hurricane Ivan in September 2004, it is his evidence that he did all the sheetrock work needed to repair the home and he and the wife hired workmen to do the roofing and tiling. He says the wife obtained a grant of $10,000 from the Cayman Islands Government which covered the cost of the repairs to the roof.

24. It is his evidence that, over the years and up until he left the matrimonial home in 2018, he did all the maintenance work around the home, including painting and landscaping, and paid for necessary plumbing repairs. His trade is "finishing work" and, at his own cost, he added decorative exterior foam trim at the windows and foam quoins at the corners of the house with the help of his co-workers.

25. In addition, to the work he did on and around the house, the husband asserts that he also contributed to the household expenses while they were cohabiting and throughout the marriage. He said he gave her $500 to $600 a week towards household expenses. He said that when they

met, the wife's youngest child was 2 years old. The wife had a lady who used to come in and look after the children. When that lady stopped worked there, a woman called Keisha came to look after the children and he paid her at the rate of $125 per week. Mr. Allen asked the husband if he thought this Court would believe they paid a helper $600 a month. The husband replied that some people are still earning that right now, which I do believe.

26. He said he gave his wife $500 to $600 a week consistently until he lost his job with Arch and Godfrey in 2008. After that, he earned an average of $800 a week and would give her between $400 and $500 a week depending on his income, and *"if it drop to $350, she complain."* He described the wife as being always *"at him"* for money. As he put it, *"if I leave my pants on the floor, she take money out of my pants pocket".* He said that, even after she sold the Land behind his back, he still gave her money.

27. He refuted the suggestion in cross-examination that he had not worked after leaving Arch and Godfrey stating that he continued to work in construction as a sub-contractor, working with a small crew. He said he did *"price work"* in masonry, sheetrock, and finishing on various construction sites earning an average of $800 a week. He produced a letter from Frank Hall Homes ("FHH"), a real estate development company, which detailed his contract them between 2010 and 2013 to do finishing work on houses they were building at $1,500 a house. He said the average income he earned from that job was $2000 a month but he could earn more per house if the purchaser of the house contracted him to add decorative exterior mouldings. During this period, he did other work with FHH and also did jobs on other projects including the Shetty Hospital. It was his evidence that he continued to work in construction thereafter and up to this day.

28. In 2007, he bought the Land. It was his evidence that he paid $12,000 down and borrowed $50, 715 from the Credit Union, the Land being the security for the loan. He said he was responsible for the loan payments. He accepts that, on one occasion, it fell into arrears but says he brought the account up to date.

29. In 2012, on the advice of the Credit Union loan officer, he and the wife paid off the balance of the loan. He recalled that she paid $15,000 and he paid $5000. He later gave her back between $7000 and $8000 at the urging of the loan officer who said he should pay back the $15,000 which had been taken from the wife's share account.

30. According to the husband, the denouement of the marriage began in 2016 when the wife traveled to the United States and did not return. He remained behind in the matrimonial home with one of her sons. He said that, before she left, she took his belongings out of their bedroom and gave the room to her son, leaving him to sleep in the living room.

31. In 2018, when one of the bedrooms became free, he was prevented from moving into it by the son to whom the wife had given *"control of the rents"*. Instead, the son rented that room to one of his friends who subsequently turned the living room into a *"gambling house"* right where he slept. He said he left the home because he *"could not take the embarrassment."*

32. He denied the suggestion made in cross-examination that he had moved out of the bedroom in 2010 and refused to have anything more to do with the wife, stating that they enjoyed marital relations up until 2015.

33. He also denied that he had announced that he was taking his pension and going back to Jamaica. He explained that he took early retirement and that his pension which was then in the sum of $40,000 USD, more or less, was paid into a joint account he held with the wife in the Victoria Mutual Building Society in Jamaica ("VMBS"). He said that they both travelled to Jamaica and both returned to Cayman and to the matrimonial home, though on different dates. He did not understand why the wife would say the marriage ended in 2010, as she had said in Jamaica that she wanted to renew their vows she had said in and she *"buy a big ring"* and, on their return to Cayman they *"renewed their marriage"* and had *"a big party in Tropicana Crescent."* His account was not challenged.

34. He said he had no intention of divorcing the wife when he left the home in 2018. His decision was made when he discovered in September 2020 that she had sold the Land in *"behind his back"*. As

he told it, someone had approached him and expressed interest in buying the Land. That person made inquiries and later reported to him that the Land was already sold.

