Michaelmas Term
[2016] UKPC 36
Privy Council Appeal No 0059 of 2015

JUDGMENT

Scatliffe (Appellant) *v* Scatliffe (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lady Hale
Lord Wilson
Lord Carnwath

JUDGMENT GIVEN ON

12 December 2016

Heard on 17 November 2016

Appellant	*Respondent*
Gerard St C Farara QC	Nigel Dyer QC Juliet Chapman
(Instructed by Charles Russell Speechlys LLP)	(Instructed by O'Neal Webster)

THE OPINION OF THE BOARD WAS DRAFTED BY LORD WILSON:

1. The husband (as it will be convenient to describe him notwithstanding that the parties are divorced) appeals against an order of the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands) dated 16 September 2013. Before that court were an appeal by the husband and a cross-appeal by the wife (as it will be convenient to describe her) against an order for ancillary relief made in favour of the wife by Hariprashad-Charles J in the High Court of the Eastern Caribbean Supreme Court (British Virgin Islands) dated 3 January 2012. The Court of Appeal (Baptiste JA, Blenman JA and Mitchell JA) dismissed the husband's appeal and, to a modest extent, it allowed the wife's cross-appeal.

2. Unfortunately the husband chose to represent himself both before the trial judge and before the Court of Appeal. As a layman, he inevitably betrayed limited understanding of what was relevant and, on appeal, of his inability to give his evidence again. The extensive transcripts of the proceedings show an admirable degree of patience and courtesy which both courts extended to him. Before the Board, however, the husband has been represented by Mr Farara QC, who has presented the appeal with fine judgement, eloquence and charm. The Board did not call on Mr Dyer QC who, with Ms Chapman, has represented the wife and indeed who, like her, has nobly done so without fee.

3. The husband is now aged 70. He has diabetes and in 2009 he had the misfortune to suffer the amputation of his left leg and confinement to a wheelchair. He lives in an apartment at **Parcel 195**, Block 2938B, Road Town, Tortola.

4. The wife is now aged 63. She lives in an apartment at **Parcel 38**, Sand Box Road, Road Town.

5. The parties were married in 1971 and almost immediately they began to make their home in the apartment in which the wife continues to live. They have two children, namely Derwin, born in about 1972, and Derecia, born in about 1977. The husband has two other sons, presumably born prior to the marriage. In 2009, notwithstanding the husband's defence of her suit, a decree of divorce was granted to the wife; and soon afterwards, pursuant to an order which gave her the exclusive right to occupy it, the husband vacated the home.

6. The governing statute is the Matrimonial Proceedings and Property Act 1995. Part II is entitled "Maintenance and Related Matters" and comprises sections 22 to 42,

which bear a reasonably close relationship to sections 21 to 38 of the Matrimonial Causes Act 1973 in force in England and Wales. In particular the power in section 23(1)(c) of the 1995 Act following divorce to order payment by one party to the other of a lump sum is almost identical to the power in section 23(1)(c) of the 1973 Act; and the power in section 25(1)(a) of the 1995 Act to order a transfer of property from one party to the other is almost identical to the power in section 24(1)(a) of the 1973 Act. Like section 25(2) of the 1973 Act, section 26(1) of the 1995 Act specifies matters to which the court must have regard in deciding whether, and if so how, to exercise its powers under sections 23 and 25. There are considerable similarities between the matters specified in the two subsections. For reasons which will become apparent, the Board would stress, in particular, the obligation, common to limb (a) of both subsections, to have regard to "the income, earning capacity, property and other financial resources which each of the parties … has …". Indeed limb (f) of section 26(1), which requires regard to "contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home …" is also broadly similar to limb (f) of section 25(2). But there is one substantial difference between the two subsections. For, while the concluding words in the original version of the subsection in the 1973 Act were omitted in the version substituted by section 3 of the Matrimonial and Family Proceedings Act 1984, they remain in section 26(1) of the 1995 Act. They oblige the court so to exercise its powers

> "as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

7. In the course of her judgment the judge wisely set out section 26(1) in full. There is no doubt that she recognised the need for her to have regard to such of the specified matters as were relevant, therefore including the ages of the parties and the husband's disability, and to comply with the concluding obligation.

