SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2003

BETWEEN:

WENDELL JEREMIAH DIAMOND

Appellant

and

PRINCESS MARGARET DIAMOND

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal

Appearances:

Mr. Emery Robertson for the Appellant
Ms. Paula David for the Respondent

2003: November 24;
2005: February 28.

JUDGMENT

[1] **GORDON, J.A.**: In November 2003 when this matter came before us Counsel for the Appellant sought an adjournment on the grounds that the listing of the appeal had taken him by surprise. The Court, without ruling on the application for an adjournment, felt that this was a case well suited to be decided on written submissions. In the circumstances it was ordered that the parties do submit written arguments in support of their respective cases and the Court would decide on the basis of those arguments in conjunction with the Record of Appeal. Written submissions were submitted and the Court now delivers its judgment based thereon.

[2] The Appellant and Respondent were married in November 1994 and divorced in January 2002 after a marriage lasting just over seven years. Subsequent to the divorce, the Appellant applied in June 2002 by way of Ancillary Proceedings for a variety of orders. The Application was heard in June of 2003 and judgment was handed down in July 2003. Essentially the Application was for a resolution of the parties respective rights to certain properties (both real and personal) and for a determination of the status of the child Benjamin Mc Fee.

[3] If one may make a general comment at the beginning, this is a prime case where the "clean break" principle should be applied. A reading of the Affidavits of the parties indicates that there is a reservoir of vitriol which is far from being exhausted, feelings of a passionate nature exist between the parties which are not love.

[4] At the trial of this matter the learned trial Judge made the following orders:

(1) That the Petitioner [Appellant] transfer all his share and interest in the matrimonial home subject to the mortgage thereon to the respondent.

(2) That the Respondent transfer all her share and interest in that lot, piece or parcel of land situate at Belmont containing 24,401 square feet conveyed to her by deed No. 2490/94 to the Petitioner free and clear of all charges and encumbrances. Should the Saint Vincent Building and Loan Association be unwilling to release the said land from the mortgage which it holds over the land, it is ordered nevertheless that the respondent shall faithfully meet the mortgage payments under the deed of mortgage until the mortgage debt is paid off.

(3) That the respondent have custody of the said Benjamin [McFee, child of the respondent only] , and that the petitioner pay towards his maintenance the monthly sum of $100.00 commencing on August 31st 2003 until he attains the age of 16

(4) That the petitioner has no proprietary interest in the respondent's business venue [sic] Hair talk Unisex Salon.

(5) That no order is made for the maintenance of the respondent or the petitioner.

(6) That each party will bear his/her own costs.

[5] The complaint of the Appellant against the Order of the trial Judge falls into two parts, firstly, that the distribution of the property is unfair and premised on wrong legal conclusions from the facts, and, secondly, that the trial Judge erred in law and in his findings of fact that the child Benjamin was a child of the family.

[6] In 1985 and 1988 (well before the marriage of the parties) the Appellant purchased two pieces or parcels of land, the latter being a parcel of almost 5,600 square feet and the former being 30,501 square feet. The Appellant built his home on the smaller portion of land. In August 1994, a few months before the marriage, the Appellant transferred to himself and the Respondent as tenants in common both pieces of land (save that the larger piece of land seems to have been reduced in area to 24,401 square feet) in consideration of the up coming marriage and in consideration of the love and affection of the Respondent by the Appellant. In 1995, both portions of land were mortgaged to The Saint Vincent Building and Loan Association to secure borrowings of $85,000.00. The funds were used to pay off an existing debt to National Commercial Bank and to provide additional funds of $15,433.16 which additional sum was paid to the Respondent to assist in the setting up of her hairdressing business. I am satisfied that that sum was paid to the Respondent as a photo copy of the cheque was exhibited to the Appellant's affidavit.

[7] Perhaps it is appropriate at this stage that I comment on the affidavit evidence of the Respondent. The Respondent filed three affidavits pertinent to this matter. The first was filed on the 11th November 2002, and the second on the 11th March 2003, two months after the Appellant filed an affidavit in response to the Respondent's first affidavit. The first sentence of the latter affidavit is instructive. It reads: This affidavit is made to correct certain inaccuracies in my affidavit which is dated 11th

