

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 26 OF 2000

BETWEEN:

ALSTON HARRY

Claimant

and

PATRICIA HARRY

Defendant

Appearances:

Mr. J. S. Archibald Q.C. and Mr. O. Ramjeet holding for Ms. M.
Matthew for the Claimant
Mrs. M. Price-Findlay for the Defendant

2002: January 31.
February 11.

JUDGMENT

[1] **MATTHEW J. Ag:** (In Chambers) The Parties were married on December 1, 1979 at the Wesley Methodist Church in St.Thomas, U.S.V.I. Afterwards they lived and cohabited at divers places and thereafter at East End, Tortola, B.V.I. They are both resident and domiciled in Tortola.

- [2] There are two sons of the family, Kieron born on January 5, 1982 and Kiprion born on September 26, 1985. Kieron is employed and Kiprion is expected to leave school next June.
- [3] The Claimant is self employed and is residing in his own home at Nanny Cay, Tortola and the Defendant is employed with Barclays Bank PLC as a Supervisor and presently resides in the matrimonial home at East End, Tortola.
- [4] On November 29, 2000 the Defendant filed a Petition for divorce on the ground that the Parties had lived separate and apart for a continuous period of five years immediately preceding the presentation of the petition. She obtained a decree nisi on July 20, 2001 but it has not yet been made absolute.
- [5] On February 25, 2000, the Claimant took out an Originating Summons asking for a declaration that he is entitled to half ownership in the property consisting of the matrimonial home and the land on which it is situated or alternatively a monetary sum of \$135,000.00 for his half interest.
- [6] The Defendant filed an appearance on March 3, 2000. Then in support of his Originating Summons, the Claimant filed an affidavit on March 2, 2001. It is necessary to refer to certain portions of his affidavit since the bulk of the evidence in this hearing is by way of affidavit evidence.

EVIDENCE

- [7] In his affidavit, the Claimant said that his father-in-law, Charles Smith, transferred Parcel 179 of Block 3539 B of the East End Registration Section to his wife and his son Kieron and that the matrimonial home was built on the said Parcel 179.
- [8] He said he contributed significantly to the construction of the home and was also physically involved in the construction by providing labour for several weeks.
- [9] He said he contributed \$35,000.00 in cash to purchase materials and equipment and that when the house was remodeled and expanded in 1985, he spent another \$47,000.00 on its improvements.
- [10] He said that both himself and his wife entered into mortgages with Barclays Bank from the year 1982 and that the monthly repayment was \$445.00 of which he paid \$245.00. He indicated that the monthly payments were reduced to \$245.00 and he has continued to pay half of that every month.
- [11] He gave the appraised value of the house to be \$204,000.00 and said he has maintained the matrimonial home from the time of construction in 1982 up to the year 1996 and that in 1995 he paid for the removal of the roof and replaced it with galvanized roof.

- [12] He stated that he had been paying the insurance premiums for the house from 1982 until 1996 when the Defendant restricted him from entering the home.
- [13] On June 29, 2001, the Defendant filed an affidavit in opposition to that of the Claimant asking the Court to reject the prayer of the Claimant to award him the sum of \$131,000.00 and to make an order based on the true contributions of both Parties.
- [14] She stated that her father, Charles Smith, in 1982 transferred Parcel 179 Block 3539B to herself in trust for the child of the marriage, Kieron. She tendered an exhibit to this effect.
- [15] She agreed that they both approached Barclays Bank, where she worked, for a loan and because she was an employee of the Bank she received the greater portion of the loan at an interest rate of 5 per cent and not at the going rate of 16.5 per cent. She estimated a savings of interest in excess of \$46,000.00.
- [16] She stated that the Claimant did no manual labour on the house although he used his company's vehicle to transport materials to and from the work site during the initial stages of construction.
- [17] She said she was unaware that the Claimant had spent sums of \$35,000.00 and \$47,000.00 on the house. She said she did not contribute any funds to the remodeling of the house in or about 1985

but before his affidavit the Claimant told her that he had spent \$15,000.00 to \$20,000.00 for the improvements.

[18] She said she was the one who paid for the repairs of the roof in 1989 to 1990 as the Claimant had by that time ceased living at the home and the cost of the repairs was approximately \$6,000.00 to \$7,000.00.

[19] She stated that after the remodeling she paid for putting tiles on the porch and for repainting the house. She said since the Claimant left the house she has been responsible for paying the insurance and the house and land tax. She tendered exhibits in support of these payments.

[20] She stated that it is untrue that the Claimant had maintained the house from 1982 to 1996. She said the first loan of \$50,000.00 was still outstanding and that she had made a valuation of the home which came to \$180,000.00. She tendered an exhibit to this effect.

[21] On July 4, 2001, the Claimant filed a further affidavit. In that affidavit he stated that his father-in-law transferred the parcel of land in his wife's name in trust for her and himself.

