EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2009/0003

BETWEEN:

BETTY LOU BAILEY (NEE CHALWELL)

Appellant

and

MARK BAILEY

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Michael Gordon — Justice of Appeal [Ag.]

Appearances:

Ms. Tana'nia Small-Davis with her Ms.Tamara Cameron for the Appellant
Mr. John Carrington for the Respondent

2010: September 23;
2013: April 22.

Civil appeal – Divorce – Matrimonial Proceedings and Property Act, 1995 – Ancillary relief – Sale of matrimonial home – Exercise of judicial discretion – Lump sum payment – Jurisdiction of appellate court – Circumstances in which appellate court can interfere with first instance decision – Whether appellate jurisdiction different in cases dealing with welfare of children

The appellant and the defendant were married in 1989 and are the parents of two children born to them during the subsistence of the marriage. The marriage ended in divorce in 2007. The appellant subsequently filed an application for ancillary relief seeking, inter alia, that she be awarded the matrimonial home and that any interest held by the respondent be transferred to the children of the marriage; that the respondent do continue to pay the mortgage on the home and continue to meet the car and house insurance; that the respondent do repay her for the repairs to her motor vehicle and that the respondent do pay to her a lump sum payment in the amount of $150,000.00 in lieu of maintenance.

The learned trial judge ordered, inter alia, that the matrimonial home be sold at a price to be agreed by the parties and failing agreement at a price to be fixed by a reputable valuer appointed by both parties within 4 months of the date of judgment, either party having the right to buy the other's interest; that the proceeds of sale are to be divided equally between the parties after payment of the balance on the mortgage and after repayment of the loan to Mr. Raymond Bailey, the father of the respondent; that the appellant is wholly responsible for repaying the educational loan (a loan taken out on behalf of the elder child); that the appellant do pay to the respondent the sum of $3,500.00 being his share of the insurance monies relating to their car and such sum to be deducted from the appellant's share of the proceeds of sale of the matrimonial home; that the appellant's claim for a lump sum payment of $150,000.00 in lieu of maintenance is dismissed.

The appellant appealed each of those orders made by the learned trial judge.

Held: allowing the appeal in part in relation to the educational loan and ordering that the respondent do pay one half of the balance of the educational loan (shorn of any additional loans taken out by the appellant) as existed at the date of the trial; and dismissing the appeal on the other grounds, that:

1. The learned trial judge in reaching her decision correctly directed herself that one of the major considerations on a divorce settlement is that both the parties and, most importantly, the children of the marriage, have homes. In the exercise of her discretion, and based on the affidavit evidence and the oral evidence led before her at the hearing the trial judge arrived at her conclusion that the house should be sold. There was no error in law and or in fact in the learned trial judge's decision.

   Section 26 of the Matrimonial Proceedings and Property Act, 1995 applied.

2. The principles applicable to the Court of Appeal's jurisdiction when reviewing a judge's exercise of discretion in cases involving the welfare of children are the same as those which apply to the Court of Appeal's general appellate jurisdiction. That being said, an appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. Where therefore there is an appeal against the finding of facts, the burden upon the appellant is a very heavy one. Having regard to the fact that in cases such as the one at bar there are often no right answers and the judge at first instance is faced with choosing the best of two or more imperfect solutions, the Court of Appeal should only intervene when it considered that the judge at first instance had exceeded the generous ambit within which judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the Court of Appeal preferred a solution which the judge has not chosen. In this instance, the learned trial judge properly exercised her discretion and did not exceed the generous ambit within which reasonable disagreement is possible. Accordingly, the Court of Appeal will not interfere with her decision.

G v G [1985] 2 All ER 225 applied; Jada Construction Caribbean Limited v The Landing Limited Saint Lucia High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported) followed.

3. The learned trial judge was wrong in principle in holding the parties to any sort of agreement as to how they would manage their finances during marriage after the break-up of the marriage. Excluding the paramount interests of the welfare of any children of the union, the Court must be guided only by the principles of fairness. People come to arrangements of all kinds for different reasons. It is not for the Court to cast those arrangements in stone in circumstances which, by definition, have fundamentally changed.