8. In parenthesis the Board adds that Part IV of the 1995 Act, entitled "The Matrimonial Home", incorporates provisions which entitle the court to regulate occupation of a matrimonial home and to make other orders in relation to it. Equally the Married Women's Property Act (passed in 1887) includes at section 19 a provision, closely analogous to section 17 of the Married Women's Property Act 1882 in England and Wales, which enables the court in a summary way to determine issues between husband and wife as to the ownership of property. The Board was concerned to note submissions in Mr Farara's written case to the effect that:

> (a) the judge had wrongly failed to allude to section 19 of the Married Women's Property Act;

(b) she had wrongly failed to take account of her powers in Part IV of the 1995 Act;

(c) her power to transfer property under section 25 of the 1995 Act did not extend to the transfer of a matrimonial home; and

(d) she had been mistaken in applying section 26(1) of the 1995 Act.

In the event, in his oral argument, Mr Farara has adverted to none of those four submissions. Nevertheless it may be helpful for the Board to stress that all of them are misconceived. In the appeal from Jamaica in *Bromfield v Bromfield* [2015] UKPC 19, [2016] 1 FLR 482, the Board explained at para 5 that, now that divorce courts have wide redistributive powers, proceedings under ancient Married Women's Property Acts to determine the existing extent of the beneficial interests of husbands and wives in property have become obsolete. And, although there will be cases in which the court will appropriately determine issues in relation to the matrimonial home under Part IV of the 1995 Act, for example, as it did in this very case, by regulating its occupation on a temporary basis under section 49, the determination of any issue about its future ownership will ordinarily be conducted under sections 25 and 26. It is wrong to suggest that section 25 does not extend to the transfer of a matrimonial home; and, far from having mistakenly applied section 26(1), the judge was required to do so.

9. The judge found that during the long marriage the husband had worked hard, managed various businesses and entered into certain successful property ventures but that, in light of his age (then 65) and disability, he could not continue actively to work. She found that the wife had been in full-time employment for eight of the early years of the marriage; that thereafter she had assisted the husband in his businesses; that she had been a mother and a home-maker; and that in those various ways she had made a full contribution to the welfare of the family. Following the breakdown of the marriage the wife had become employed in the museum at Government House, earning $23,000 pa (all the Board's references to dollars are to US dollars) but, at the time of the hearing, she was already aged 58.

10. Principles identified in the UK Supreme Court and its predecessor, and in the courts of England and Wales, as applicable to the exercise of powers under sections 23 and 24 of the 1973 Act are of persuasive authority in relation to the exercise of powers under sections 23 and 25 of the 1995 Act: *Wheatley v Wheatley*, Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands), 13 October 2008, HCVAP 2007/006, para 92.

11. The judge found that there were three properties in Road Town which should be classified as the parties' matrimonial property and which should be subject to the

sharing principle, which was first identified, albeit then as a yardstick, in *White v White* [2001] 1 AC 596 and was later developed in *Miller v Miller*, *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

12. The first property was **Parcel 38**. The first floor comprised the three-bedroom apartment which had been the matrimonial home and in which the wife continued to live. The ground floor comprised two other apartments which together generated rental income of about $19,000 pa. Parcel 38 was in the husband's sole name. The husband had bought the property two years before the marriage and in both local courts he made energetic attempts to prove that he had also constructed the apartment on the first floor just prior to the marriage rather than, as the wife said and the judge accepted, just following the marriage. The husband appeared to believe that proof of his assertion in that respect would render the property incapable of transfer to the wife. In any event, however, the judge reminded herself of the observation of Lord Nicholls of Birkenhead in the *Miller* case, at para 22, that a matrimonial home should normally be treated as matrimonial property even if one of the parties had brought it into the marriage at the outset. Parcel 38 was professionally valued at **$600,000**. The judge ordered the husband to transfer it to the wife.