35. He made his own inquiries and, thereafter, instructed attorneys who filed the petition for divorce and an made an application to the Court for an order that the wife account of the proceeds of sale of the Land and an injunction to restrain her from disposing of the FMH.

36. The husband rejected the suggestion that he had agreed with the wife that she could sell the Land and keep the proceeds because she had repaid the greater part of the loan and had given him $10,000 to assist in building a dwelling on property he owned in Jamaica in 2004. He insisted there was no such agreement.

37. He said that it was he, and not the wife, who had made the majority of payments on the loan. He also said that she had only given him $4000 in 2004 which he had used to buy some materials and pay for labour and material to build a *"one room"* on property owned by his father so his father, who had been living in a small wooden dwelling, could live more comfortably and that he had paid her the money back over time.

38. He also said he had no interest in the property on which his father lived. It had never been conveyed or registered in his father's name and was now occupied by his siblings who paid the property taxes due in the name of the original owner which would, as I understand his case, give them presumptive ownership of the property.

39. He also rejected the suggestion that in pursuance of the agreement that she could sell the Land and that he had attended with his wife on the Notary Public to have the instrument of Transfer notarised. He recalled an occasion when he visited his wife who had agreed to help him get his Caymanian status on the basis of their continuing marriage. He said he had signed some documents related to his immigration application but he had refused to sign it another document she gave to him because it was unrelated to the immigration matter.

The Wife's Evidence

40. The wife's evidence was a complete traverse of the evidence of the husband save for the date on which they were married. Her evidence was that she had lived in the FMH since 1991. She and the husband got together in 1999 and began cohabiting at the FMH in 2000. She said she told the husband right at the outset that the house was for her sons and he agreed and had reassured her sons that he *"didn't come to take anything."*

41. It was her evidence that the husband did not do any work on the FMH. She said he was only skilled at "finishing work" and that the garage had been converted by her cousin, Winston "Colin" Rennis, before the husband had moved into the house. She exhibited an invoice dated 2000 and said she had paid for all the work done. An extra rental unit had been created in the living room sometime later, by her son before he left home to live with his wife.

42. It was her evidence that she paid for the daily upkeep of the home and for all the gardening and maintenance work. She produced a letter from an agency called Affordable Care which stated that they had provided the wife with *"domestic duties"* on a daily basis when the wife's children were younger and provided a monthly yard cleaning service. In 2004, she had received $75,000 which she used to fix the FMH, to replace her car and furniture *"and everything else".* It was from that $75,000 that she had given her husband $10,000 to help with the construction expenses of a dwelling he was building in Jamaica. It is her case that he had told her the Land was his and that he was building a house in Jamaica for their retirement.

43. She was emphatic that her husband never gave her any money towards the household as he said in his evidence. She said that he would buy things for himself and his family and cook for himself. When she asked him for money he would tell her that she knew Arch and Godfrey did not pay much and that he had to take care of his father, his baby mother and his children. At other times, he would remind her that she was collecting rent. She said after he lost his job at Arch and Godfrey, he did not work. Her case as put to the husband in cross-examination was that all he did after losing his job at Arch and Godfrey was sleep. She refuted the suggestion that he worked for himself as a sub-contractor because his residency status required him to have a work permit.

44. In answer to Mr. Kennedy in cross-examination, however, she allowed that *"he was buying a little food and showing a little love"* up until 2008 when she showed him her Will. At that point, she said, he *"practically stop"* and the marriage began to breakdown. By 2010, he had stopped sharing a bed with her, telling her he was impotent and later, he took his pension and declared he was returning home to Jamaica.

45. She accepted that the pension funds were put in their joint account in Jamaica and that she too had travelled to Jamaica but only because VMBS needed her to sign on the account because he did not have a job. She also accepted that he had returned to the FMH some 6 weeks later but insisted that she treated the marriage at an end.

46. In 2015, the husband applied to the Immigration authorities for the grant of Caymanian Status on the ground of Marriage to a Caymanian. Explaining why, since they were separated, she had signed a document in 2015 confirming to the Immigration authorities that they were still living as man and wife for the purposes of the husband's application, she said she did it in an effort to *"resurrect the marriage".* [1] After the application was refused, he reverted to his previous behaviour towards her which caused her to leave Grand Cayman in 2016 and go the United States.