JUDGMENT

[1] GORDON JA [AG]: This is a judgment of the court. The parties were married in 1989. Two daughters, Nicola aged 14 and Shelby aged 8, were issue of the marriage. In February 2007 the respondent (hereafter Mr. Bailey) filed for divorce on the grounds of irretrievable breakdown of the marriage due to the fact that the parties had been living separate and apart for at least two years preceding the presentation of the petition for the divorce. The appellant (hereafter Mrs. Bailey) consented to the divorce and the decree nisi was duly granted in June 2007.

[2] In October 2007, Mrs. Bailey filed an application for ancillary relief seeking, inter alia, equal division of the proceeds of all accounts held by Mr. Bailey; that Mrs. Bailey be awarded the matrimonial home and that any interest held by Mr. Bailey be transferred to the children of the marriage; that Mr. Bailey pay $1,000.00 per month maintenance in respect of each child (i.e. $2,000.00 per month); that Mr. Bailey do continue to pay the mortgage on the home and continue to meet the car and house insurance; that Mr. Bailey do repay her for the repairs to her motor vehicle; that Mr. Bailey do pay to her a lump sum payment in the amount of $150,000.00 in lieu of maintenance and finally that Mr. Bailey do pay the costs of the application.

[3] To the extent relevant for this judgment, the learned trial judge ordered, inter alia, that the matrimonial home be sold at a price to be agreed by the parties and failing

agreement at a price to be fixed by a reputable valuer appointed by both parties within 4 months of the date of judgment, either party having the right to buy the other's interest; that the proceeds of sale are to be divided equally between the parties after payment of the balance on the mortgage and after repayment of the loan to Mr. Raymond Bailey, the father of Mr. Bailey; that Mrs. Bailey is wholly responsible for repaying the educational loan;[1] that Mrs. Bailey do pay to Mr. Bailey the sum of $3,500.00 being his share of the insurance monies relating to their car and such sum to be deducted from Mrs. Bailey's share of the proceeds of sale of the matrimonial home; that Mrs. Bailey's claim for a lump sum payment of $150,000.00 in lieu of maintenance is dismissed.

[4] In her grounds of appeal, Mrs. Bailey challenged each of those orders by the learned trial judge. We shall treat with the orders in the sequence they have been treated in the skeleton argument filed on behalf of Mrs. Bailey.

The matrimonial home

[5] With respect to the matrimonial home it is stated on behalf of Mrs. Bailey as follows:

> "The learned judge erred in fact and in law when she found that the Matrimonial Home is to be sold and the proceeds divided between the parties (Paragraph 22 of the decision). The Respondent is a mother who has the main responsibility of raising two small children. The children reside at the Matrimonial Home with their mother, the smallest of which is eight years old. The paramount importance of any decision relating [to] children in any divorce proceedings should be where the children will reside after the divorce. The Judge by requiring that the house be sold would be depriving the Appellant and the children of the marriage of a place to live. The Appellant had never suggested that the interest in the Matrimonial Home not be determined but her application was for the interest to be determined once the youngest child attained the age of eighteen (18) years. The Learned Judge had not taken into consideration

[1] The elder child of the marriage has special learning needs, a fact which was recognized early on in the child's life. The parties agreed that she should go to school in Canada, the home country of Mr. Bailey and the country of her birth. She attended school in Canada for two years before returning to the Virgin Islands and her family due to home sickness. The educational loan was taken out for the purpose of affording this facility.

the evidence of the Appellant that in light of her salary she would not in a position to source another mortgage for a house."[2]

[6] In her notice of application for ancillary relief Mrs. Bailey had asked that she be awarded the matrimonial home with whatever interest belonging to Mr. Bailey being transferred to the children of the marriage.

[7] The learned trial judge dealt with the issue of the matrimonial home in this way:

> "[17] Mrs. Bailey is asking the court to postpone the sale of the home, which she concedes is jointly owned by both parties even though the title is in her name, until the younger child attains eighteen years. That equates to a postponement for ten years. Section 50 of the Act gives the court the power to order an immediate sale of matrimonial property or to postpone the sale.
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> "[18] The matrimonial home is the most substantial family asset. Prior to the divorce Mr. Bailey made the mortgage payments directly from his salary. Since the divorce he has only paid half of the mortgage and requested Mrs. Bailey to meet the other part. Having regard to the income of both parties and their financial obligations it is evident that neither of them can meet the payments on his/her own and any contributions they might be prepared to make would mean that they could not do so without some real sacrifice. Further, the home is presently in need of maintenance and neither party has offered to carry those out or to share it. In addition, the question of how the continuing costs of maintaining the home for ten more years will also have to be considered against a background where the parties have not been able to communicate effectively with each other even during the later years of their marriage. Again, I have had no proposals on that.
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> …
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> "[20] The court is mindful that one of the major considerations on divorce is to ensure that both parties and their children have homes. If the house is sold, based on the valuation which dates back to 2003 and to the amount outstanding on the mortgage each will realize substantial equity. Thus, I am satisfied that Mrs. Bailey will have sufficient means coupled with her other resources which I have referred to under issue "whether Mrs. Bailey should be awarded a lump sum payment from Mr. Bailey" to enable her