November 2002". There then followed six paragraphs "correcting" the first affidavit. The corrections are of substance and go the root of the Respondent's allegations in relation to property. They are clearly the result of the Respondent's legal adviser pointing out the discrepancies between her evidence and that of the Appellants and seeking proof for the allegations of the Respondent for presentation to the Court. The Respondent seeks to excuse the mistakes on the basis of her solicitor misunderstanding her instructions. Of course, she signed the first affidavit. The kindest way I can characterize the affidavit evidence of the Respondent is to say that I find it completely and utterly unreliable. In that connection, I find that the Financial Statements concerning "Hair Talk Unisex Salon" of little or no use. It is true that the report is prepared by KPMG, a well known international accounting firm, but one only has to read the accompanying letter written by the accountants to realize that they have had no input in regard to the accuracy of the figures presented. The letter is short and is worth repeating. It reads:

> "On the basis of information provided by management we have compiled, in accordance with the International Standard on Auditing applicable to compilation engagements, the statement of earnings of Hair Talk Unisex Salon (Unincorporated) for the year ended December 31, 2000. Management is responsible for these financial statements.
>
> We have not audited or reviewed these financial statements and accordingly express no assurance thereon."

I wish to make it abundantly clear that I cast no aspersions against the accounting firm. However, they eschew all responsibility for the figures. I therefore take the same jaundiced view of the report as I do of the rest of the Respondent's evidence. The Appellant's affidavits are, on the other hand consistent and well supported with documentary exhibits.

[8] The learned trial Judge did not give, in his judgment, the underlying basis for the exercise of his discretion in making the award that he did. Hence, I am forced to approach the matter de novo. Further, I am of the view that the trial Judge misled himself in coming to the conclusion that in addition to the matrimonial home and land, there was an additional 24,401 square feet of land, which he awarded to the

Appellant. According to the evidence of the Appellant, a dismemberment of that land of approximately 10,000 square feet was sold to a third party subsequent to the marriage. According to the evidence of the Respondent a further piece was also sold, though, as I have said above, I regard the evidence of the Respondent as having little or no weight. In any event, there can be no more than approximately 14,000 square feet of land in addition to the matrimonial home property.

[9] As stated above, in 1994, shortly before the marriage of the parties, the Appellant transferred from his sole name to the names of himself and the Respondent both the matrimonial property and the additional land. This was a gift expressed to be in contemplation of the coming marriage and in consideration of the love and affection of the Appellant for the Respondent. The position, therefore, prior to any settlement between the parties ordered by the Court, is that the Appellant and Respondent each own a half interest in the properties. In **Pettitt v Pettitt**[1] the House of Lords advanced what seems to be the absolutely logical proposition that before the Court enters into the gymnastics of trusts and implied intentions, they should first look at the intention of the parties in written form. As Upjohn LJ said:

> "If that document [title] declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest, that necessarily concluded the question of title as between the spouses for all time..."

[10] One aspect of this case that has created difficulties for this Court is the lack of valuations of the various properties. The Respondent refers to two valuations, but they are not part of the record.

[11] It is common ground between the parties that the Appellant alone serviced the mortgage loan and I accept the evidence of the Appellant that, in addition, he paid all utilities and some of the other household expenses. I also accept that the Respondent did from time to time contribute to grocery expenses. I accept that the

[1] [1969] 2 All ER 385

Appellant contributed some $15,433.00 dollars to the Respondent's business by virtue of the loan taken out with The St. Vincent Building and Loan Association. Whilst it is true that the security used for this loan was property owned in common by the parties, it is conceded that the Appellant alone serviced this loan. Unfortunately, the report from KPMG, for what it is worth, contained no balance sheet of the business Unisex Salon which would at least have indicated a value of the assets of the business. The Respondent in her affidavit evidence gave no indication of what her investment in the salon had been. On the basis, therefore, that absent further information, equality is equitable, I would find that the Appellant had a half interest in the Salon.

[12] The learned trial Judge said the following in his judgment at paragraph 10:

> "Mrs. Diamond has alleged in her affidavit that throughout the marriage she paid all electricity, water and propane gas, and almost all the groceries, in addition to paying a gardener to tend the yard. She said she bought clothing for herself, her husband and her children. She sometimes paid for parts for his car and even in making child support payment to his children, including buying school books for those children. Yet she says that she does not pay herself a salary, because after expenses there is not usually a surplus. That leaves me to wonder from what resources she met all the expenses to which she adverted."