47. She returned in 2018. It was her evidence that, in March 2020, her husband came to *"her house"* and asked her if she would help him with his Caymanian Status. She did not say yes or no but asked him about the FMH which was in need of repair: *"I tell him I need to sell the Land because my house need repair and he agreed."*

48. She said he agreed that she could take all the money because she had paid the greater part of the loan secured by the Land and had given him $10,000 towards the development of the property in Jamaica.

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[1] Para 18 of Affidavit of 29 July 2021

49. They then arranged for the husband to sign certain Immigration documents for the status application and on 11 March 2020, they went to the Notary Pubic together to get both the "*Immigration paper*" and the *"land paper"* witnessed. These documents, which were exhibited by the wife, were a form of Affidavit which the Immigration authorities provide to applicants for status on the ground of marriage and an instrument of Transfer for the Land.

50. According to the wife, the Notary, Mr. Norman Wilson, returned to his office very late in the afternoon. The husband, who was pressed for time as he had to pick up his police certificate from the police station, told Mr. Wilson, *"I have to leave, she* [the wife] *can sign for me."* Mr. Wilson had replied, *"No. I don't like that",* but the husband had assured him, *"She can sign. She always sign for me."*

51. It is accepted that she signed his name on the Transfer and that Mr. Wilson completed the Certificate of Identification attesting to the signatures on 11 March 2020 and attached his notarial seal.

52. The Notary Public, Mr. Wilson, gave evidence on the wife's behalf. He said he knew the wife, who he knew as Bev, for some 15 to 20 years. He would see her whenever he went to the Legislative Assembly where she worked which he did often to pick up copies of the Gazette. Their relationship was cordial and he did not know her to be dishonest.

53. He read over a letter he wrote to Mr. Allen which he said set out his best recollection of the matter. He stated that on 11 March 2020, he met the wife in the parking lot at his office. It was drizzling. She proffered two documents and said she wished him to witness some signatures. He saw that the document was *"a transfer/conveyance sort of thing"* and asked her where her husband was. She pointed to a vehicle in the parking lot and said her husband was there. He accepted that he did not know the husband and would not recognise him if he saw him on the street. He asserted, however, that he could *"vividly see the person"* who was sitting in the car and offered belatedly, in answer to the Court, that the man in the car looked like the man in the passport.

54. He said he spoke to him and told him, *"You have to sign this. You have to be here in my office"* but the man replied, in Jamaican parlance, *"Everything is cool. You can go in and do everything with her."* On receiving that assurance that his wife could conduct his affairs on his behalf, he proceeded to his office with the wife and notarized the documents.

55. Cross-examined by Mr. Kennedy, Mr. Wilson said he believed the Transfer was already signed when it was presented to him but he could not be sure. He accepted that he had certified that the Transfer had been signed by the husband it in front of him, when it had not, and that he had he certified that the husband was known to him, which he was not. He said he acted in good faith and complained about Mr. Kennedy's line of questioning, protesting that Mr. Kennedy was trying to *"get him into trouble."*

56. Though not relevant to the issue at hand, I note that in further breach of his notarial oath, Mr. Wilson also certified that the Affidavit to be completed by the spouse of an applicant for status had been sworn in front of him by the wife, notwithstanding the wife had not signed the document at all.

57. The husband was recalled with leave and exhibited the call log records of his WhatsApp messages with his wife on 11 March 2020. At 7:53 pm he sent the following message:

> *"Hi good evening. I don't hear anything from you today look like you get caught up."*

58. The husband said he sent that message because he had not heard from the wife at all that day.

59. Later that evening, the wife sent him a voice note in response. This was played in open Court and it confirmed the husband's evidence that he had not seen his wife on 11 March 2020 or gone with her to the Notary as she alleged. In the voice note the wife stated:

> *"I have some papers that I have to go to get signed by the Notary Public. If you bring your passport tomorrow, I will go get those papers signed ... if you bring them to me, I will get them signed by the Notary Public...."*

Findings of Fact

60. Lord Pearce's observation in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 at p 431 comes to mind as I turn to find the facts in a case where the parties agree on nothing except the date of their marriage. In a disquisition on the judicial process involved in assessing the credibility of an oral witness, His Lordship observed that,

> *"Every judge is familiar with cases in which the conflict between the accounts of different witnesses is so gross as to be inexplicable save on the basis that one or some of the witnesses are deliberately giving evidence which they know to be untrue ...."*

61. This is such a case.

62. The cellphone evidence which was adduced makes it clear that the wife deliberately gave and called evidence which was untrue. It supports the husband's evidence that he did not see her on 11 March 2020 or go with her to the Notary Public's office or give her permission for her to sign his name on the Transfer or Mr. Wilson permission to witness his signature. If ever there was a smoking gun, the evidence adduced from the cellphone was one.