13. The second property was **Parcel 195**. One floor, apparently the upper floor, comprised the three-bedroom apartment, with wheelchair access, in which the husband lived. At the time of the hearing before the judge the building was only half completed and the proposed apartment of similar size on the ground floor was presumably not ready for letting. The property was in the husband's sole name; he had bought it in 2003, with money made during the marriage, for $260,000. It was professionally valued in its incomplete state at $350,000 and, once completed, at $750,000.

14. The husband's evidence was that he held Parcel 195 in trust for Derwin and one of his other sons. The judge rejected his evidence and held that he owned it beneficially as well as legally. The wife did however concede during cross-examination by the husband that they had discussed acquiring the land for the benefit of (to use their own words) "our children", ie presumably the two children of the marriage; and this possibly ambiguous concession on the wife's part just about entitled the judge to make a finding, with which the wife now expresses a measure of discontent, that "both parties agreed that it was meant to be for the benefit of the children". This finding forms the context of the judge's order in relation to Parcel 195, namely that the husband should have a life interest in it, which would therefore enable him to continue to live in the apartment on the first floor and to receive the rent from the apartment on the ground floor, once lettable; and that, subject to his life interest, it should become the property of "the children", which, in light of the above, means, as the husband accepts, the two children of the marriage. In passing the wife seeks to question the judge's jurisdiction to make that order. It was not, strictly speaking, a settlement of property order under section 25(1)(b) of the 1995 Act because it was not made for her benefit as well as that of the children. Rather, it was a purported order for transfer of an interest in remainder to the

children under section 25(1)(a); and this leads Mr Dyer, in his written case, to refer the Board to section 29(1)(a), which precludes orders for transfer (as opposed to settlement) of property in favour of adult children. The answer is, however, that the judge understood the wife to agree to a disposal of this character and that there would be no difficulty in so rearranging its terms as to cast them as an agreement rather than as an order.

15. The more difficult question is to identify the sum which, in its compilation of the balance sheet relating to the effect on the parties of the orders made in the courts below, the Board should ascribe to the interest left to the husband in Parcel 195. For the professional valuers made no valuation of a life interest in the property. The relevant life interest was that of a male then aged 65 who, as the Board hopes would have been medically confirmed, had, but alternatively who did not have, a normal expectation of life. The Board can do no more than to ascribe the valuation of **$350,000** to the husband but then to remind itself that the figure relates to absolute ownership of the property and so will significantly overstate the value of the husband's life interest in it.

16. The third property was **Parcel 147** in Sand Box Road. The complication here was that the land was owned by the Crown. In 1989 the husband began to construct a building on it, using money made during the marriage. The wife's evidence was that the husband had soon completed and let out two apartments on the ground floor and, through her, had collected the rents; that by 1999 he had completed and also let out two apartments on the first floor and, again through her, had collected the additional rents; and that at the date of the hearing the total annual rent generated by the four apartments, by then received directly by the husband, was $40,000. The husband's evidence, by contrast, was that the land was owned by the Crown; and, in respect of the rentals, his words to the judge were that he declined to "speak to any land that is not owned by me". Accordingly the judge found that the husband was receiving rentals of $40,000 pa from the four apartments on Parcel 147. There was a professional valuation of the building, excluding the land, at $425,000 and of the land at $30,000. The judge's ruling was that the husband should retain the building, worth **$425,000,** and should thus continue to receive the rentals; and she expressed the hope that, were he to offer $30,000 for it, the Crown would sell the land to him. The husband argues to the Board, as he did to the Court of Appeal, that the building cannot be separated from the land and that it is therefore entirely owned by the Crown. Unfortunately for him, the local valuers, in the light, among other things, of the rental value of the apartments in the building, and no doubt of the husband's actual receipt of rents from them for over 20 years, felt it appropriate to identify a value for it of $425,000 quite separate from the Crown's land; and, even assuming that the husband has no right of prescription against it, the Board infers that any right which the Crown has to repossess the building can therefore be discounted for present purposes.

17. There was a fourth property, namely **Parcel 174** in Long Trench. It was vested in the joint names of the wife and the son Derwin. But the judge found, on clear

evidence, that they held the property on trust for Derwin absolutely. The husband does not challenge the judge's conclusion that it was therefore not an asset of the parties which should figure in the exercise which she was required to conduct. The judge, however, described her conclusion as being that Parcel 174 was not a "matrimonial asset"; and, although that description of it was strictly true, it may have contained the seeds of a confusion to which the Board will revert in para 24.