[22] This is such a blatant falsehood that I must deal with it straight away. In his earlier affidavit he stated;

"That Charles Smith, my father-in-law, transferred Parcel 179 of Block 3539B of the East End Registration Section to my wife Patricia Harry, the Defendant herein and my son Kieron

Alston Harry."

Is he consistent in his two affidavits? Obviously not.

[23] The exhibit IPH 1 to the Defendant's affidavit cannot by any form of interpretation support his claim. The donor transferred the land:

"in consideration of my natural love and affection to Ilda Patricia Harry and Kieron Alston Harry."

[24] The Claimant admitted in his second affidavit that it is because of the Defendant's relationship with the Bank that they were able to get the low interest rate of 5 per cent.

[25] He stated that it was he who paid Allan Smith approximately \$4,000.00 to draw the plans for the house and paid a further \$2,700.00 to Alvin Pickering to cut the foundation.

[26] The Claimant in his affidavit admitted in effect that the Defendant is responsible for tiling the porch after the remodeling; for repainting the house in its entirety; and for paying the house and land tax.

[27] In respect of payment of insurance he stated that he gave his wife money to pay the insurance premiums and the receipts submitted by the Defendant are in the names of both of them.

[28] He stated that he gave his wife a healthy allowance to cater for the maintenance of his children and all expenses relative to the house. He

stated that he continues to pay his share of the mortgage and will continue to do so.

[29] In addition to the affidavit evidence, there was some oral testimony. Both Counsel in their closing submissions submitted that it was the affidavits that contained much of the evidence and the cross-examination of the deponents on their affidavits only went to explain what had already been said in the affidavits.

[30] However I think I shall refer to some of the things stated by the Parties in oral evidence.

[31] Alston Harry stated that before this Court he was seeking only one half of the agreed value of the house of \$180,000.00 and not the land. He said he owned another house at Nanny Cay which was valued at \$200,000.00.

[32] He tendered for examination by the Court cheque stubs, which showed he had been paying \$245.00 a month to the Bank for his mortgage payments.

[33] Patricia Harry stated that the Claimant did not give her \$1,050.00 a month over a long period of time but did this from about three years ago. She stated the present mortgage is outstanding in the amount of \$18,300.00.

[34] When she was cross-examined she stated that apart from the house she now lives in, she has three other properties which she purchased

of her own. She admitted that her husband had an interest and share in the house but estimated it at between 20 and 25 per cent.

[35] When asked how her husband's share could be realized, she suggested that the house could be rented and he could obtain his share from the rents or perhaps she could pay him the value of his share over a period of 10 years.

[36] She reluctantly, understandably, told the Court that her gross salary was \$3,400.00.

SUBMISSIONS OF COUNSEL

[37] In her closing submissions Learned Counsel for the Defendant submitted that the affidavits basically state each Party's position and what was stated this morning only bears out what was said in the affidavits. Counsel submitted that the law had progressed since **WACHTEL V WACHTEL** (1973) All E. R. 829 and she referred to **WHITE V WHITE** 2001 1 All E.R. 1 which suggested a fair financial arrangement.

[38] Counsel submitted that there was a movement from the one-third rule to equality. One should start with equal division and shift from that in accordance with the evidence. She said that Mrs. Harry says there was something why there should be a variation: (a) savings of \$46,000.00 in mortgage interest payments, (b) Claimant had left home

since 1989 and wife had been maintaining the house and paying the insurance on her own since that time.

[39] Counsel referred to two similar cases decided by Webster J. Ag. in Saint Vincent. **NOEL V NOEL** *Civil Suit 472 of 1995* and **DUBLIN V DUBLIN**, *Civil Suit No. 411 of 1995* both decided on September 26, 2001.

[40] Learned Counsel for the Claimant also submitted that the facts can be gleaned from the affidavits as assisted by the oral evidence. Counsel referred to the following authorities:

(1) *Registered Land Act Cap 229 of the Revised Laws of the Virgin Islands Section 28(g)*. Counsel submitted that there was an over-riding interest in favour of the husband.

(2) Section 161 of Cap 229 which stated:

"Any matter not provided for in this Ordinance or in any other written law in relation to land, leases and charges registered under this Ordinance and interests therein shall be decided in accordance with the principles of justice, equity and good conscience."

[41] In further reliance on the law of overriding interests and the conduct of the parties, Counsel referred to the House of Lords case **LLOYDS BANK V ROSSET** (1990) 1 All E. R. 1111 and page 1112. Reference was also made to *HANBURY AND MARTIN'S MODERN EQUITY* and to passages from pages 880 to 893 and to the *West Indies Associated*

States Supreme Court (Virgin Islands) Ordinance Cap 80, Sections 20-21.

CONCLUSIONS

[42] After a review of the evidence, both oral and affidavit evidence, and having regard to the demeanour of the Parties and the way in which they gave their testimony, I have made a few findings on the facts.

[43] I believe the Claimant made financial contributions to the construction of the house and that he physically helped in the said construction. Learned Counsel for the Claimant submitted that the figures alleged by the Claimant were not suggested to be untrue.

[44] It is true that the Defendant said she was unaware of the cash contributions of \$35,000.00 and \$47,000.00 by the Claimant but in her affidavit she said that prior to his affidavit he had informed her that he had spent about \$15,000.00 to \$20,000.00 on the remodeling and not in fact \$47,000.00. This in my view is a suggestion of untruth.

[45] I believe the Claimant is inflating his cash contributions and especially so in the second amount of \$47,000.00. I do not think he expended cash in excess of \$50,000.00 towards the construction of the matrimonial home.

- [46] It cannot be denied that the Claimant did pay \$245.00 per month out of the \$445.00 initial monthly payment for the mortgage of the matrimonial home and that when the amount was reduced that he paid and still pays half of the monthly payments.
- [47] As much as I think it is conceptually difficult to fix separate prices for a wall structure and the land on which it is erected, both Parties are ad idem that the matter in dispute is the house and not the land, and that the value of the house is \$180,000.00.
- [48] I do not believe the Claimant maintained the house or paid any part of the insurance premiums after he left the house in or about 1989. And to point out that this is so because the receipts submitted by the Defendant are in their joint names is an insult to one's intelligence.
- [49] The Defendant claims that a savings of \$46,000.00 was made in the monthly interest payments because she was a staff member of the Bank. The Claimant admits that is so. But does it follow that all of that savings should be credited to her as against the husband? She saved as well.
- [50] When I sum up the contributions, I find the Claimant has fully borne half of the mortgage payments and that the money borrowed according to the Defendant was the only source of funding for the construction. In addition I find that he alone spent cash for the remodeling of the house and in 1982 physically assisted in the construction.

- [51] I find also that the Defendant has fully borne roughly half of the mortgage payments from the beginning till presently. It is insignificant in my view that the husband paid \$245.00 and the wife paid \$200.00 for some time.
- [52] In addition there was some saving to the Claimant because of the Defendant's relation to the mortgage; she tiled the porch and painted the entire building after the remodeling in or about 1985. She continued to pay insurance and the house tax after the Claimant left but it is also true that she alone enjoyed the house for that period.
- [53] In **WHITE V WHITE** the House of Lords held that the purpose of the powers conferred in proceedings for ancillary relief was to enable it to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses and fairness required that that should not prejudice or advantage either party when considering *section 25(2)(f) of the 1973 Act*.
- [54] The House further stated that if in their different spheres, each contributed equally to the family, then in principle it did not matter which of them earned the money and built up the assets. As a general rule, equality should be departed from only if and when to the extent that, there was 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.

[55] The provisions of the *Matrimonial Causes Act 1973 of England* are similar to the provisions of the *Matrimonial Proceedings and Property Act 1995 of the B.V.I.* Section 26 of the 1995 Act sets out the familiar list of matters to which the Court is to have regard in deciding how to exercise these powers, for example:

- “(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has, or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
- if, contributions made by each of the parties to the welfare of the family.”

[56] I have pondered on the provisions of the section. I could not determine the ages of the Parties for they were married in the USVI, where unlike the BVI and the East Caribbean Islands, the ages are not inserted on the marriage certificates. And neither party gave evidence of age.

[57] But the Parties look relevantly young and healthy. They are both working and the Defendant has a good income. Both Parties own other properties apart from the one in dispute. Indeed each of them appears

to be financially comfortable and they have been living apart for over twelve years.

[58] In the cases cited from Saint Vincent the learned Judge on very different facts found that the Petitioner had made the more substantial contribution. I cannot say the same here and I have regard to the decision of the House of Lords in **WHITE V WHITE**.

[59] I am unable to discern any good reason for departing from equality in this case where both Parties in my view side by side constructed the matrimonial home and almost fifty-fifty bore the mortgage instalments from the date of construction to the present.

[60] I agree with the submissions made by learned Counsel for the Defendant that the balance due on the mortgage debt should be taken into account. This should be in accordance with the clear break principle, which is to be desired.

[61] The last page of *Hanbury and Martin* to which my attention was drawn, that is, *page 893*, states as follows:

"Finally, the Court will not make an order which would be unworkable in view of family discord. In such a case, a clear break may be the best solution involving an award of compensation rather than a proprietary interest."

[62] I think the mortgage balance of \$18,300.00 should be deducted from \$180,000.00 leaving an amount of \$161,700.00. I would divide this

between the Parties in the proportion of \$80,000.00 to the Claimant and \$81,700.00 for the Defendant; the little extra having regard to the fact that the infant child of the marriage still lives with the Defendant and the paltry sum awarded for his maintenance.

[63] My judgment is that the Defendant pay to the Claimant the sum of \$80,000.00 for his share of the matrimonial home to be paid on or before July 31, 2002. There shall be no order as to costs.

A.N.J. MATTHEW
High Court Judge, Ag.