63. I note *en passant* that it also emerged from the voice note that the wife did not have the husband's passport on 11 March 2020, which put paid to the lie told by Mr. Wilson that she had given him the husband's passport and he had compared the face of the man in the car to the photo in the husband's passport.

64. It follows that I reject the wife's evidence that she and the husband had agreed she would sell the Land and take the proceeds. I am satisfied and find that she signed the Transfer without his knowledge and consent and was assisted in her scheme to deprive the husband of his rights in the Land by Mr. Wilson who certified the identity of the signatories in breach of his notarial duties.

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65. The proposition that the husband had agreed that she could sell the land was, in any event, wholly inconsistent with his making an application to the Court seeking an account of the proceeds of sale of the Land and an injunction to restrain the wife from the disposing of the FMH when, as he says, he discovered she had sold the Land *"behind his back."*

66. The proposition was further undermined, if it were necessary to say so, by a close scrutiny of the Credit Union loan account statement which does not support the wife's assertion that the husband only paid $15,000 on the loan secured on the Land while she had paid $41,000. The sum of $15,000 appears to have been derived by subtracting the "book balance" or remaining principal debt of $35,479.83 at the date the loan was paid out, from the total sum of $50,715 which had been advanced by the Credit Union.

67. The wife's analysis conveniently ignored the fact that there are two components of a loan, the principal and the interest which must be paid for the use of the lender's money. What can be gleaned from the Credit Union Loan account statement is that the husband made 33 payments on the loan account. Totting up the figures, he paid $12,189 in interest and $11,471.77 towards the principal, bearing out his complaint that all the money he paid in was going to pay interest. Added to the $12,000 which he said he paid down on the Land - which evidence was not challenged - the total amount paid by the husband towards the acquisition of the Land was **$35,660** as the husband said in his evidence. The wife, on the face of it, made 6 payments between 2009 and 2011[2], before paying the balance of the principal in the sum of $35,479.83 for a total **$41,596.58**.

68. The Credit Union Loan statement supports the husband's evidence that he continued to work after he left Arch and Godfrey as it shows that he made payments on the loan right up to 2012 as he said. The WhatsApp exchanges which were adduced also support his evidence that even after he and the wife had separated, he continued to work and contribute to the family. In one exchange, he is asked by the wife to help pay for Monique's work permit and he agrees. In another he asks the wife if she still needs a phone - the clear inference being that he is proposing

[2] 30 Jan 2009, 3 July 2009, 2 Nov 2010,11 April 2011, 15 April 2011 and 15 Nov 2011

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to get one for her- and tells her he *"will pass by tomorrow after work"*, a statement clearly not made in anticipation of litigation.

69. The wife's credibility has been hopelessly undermined by the lies told and the external inconsistencies in her evidence, in contrast to the evidence the husband gave which was consistent with the contemporaneous documents and with commonsense. As a result, wherever the wife's evidence and that of the husband conflict, I prefer his evidence.

Marital Assets

70. I reject the wife's evidence that she and the husband had agreed that she could sell the Land and keep the proceeds. The Land to which they both contributed was very much the product of their common endeavour and a marital asset to which each was entitled an equal share.

71. I am also satisfied and find that the husband made contributions throughout the marriage, both in cash and in kind, to the running of the household and the upkeep of the FMH and converted the garage and the dining room to rental to studio units which generated the rents that were applied to the mortgage. Although the FMH is registered in the sole name of the wife and was brought by her into the marriage, they were both engaged in a common endeavour as far as their home was concerned and it is a marital asset.

Application of the Sharing Principle to the FMH

72. In *E v L* [2021] EWFC 60, Mostyn J noted at [45] that the law recognises a distinction between property acquired during a marriage and property brought into a marriage which has been *"matrimonialised,"* such as the dwelling used as a matrimonial home, and the possibility that such an asset might be unequally shared.