Where a party to ancillary proceedings is less than full and frank in its disclosure of its assets and resources, or to put it more directly is duplicitous and concealing, that party cannot after be heard to complain if a Court concludes adversely to that party. Clearly the Respondent runs a thriving business from which she derives a comfortable living. The Appellant speaks of the Respondent having acquired a car in 2000. I find corroboration for this in the Respondents Affidavit of 13th June 2003 at paragraph 4 where she lists as one of her expenses $40.00 for petrol every fortnight. The Appellant also speaks to the construction by the Respondent of a two bed-room apartment at Diamond which evidence is uncontroverted by the Respondent. Absent any evidence of an alternative source of income in the Respondent, other than the salon, I find that these acquisitions derived from the

income of the Salon and that the Appellant therefore has a notional half share in them.

[13] The Appellant admits to the ownership of land at La Croix. This land he avers was given to him by his mother in 1993. This latter evidence is not controverted by the Respondent. I therefore find that this land forms no part of the marital assets. Similarly, the Appellant states that the Respondent, using money derived from the salon business bought a wooden house in which she resides. The Respondent does not deny that she owns the wooden house, but denies that she bought it. Rather, she says, the house **belonged** to her mother and was purchased by her mother. She does not deny that she now owns the house. Giving her the benefit of the doubt, I would also exclude the wooden house from the marital assets.

[14] I therefore find that the marital assets of the parties comprise of the matrimonial home, the adjacent property, what appears to be a successful hairdressing salon and the two-bedroom apartment at Diamond built by the Respondent. I further find that these assets were owned, as to beneficial interest, equally between the parties.

[15] As I said earlier on in this judgment, this is a case that cries out for a clean break solution. As I have also said, the Court is hamstrung by the absence of valuations for any of the marital assets. In the circumstances, doing the best it can, and seeking to apply the principle of fairness and equality as set forth in this Court in **Stonich v Stonich**[2], I would order that the Respondent do transfer her share of the matrimonial home to the Appellant and that the Appellant do transfer his share of the adjacent land (14,000 square feet more or less) to the Respondent. I further direct that the two properties be valued by an independent valuer and the outstanding mortgage debt secured by the two properties be divided as to the obligation to repay between the parties in proportion to the respective values of the two properties. In the event that the Saint Vincent Building and Loan Association

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be unwilling to separate the loan obligations and the security as above it is ordered nevertheless that each party shall be liable to the other for the faithful performance of their obligations to repay their proportion of the mortgage debt as set out above. I would further order that the business Hair Talk Unisex Salon belongs absolutely to the Respondent and that the Appellant hence forth shall have no interest therein. Similarly, the two bed-roomed apartment shall belong absolutely to the Respondent and the Appellant shall have no interest therein.

[16] The second substantive ground of appeal by the Appellant is that the learned trial Judge erred in law and in fact by making Benjamin a child of the family and ordering the Appellant to pay $100.00 per month to support him until he reaches the age of 16. On this aspect of the case, the learned trial Judge's sole comment is: "Having considered all the evidence, I am satisfied that the child Benjamin is a child of the family."

[17] Having reviewed the affidavits of both the Appellant and the Respondent, I have no hesitation in agreeing with the trial Judge. Based on the evidence of the Appellant himself I am of the view that this was a proper conclusion to come to. The Appellant argues that he never accepted the child and the child was never treated as a child of the family. As argued by Counsel for the Respondent, the law tries to take an objective view of how the child was treated, rather than regard the very subjective feelings of the step-parent.

[18] I can see no reason to upset or vary the Order of the trial Judge in regard to the child Benjamin, notwithstanding that it unfortunately preserves a contact between the parties which would best have been severed.

[19] I therefore would make the following order:

(1) That the Respondent do transfer all of her share and interest in all of the property comprising 5394 square feet together with all the buildings and

erections thereon (the marital home) being part of the properties conveyed to them by deed No. 2490/94.

(2) That the Appellant do transfer his share of the adjacent land (14,000 square feet more or less) to the Respondent conveyed to them by deed No. 2490/94.

(3) That the two properties mentioned at paragraph 1 and 2 of this Order be valued by an independent valuer and the outstanding mortgage debt secured by the two properties be divided as to the obligation to repay between the parties in proportion to the respective values of the two properties. In the event that the Saint Vincent Building and Loan Association be unwilling to separate the loan obligations and the security as above it is ordered nevertheless that each party shall be liable to the other for the faithful performance of their obligations to repay their proportion of the mortgage debt as set out above.

(4) That the Appellant has no proprietary interest in the Respondent's business, Hair Talk Unisex Salon.

(5) That the Respondent do have custody of the child Benjamin and that the Appellant do pay towards his maintenance the monthly sum of $100.00 commencing on August 31st 2003 until he attains the age of 16.

(6) That each party will bear his/her own costs.

Michael Gordon, QC
Justice of Appeal

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal