SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HIGH COURT CIVIL APPEAL NO. 21 OF 2005

BETWEEN:

RODGER FUSSEE-DURHAM

Appellant

and

DIANA FUSSEE-DURHAM nee Baker

Respondent

Before:

The Hon. Mr. Michael Gordon Q.C.	Justice of Appeal
The Hon. Mr. Denys Barrow S.C.	Justice of Appeal
The Hon. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Samuel Commissiong and Ms. S Commissiong for the Appellant
Ms. Nicole Sylvester for the Respondent

2006: May 23;
September 18.

JUDGMENT

[1] GORDON, J.A.: The appellant is 71 years of age and the respondent 53. The appellant is retired and the respondent works. Their respective incomes were spoken of by the learned master. The parties were married in 1983 and divorced in 2003. There were no children of the union. The respondent applied for ancillary relief and the learned master handed down a judgment on 3rd November 2005 which has displeased the appellant. The master concluded that having regard to the age of the parties and the income and earning capacity of both he would make no order for financial provision under the Matrimonial Causes Act (hereafter "the Act") There is no appeal against that part of the master's decision. As the learned master then expressed himself: "I thus confine myself to an examination of the way in which the matrimonial home is to be disposed of."

[2] At paragraph [6] of his judgment the learned master dealt with the then existing legal situation in respect of the matrimonial home in this way: "The matrimonial home is situate in Bequia on lands conveyed to the parties jointly. Thus the present position is that the parties each are entitled to an undivided half share of the matrimonial home." The master's conclusion, which has upset the appellant, expressed at paragraph 10 of his judgment, was that the clear intent of the parties was that they both be equally entitled to the matrimonial home.

[3] The appellant filed a Notice of Appeal containing four grounds, which he consolidated into to two in his skeleton argument and they were expressed in the following manner:

> "Ground 1 The Master having found that the Respondent [appellant hereafter] contributed substantially more to the acquisition of the matrimonial home implicitly found that the parties contributed in unequal shares to its acquisition and should have found that they were tenants in common in equal (sic) shares; alternatively that they held the beneficial interest in unequal shares.
> "Ground 2 The Master failed to take into account (i) the Respondent's (appellant's) age as compared to that of the Petitioner (respondent); (ii) the fact that she still earns a regular income of $1,600.00 - $1,800.00 US monthly and an unspecified income from her concrete curbing business; (iii) the fact that both parties had previous marriages and that their second marriage produced no children; the fact that she still works and can expect to get an old age pension and enhanced Social Security after she attains age 65."

[4] The leading case in our jurisdiction on the approach to division of matrimonial property is Stonich v Stonich[1]. In the course of his judgment Saunders JA said the following:

> "One of the useful features of the MPPA (Matrimonial Proceedings and Property Act) is that it gives the Court a broad discretion in apportioning assets built up over the course of the marriage. The ultimate and overriding objective that the court must strive at is fairness. In apportioning the assets, the Court must consider the various factors the legislature has asked it to take into account and then arrive at a solution that is, in all the circumstances, fair to the parties. The wide discretion available permits

[1] Civ App No. 17/2002 BVI delivered Sept 2003

> the court the ability to interpret fairness in the light of prevailing societal standards."
>
> In assessing the respective contributions of husband and wife, there was a time when one regarded the fruits of the money-earner to be more valuable, more important than the childrearing and homemaking responsibilities of a wife and mother. If the man was reasonably successful at his job and the family fortunes were vastly improved, his contribution was almost automatically treated as being greater than that of the wife who remained at home. Ironically, if the man's business failed, whether through bad luck or ineptitude, the wife invariably shared equally the couple's hard times.
>
> The time has long gone for courts to eschew this approach. That kind of reasoning pays too much regard to a contribution merely because it is easily measurable in hard currency and too little to a contribution that is less tangible but equally important to the family structure. In the vast majority of cases where these two types of contribution are in issue – that of a homemaker and that of an income earner, it is the wife who has stayed at home while the husband has performed the role of breadwinner. There is therefore an element of gender discrimination in degrading the woman's role in the home.
>
> The MPPA does not rank in any order of preference any of the factors to which Courts are obliged to have regard. It is for the Court to consider all of them. In one case, the facts and circumstances may call for a particular factor to be given special importance. In another case another factor may assume most significance. The point is that there is no basis in law for courts to regard always as decisive or of special importance the financial contribution made by a party to the welfare of the family.[2]

[5] The day after argument in this case was presented to this court by learned counsel, the House of Lords handed down the decision in **Miller v Miller**[3]. The Miller case in no way derogates from **White v White**[4], a watershed case if ever there was one, but rather echoes Saunders JA in Stonich and seeks to assist courts in the exercise of the discretion given by section 34 of the Act, which is largely similar to section 25 of the English Matrimonial Causes Act.

[6] Lord Nicholls of Birkenhead, who delivered the first opinion commenced with an almost philosophical discourse on the concept of fairness, which should attend the

---

[2] Stonich paragraphs 27 - 30
[3] [2006]UKHL 24
[4] [2001] 1 AC 596

exercise of judicial discretion in the distribution of assets on a divorce. At paragraphs 4 et seq he stated:

> "Fairness is an elusive concept. It is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. The values, or attitudes, can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.
>
> "At once there is a difficulty for the courts. The Matrimonial Causes Act 1973 gives only limited guidance on how the courts should exercise their statutory powers. Primary consideration must be given to the welfare of any children of the family. The court must consider the feasibility of a 'clean break'. Beyond this the courts are largely left to get on with it for themselves. The courts are told simply that they must have regard to all the circumstances of the case.
>
> "Of itself this direction leads nowhere. Implicitly the courts must exercise their powers so as to achieve an outcome which is fair between the parties. But an important aspect of fairness is that like cases should be treated alike. So, perforce, if there is to be an acceptable degree of consistency of decision from one case to the next, the courts must themselves articulate, if only in the broadest fashion, what are the applicable if unspoken principles guiding the court's approach."

[7] It is always unfortunate when a marriage which has, as in this case, lasted for some 15 years with the parties on good terms and a further five years when extrication must have been the predominant thought, comes to an end and the spouses seek to examine minutely the contributions made by each other. In the end the reality is that it cannot be done, unless the parties have lived their lives together preparing for divorce – a sufficiently unlikely circumstance as to be ignored. That is why courts must seek 'fairness' painted with a broad brush as they undo multi-layered relationships.

[8] An example of the impossibility of measuring in a balance the respective contributions of the spouses can be seen from the affidavit of the appellant dated 7th January 2005 wherein he states, at paragraph 10:

> "When the petitioner and I were first married we had built a house in Georgetown, Texas in 1985 and lived in it. This house was 100% financed and no personal funds were involved. We sold this house in 1992 and applied the net proceeds of sale amounting to $104,000 to the construction of the second house at Briarcrest Road, Georgetown, Texas. We lived in this house for about 2 years and afterward moved to Bequia and rented the Texas house for about 1 year before selling it. The net proceeds of this house was approximately $187,000.00. From that money we purchased a few consumer durables – washing machine, dishwasher and a new refrigerator for the Bequia house."

[9] It is well within the court's knowledge that expenditure on the listed 'consumer durables' in 1995 referred to in the affidavit of the appellant could not have been $187,000.00. It is clear that his memory of expenditures and, presumably contributions, was as incomplete as one would expect after such a period of time. As the learned master said in his judgment: "That said, however, I am in no position to precisely calculate the exact proportion of the contribution of either party"[5]. It is to be born in mind that the master was referring only to financial contributions in that statement.

[10] The essence of this appeal is that the appellant is asking this court to substitute its own discretion in the determination of the division of the matrimonial property for that of the learned master, who had the significant advantage of hearing and seeing the parties. In his filed grounds of appeal the appellant (at ground 2) adverts that the decision of the learned master was unreasonable and contrary to the statutory provisions set out in section 34 of the Act. Both in his skeleton and in argument before us learned counsel for the appellant seemed to have abandoned this ground. He recast the argument to state that the powers of distribution of assets must be exercised in consonance with the principles set out in section 34of the Act. Nowhere did learned counsel point to a failure by the master to act in

[5] Paragraph 9 of Master's judgment

conformity with section 34 of the Act. As I said at the beginning of this paragraph, we are being asked to substitute our discretion for that of the master, and I now add, in the absence of any suggestion that the master failed to take into account the relevant particulars section 34 requires him to do.

[11] In the often quoted words of Singh JA in Alphonse v D. Ramnauth[6] where he was speaking to the variation of an award of general damages:

> The award of damages is a matter for the trial judge's discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere".

The principle here is the same. The master's decision does not in my view exceed the 'generous ambit within which reasonable disagreement is possible.' I would dismiss the appeal with costs to the respondent.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[6] Civil Appeal No 1 of 1996, BVI