73. He referred to the case of *Vaughan v Vaughan* [2007] EWCA Civ 1085, in which Wilson LJ considered a former matrimonial home which had been owned by the husband mortgage-free prior to the marriage with an inheritance from his father. The property was placed into the parties'

joint names towards the end of the marriage. Although this was long marriage with two children, Wilson LJ said this at [49]:

> *"Although, in the words of Baroness Hale in Miller v Miller; McFarlane v McFarlane [2006] UKHL 24, [2006] 2 AC 618, [2006] 1 FLR 1186 at 663E and 1223 respectively, "the importance of the source of the assets will diminish over time", I consider that the husband's prior ownership of the home carried somewhat greater significance than either the district or circuit judge appears to have ascribed to it."*

74. In the circumstances here, where there was a substantial mortgage on the FMH when the parties began cohabiting and the rents which paid the mortgage were generated by the studio units built by the husband, the wife's prior ownership carries no significance and would not justify a departure from the equal sharing principle.

Dissipation of Assets: the Sale of the Land

75. The Land was property acquired during the marriage to which each was likewise entitled an equal share. As the Land has been sold, the question which arises for resolution is whether the sale proceeds should be added back to the marital pot to compensate the husband for the effect of the wife's fraudulent conduct.

76. Section 19 the **Matrimonial Cause Act** prescribes that the deserts of the parties, that is say, conduct which deserves reward or punishment or to that which is deserved by a party, be taken into account.

77. The authorities establish that such conduct is relevant where it is *"both gross and obvious": see Baroness Hale in Miller v Miller [2006] UKHL 24 at [145] citing Ormrod J in Wachtel v Wachtel [1973] Fam 72.* In *Vaughan v Vaughan,* Lord Wilson remarked at [14] there is a

> *"line of authority which stretches back to the decision of this court in Martin v. Martin [1976] Fam. 335 that, in the words of Cairns LJ at 342H,*
>
> > *"a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then to claim as great a share of*

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> *what was left as he would have been entitled to if he had behaved reasonably."*

78. Wilson LJ cited with approval the first instance decision of Bennett J in *Norris v Norris* [2002] EWHC 2996 (Fam) who stated at [77] that,

> *"In my judgment there is no answer that the husband can sensibly give to the question, "Why should the wife be disadvantaged in the split of the assets by the husband's reckless expenditure?" A spouse can, of course, spend his or her money as he or she chooses, but it is only fair to add back into that spouse's assets the amount by which he or she recklessly depletes the assets and thus potentially disadvantages the other spouse within ancillary relief proceedings."*

79. In *Vaughan*, however, the Court of Appeal held at [14] that re-attribution was subject to two caveats: dissipated sums could be added back or re-attributed only where there is *'clear evidence of dissipation (in which there is a wanton element)'* and where it is necessary to add back to meet needs, such as housing needs.

80. More recently, the Court of Appeal in ***TT v CDA* [2021] 1 FLR 996,** a case dealing with adding back funds dissipated by litigation misconduct, the Court held that the incurring of unreasonable costs may, of itself, be a s.25 factor which justifies a different award being made in favour of the "innocent" spouse. Moylan LJ referred to the passage cited above,

> *"However, in saying this, [Wilson LJ] did not mean that the financial effect of litigation conduct cannot impact on a needs-based award. I agree with Moor J in R v B when he said that, if required to achieve a fair outcome, the court 'must be entitled to prioritise the [needs of the] party who has not been guilty of such conduct'. It is clear from the outcomes in M v M and B v B, as referred to above, that the financial consequences of the litigation misconduct, perhaps combined with other factors, might be such that it is fair that the innocent party is awarded all the matrimonial assets. In this respect, I also agree with Moor J's observation that an order can be made which does not meet needs because to exclude that option 'would be to give a licence ... to litigate entirely unreasonably'.* [emphasis mine]

81. This observation should apply with equal force to assets disposed of with the intention of defeating the other party's claim.

82. Although it was the wife's evidence was that the sale of the Land was necessary in order to repair the FMH, the only documentary evidence she produced of any repairs done at the FMH was a letter dated 22 June 2021 stating that repairs had been done to the cost of $4,000. The rest of the funds remain unaccounted for.

83. Notwithstanding the wife's proclivity for dishonesty, I accept her evidence that the sale of the Land netted $66,000 and that the sum of $4000 was spent as aforesaid. In order to remedy the effect of there being less capital to be distributed between the parties as a result of the wife's fraudulent conduct, I add the $62,000 back to the marital estate, the husband's half share of that amount to be recouped from the proceeds of sale of the matrimonial home.