18. In February 2009, shortly prior to the breakdown of the marriage, the husband received payment from the government for work done of $219,000. The judge rejected the husband's case that he had spent it. She accepted that it was a matrimonial asset but declined to award to the wife any such lump sum as might have reflected her entitlement to share in it. It was in this regard that the Court of Appeal held that the judge had erred in the exercise of her discretion. So it allowed the wife's cross-appeal to the extent of ordering the husband to pay her a lump sum of $50,000. Into the balance sheet therefore go **$50,000** to the wife and **$169,000** to the husband.

19. The wife had shares and cash worth **$7,000**, all matrimonial assets; and the judge's ruling was that she should retain them.

20. It follows that the effect of the judge's order, as varied by the Court of Appeal, was that the matrimonial assets were divided as follows:

(a) to the wife $657,000, comprising $600,000 (para 12), $50,000 (para 18) and $7,000 (para 19); and

(b) to the husband $944,000, comprising $350,000 (para 15), $425,000 (para 16) and $169,000 (para 18).

21. Irrespective of the size of the reduction which properly falls to be made from the figure ascribed to the husband of $350,000 (para 15), it is easy to conclude that the judge's order, as varied, was an entirely reasonable sharing of the matrimonial property. It gave to each of the parties a home in which to live for the rest of their lives and a rental income on which, even without other income, they could subsist. It appears moreover to represent an outcome (of which the basis is presumably a clean break) which was fair to both parties in the light of all the relevant circumstances and which represented a reasonable discharge of the obligation cast upon the court in the concluding words of section 26(1).

22. It would be open to the Board to cease its analysis at this point and to advise that the husband's appeal should be dismissed. But it does not do so because, for two reasons, his appeal is even more problematical than so far appears.

23. The first reason is that the judge found that the husband held *undisclosed* resources. Her finding followed her extensive exposure to the husband over about four separate days, which, of course, was not confined to his performance in the witness-box. Although, inexplicably, the wife's advisers had never sought a specific order that he should disclose them, the fact was that he had never disclosed any of his bank statements although it had been made clear to him, on the first day of the hearing if not earlier, that all his statements (or at any rate the recent statements, covering, say, the previous three years) fell to be disclosed. The husband's refusal to disclose his bank statements clearly justified the judge's finding of non-disclosure. Unless in the appellate court an appellant can somehow dislodge a trial judge's finding against him of non-disclosure, the prospects of his successful appeal are, for obvious reasons, remote.

24. The second reason is that the judge did not even take account of all of the husband's *disclosed* resources. The agreed schedule of assets, placed by the parties before the Board, includes the following post-script:

> "Two-storey guest house (opposite band stand), Road Town
> H inherited from his parents.
> No valuation obtained - no claim made against property by W."

When asked by the Board about the guest-house, Mr Farara, rightly accepting that he could not give evidence, conjectured that the husband might not have been the sole heir to it. His conjecture runs counter to the terms of the post-script and, in that the husband's own proposals to the judge included a transfer of the guest-house to the wife, it seems inherently improbable. But the bigger question is: irrespective of the extent or value of the husband's interest in the guest-house, why was this asset ignored in both local courts? With respect to them, the Board considers that the answer may betray a serious misunderstanding about the treatment of "non-matrimonial property", indeed possibly about the very meaning of the phrase, in the determination of applications for ancillary relief under the 1995 Act. At least the husband's ill-starred appeal enables the Board to offer guidance in this respect, which it attempts to encapsulate in the ten propositions which follow.

25. (i) Section 26(1)(a) of the 1995 Act obliges the court to have regard to the "property and other financial resources which each of the parties … has or is likely to have in the foreseeable future".

(ii) Thus, when a court finds that an asset is not one in which either party has any interest (such as, in the present case, Parcel 174, beneficially owned by the son Derwin: see para 17 above), no account should be taken of it.

