IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

Cause No.: FAM 271 of 2018

BETWEEN

SUZETTE ELIZABETH POWERY

Petitioner

AND

CLINT OTIS POWERY

Respondent

CHAMBERS

Appearances:	**Mr. Clayton Phuran of BP Law for the Petitioner** **Mr. David McGrath of McGrath Tonner for the Respondent.**
Before:	**Hon. Justice Margaret Ramsay-Hale**
Heard:	**11 March 2020**
Draft Judgment Circulated	**24 June 2020**
Judgment Delivered:	**30 June 2020**

HEADNOTE

Matrimonial Property - repudiation of mediated property agreement

JUDGMENT

1. The Petitioner, Suzette Elizabeth Powery (nee Webb) (the "Wife"), petitioned for dissolution of her marriage to the Respondent, Clint Otis Powery (the "Husband") in 2018. By Summons dated 22 November 2019, the Wife seeks relief ancillary to the dissolution of the marriage, including provisions for the children of the marriage.

2. The children are not children for the purposes of the *Matrimonial Causes Law* ("*MCL*") but the parties had agreed that the Husband would keep their younger son, RaShaad Alija dob 2 March

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 18/17

2004, on his health insurance and that the Wife would contribute $100 per month to his costs of so doing.

3. The parties have lived at 44 Fruitland Way, West Bay since they married in 2012 and continue to live under the same roof. In her application the Wife seeks an Order that she be permitted to purchase the Husband's half-share of the matrimonial home.

4. The background to the application is this: the parties attended at mediation seeking to resolve a number of issues, including the disposition of the matrimonial home. The property at the time had a value of $135,000 and a mortgage of $18,000. After several sessions, they agreed in writing that the Husband would pay the Wife $67,500 which was half the gross value of the matrimonial home. No date for the purchase of her half-share was agreed.

5. Subsequent to the mediated agreement and in reliance on it, the Wife made an offer to purchase property of a similar value to the matrimonial home and obtained approval in principle for a mortgage in a sum she could afford, but all was dependent on her receiving the promised funds from the Husband. It is the Wife's evidence that the Husband refused to follow through with the agreement because the sum did not take into account the outstanding mortgage or the fees that would be incurred in transferring the property to her. As a result of his failure to pay, the offer to purchase fell through and the vendors thereafter increased the sale price.

6. The Wife now makes this application to the Court seeking an order that the property be transferred to her on payment to the Husband of the sum of $67,500. Although in her Summons she proposes to purchase his share of the home for the half its value, net of the outstanding mortgage obligation, at the first hearing of the Summons, she offered to pay the Husband half the gross value of the home and she would shoulder the remaining mortgage.

7. The Husband, who was not represented when the matter first came on for hearing, explained that he had not intended to give her half the gross value of the property when he made the agreement, but only half the value of the property net of the outstanding mortgage as Mr. Justice Williams had told them, at an earlier hearing, that that was all she was entitled to. The Wife had not agreed, and it was this disagreement which had led to the current impasse. He accepted that to date he had made no attempt to raise that sum which would have represented half the net value of the home or any sum at all.

8. The Court invited the Husband Court to instruct an attorney and file evidence in response to the Wife's summons and the matter was adjourned.

9. The Husband subsequently filed an affidavit in response in which he says that, as soon as he was able to obtain legal advice, he was advised that he was bound by the terms of what he had agreed and that, even if he were as a matter of principle entitled to debit from the payment to the Wife half the balance of the mortgage, he had struck a deal and should follow through. He now proposes to pay the Wife the sum of $67,500 within 30 days and is prepared to better his original offer and pay her the sum of $70,000 in an effort to resolve the matter on the original terms of the agreement which would permit him to retain ownership of the matrimonial home.

10. At the adjourned hearing Mr. McGrath, who appeared on the Husband's behalf, submitted that the parties should be held to their agreement. In support of his submission he relied on the decision of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 427 and the statement of Lord Phillips of Worth Matravers then President of the Supreme Court at para 75,

> *"The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."*

11. At para 78, Lord Phillips expanded upon that statement of principle, explaining that:

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 18/17

> *"The reason why the Court should give weight to a nuptial agreement is that there should be respect or individual autonomy. The Court should accord to the decision of a married couple as to the manner in which their financial affairs should be regulated It would be paternalistic and patronizing to override their agreement simply on the basis that the Court knows best. This is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future."*

12. His Lordship also made clear that the standard vitiating factors as apply to other agreements will also apply to nuptial agreements including duress, fraud or misrepresentation or other conduct which is oppressive or unconscionable.

13. In *X v X (Y and Z intervening)* [2002] 1 FLR 508, Munby J, noting that the Court would not lightly permit parties to an agreement to depart from it, stated that the court should have regard to all the

circumstances, and in particular to the circumstances surrounding the making of the agreement, the extent to which the parties themselves attached importance to it and the extent to which the parties had acted upon it.

14. While none of the vitiating factors identified by Lord Phillips are present in this matter, it is plain from the husband's conduct after the agreement was made that he did not intend to be bound by it. On his evidence, there was really no agreement at all as they were not *ad idem* and he had never intended to give the Wife more than she was entitled to at law, which was half the value of the property, net of the outstanding mortgage.

15. On advice, he now accepts that he was bound but the Wife considers that they had an agreement which he repudiated - in her words, "*every attempt to have this [agreement] translated to an Order of the Court was rejected by Clint. He refuses to take any steps to bring the agreement into effect*" - and she has, in my view, accepted that repudiation by bringing the matter back before the Court and seeking an order in terms of the Summons. In my judgment, that brings the agreement to an end.

16. In the absence of agreement, the issue before the Court is what should be done with the matrimonial home. The resolution of that issue turns on a consideration of what is fair and just in all the circumstances. In coming to the conclusion that I do, that fairness requires that the Wife be permitted to buy out the Husband's share in the matrimonial property, I take into account that the Wife lost the opportunity to buy a comparable home for herself with a mortgage she could afford because the Husband repudiated the mediated agreement, that her interest in the matrimonial home is her only asset whereas the Husband has, in addition to his interest therein, a piece of land on which he can either build a comparable home for himself with a mortgage, or leverage to purchase a new home for himself, and that the Wife's offer is a generous one, being in a sum greater than that to which the Husband would be strictly entitled.

17. I will hear Counsel on the form of Order and on costs.

Hon. Ms. Justice Ramsay-Hale
Judge of the Grand Court

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 18/17