Costs

84. In ancillary proceedings, parties are usually responsible for their own costs. In this case, the husband asks that he be awarded his costs. I consider the extraordinary circumstances of this case warrant a departure from the norm and the husband should have his costs and that they should be awarded on the indemnity basis.

85. The basis for a grant of such costs was considered by the Chief Justice in *AHAB v Saad Investment Co. Ltd.* 2012 CILR 344 at,

> *"In considering awards for indemnity costs, the court's focus should be primarily on the conduct of the losing party, not on the substantive merits of the case. Such an award should be made only in exceptional circumstances, such as where the losing party had behaved improperly, negligently or unreasonably... to justify such an award, there should normally be an element in the losing party's conduct which deserved a mark of disapproval. That conduct would need to be unreasonable to a high degree, though may fall short of deserving moral condemnation. "*

86. Indemnity costs are also appropriate where a party seeks to deliberately mislead the court by giving false evidence. In *Nike Real Estate Limited v De Bruyne and others* 2002 CILR 31, Kellock J

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held that indemnity costs could be awarded in the court's discretion if an unsuccessful party had acted in such a way as to abuse the process of the court. Although conduct amounting to abuse for other purposes might not suffice for the purposes of an indemnity costs order, the learned Judge held that a party who urged the court to accept as truth a case in which it had no genuine belief, would be guilty of such an abuse. He commented at [15] that he did not think that,

> *"... this court exists for the purpose of encouraging people to put forward such a case, and if they do I would have thought the charge of abuse of process was made out, at least to the extent necessary to justify an award of indemnity costs."*

87. The application of the principle in family law matters was considered at length by Sir Peter Singer QC sitting as a High Court Judge in *Joy v Joy - Morancho* [2015] EWHC 2507 (Fam).

88. In the course of his judgment at [210] he referred to the husband's '*blatant dishonesty in relation to these proceedings*' and at [215] to the case presented by the husband and the Trustee a relevant Trust as a '*rotten edifice founded on concealment and misrepresentation* [...] *a sham, a charade, bogus, spurious and contrived*' and stated that he "*would not shrink from applying to it the description fraud, a deliberate design to deceive, inflicted on W and on the court, and found by the court so to be.*"

89. At [225], the learned Judge made the following comments which are apposite:

> *"The conduct of the parties in relation to an application concerning their financial affairs is a relevant consideration whatever the format of the litigation, and whatever the particular costs regime beneath which their application or applications fall to be considered. Where one party hatches a wholly deceptive presentation, pursues it persistently to the conclusion, and is found to have done precisely all of that, then he or she should expect no quarter from the court when it comes to costs. Such conduct unravels all and can and should in an extreme case where the conclusions are clear, have clear costs condemnation meted out as the court's response. Such cases are relatively few in number .... Such cases should be fewer in number, and may become so if the costs outcome for such reprehensible conduct is clearly in prospective focus from the off."*

90. In my view, this is a case where costs condemnation should be meted out in response to the case presented by the wife in these proceedings. Having forged her husband's signature on the instrument of Transfer and suborned a Notary Public, the wife filed an answer to the husband's summons for ancillary relief which was replete with lies and she persisted in those lies to the very end, going so far as to call the Notary Public to give evidence on oath that he had witnessed the signature of the husband in an effort to deprive the husband of his share of the fruits of the marriage partnership.

91. In addition, she defied Court orders for disclosure and failed to provide an account of the proceeds of her fraudulent sale of the Land.

92. Not only was she dishonest, but, as Mr. Kennedy noted in his written submissions with which I concur, her conduct of the litigation caused a simple case of small value to become extremely complex, to which complexity was added by her failure to engage in the discovery process.

93. In my judgment, the wife's conduct of this litigation is deserving of moral condemnation and should be met with an order for on an indemnity basis. The wife is to pay the husband's costs of and incidental to the proceedings on an indemnity basis.

94. I will hear Counsel on the form of order and the orders consequential on the judgment of the Court.

95. It only remains for me to thank Counsel and the parties for their patience in awaiting the long outstanding decision of this Court.

DATED the 10th March 2023

HON. MARGARET RAMSAY-HALE
CHIEF JUSTICE