(iii) It is, however, confusing for such an asset to be described as "non-matrimonial property".

(iv) It was when introducing the "yardstick of equality of division" in the *White* case, cited above, at p 605, that Lord Nicholls proceeded, at p 610, to refer to "matrimonial property" and to distinguish it from "property owned by one spouse before the marriage, and inherited property, whenever acquired". In the *Miller* case, cited above, at paras 22 and 23, he described the latter as "non-matrimonial property"; and he explained his earlier reference to "matrimonial property" as meaning "property acquired during the marriage otherwise than by inheritance or gift".

(v) So the phrase "non-matrimonial property" refers to property owned by one or other of the parties, just as the phrase "matrimonial property" refers to property owned by one or other or both of the parties.

(vi) Accordingly it is contrary to section 26(1)(a) of the 1995 Act for a court to fail to have regard to "non-matrimonial property". This raises the question: in what way should regard be had to it?

(vii) As was recognised in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, at paras 65 and 66, it was decided in the *White* and *Miller* cases that not only matrimonial property but also non-matrimonial property was subject to the sharing principle. In the *Miller* case, Lord Nicholls, however, suggested at para 24 that, following a short marriage, a sharing of non-matrimonial property might well not be fair and Lady Hale observed analogously at para 152 that the significance of its non-matrimonial character would diminish over time. Lord Nicholls had also stressed in the *White* case at p 610 that, irrespective of whether it fell to be *shared*, a spouse's non-matrimonial property might certainly be transferred in order to meet the other's *needs*.

(viii) In *K v L* [2011] EWCA Civ 550, [2012] 1 WLR 306, it was noted at para 22 that, notwithstanding the inclusion of non-matrimonial property within the sharing principle, there had not by then been a reported decision in which a party's non-matrimonial property had been transferred to the other party otherwise than by reference to the latter's need.

(ix) Indeed, four years later, in *JL v SL (No 2) (Appeal: Non-Matrimonial Property)* [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, Mostyn J suggested at para 22 that the application to non-matrimonial property of the sharing principle (as opposed to the needs principle) remained as rare as a white leopard.

(x) So in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then to ask whether, in the light of all the matters specified in section 26(1) and of its concluding words, the result of so doing represents an appropriate overall disposal. In particular it should ask whether the principles of need and/or of compensation, best explained in the speech of Lady Hale in the *Miller* case at paras 137 to 144, require additional adjustment in the form of transfer to one party of further property, even of non-matrimonial property, held by the other.

26. On any view the husband's non-matrimonial property in the form of the guest-house merited some, no doubt proportionate, inquiry. Its existence renders his appeal against the discretionary determination of the judge, as varied by the Court of Appeal, even less arguable.

27. Finally the husband complains that, at the end of the hearing in the Court of Appeal, it gave reasons for dismissing his appeal, and for allowing to a modest extent the wife's cross-appeal, only in a few sentences articulated orally by Mitchell JA, rather than in a more considered, more comprehensive, form. In *In re Portsmouth City Football Club Ltd, Neumans LLP (a firm) v Andronikou* [2013] EWCA Civ 916, [2014] 1 All ER 12, Mummery LJ said at para 38:

> "If the judgment in the court below is correct, [an appellate] court can legitimately adopt and affirm it without any obligation to say the same things over again in different words. The losing party will be told exactly why the appeal was dismissed: there was nothing wrong with the decision appealed or the reasons for it."

In the course of the husband's extensive submissions, the members of the Court of Appeal had fully explained the difficulties which surrounded them; and, shortly prior to his brief explanation of the court's decision, Mitchell JA had articulated his concern about the judge's refusal to allow the wife in any way to share in the husband's receipt of $219,000. Having read the transcript of that hearing, which continued for almost one day, the Board rejects the husband's complaint that he was left unaware of the basis on which his appeal was dismissed. Indeed some of his submissions, such as that the court should order the trial judge to pay him 21 months' rent, were not worthy of reasoned address.

28. Accordingly the Board will humbly advise Her Majesty that the husband's appeal should be dismissed and that, to the limited extent that the wife has incurred costs in opposing the appeal, they should be the subject of an order against him.