[2] See p. 2 of the notice of appeal.

to fund her own home either by obtaining suitable rental or mortgage finance.

> "[21] In all the circumstances, I agree with the submissions of Mr. Carrington, counsel for Mr. Bailey that to postpone a sale would impose unbearable constraints on parties whose marriage broke down because they were unable to communicate with each other. To my mind, to tie up the main asset without justification and to require them to cooperate over a house in which only one of them resides albeit with the child/children would be wholly unrealistic and would make for some bitter years ahead which must be avoided if these parties and their children are to overcome the trauma of their divorce and their broken home. A clean break is called for and it can be achieved without hardship to either party.
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> "[22] Accordingly, I direct that the parties sell the house at a price to be agreed on, or failing agreement that they appoint a reputable valuer to value the home and that the house be sold within 4 months or within such further period as the parties may agree in writing. Each party has the right to purchase the other's share."

[8] The learned trial judge, in our view, correctly directed herself that one of the major considerations on a divorce settlement is that both the parties and, most importantly, the children of the marriage, have homes. In the exercise of her discretion, and based on the affidavit evidence and the oral evidence led before her at the hearing the trial judge arrived at her conclusion that the house should be sold.

[9] In the skeleton argument filed on behalf of Mrs. Bailey learned counsel for Mrs. Bailey wrote:

> "It appears that there was no proper consideration of the issue [the determination of the disposition of the marital home] from the point of view of the welfare of the children and within the reasoning of the judgment, it appears as though the main consideration was whether the Appellant would benefit at the Respondent's expense."[3]

[10] With the greatest of respect to learned counsel, we can agree with neither the first premise of that paragraph, namely that the learned trial judge gave no proper

[3] At para. 13.

consideration to the disposition of the marital home from the point of view of the welfare of the children[4] nor can we agree with the premise that the main consideration of the learned trial judge was whether Mrs. Bailey would benefit at Mr. Bailey's expense. Nowhere, that we could find, did the trial judge express such a sentiment.

[11] Perhaps this would be an appropriate place in this judgment to make certain general comments. There are five discreet grounds of appeal set forth in the notice of appeal. Each ground commences with the words "[t]he learned judge erred in fact and in law…" In reality, each of the grounds of appeal complain of the manner in which the trial judge exercised her discretion based on the facts she found.

[12] Learned counsel for Mr. Bailey referred the Court to the very helpful case of G v G.[5] We would quote (and adopt) the headnote which encapsulates the essence of the task before this Court and lays out the methodology to be followed by an appellate court faced with the kinds of questions with which this Court is faced:

> "The principles applicable to the Court of Appeal's jurisdiction when reviewing a judge's exercise of discretion in cases involving the welfare of children were the same as those which applied to the Court of Appeal's general appellate jurisdiction. Having regard to the fact that in such cases there were often no right answers and the judge at first instance was faced with choosing the best of two or more imperfect solutions, the Court of Appeal should only intervene when it considered that the judge at first instance had exceeded the generous ambit within which judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the Court of Appeal preferred a solution which the judge has not chosen. Accordingly, the Court of Appeal had been right not to interfere with the judge's decision, since he had seen both the father and the mother as well as the elder daughter, whereas the Court of Appeal had not, and the judge had been entitled to decide that the best course was to leave the children with the father. The appeal would therefore be dismissed."

[4] See para. 20 of the first instance judgment quoted above.
[5] [1985] 2 All ER 225.

[13] The general appellate approach in relation to the findings of a trial judge which we intend to adopt were articulated by Sir Hugh Rawlins CJ in Jada Construction Caribbean Limited v The Landing Limited.[6] He said:

> "[22] The basic principle which guides our courts in appeals against findings of fact is trite. They have been stated, for example, by Sir Vincent Floissac, CJ, in the landmark case Michel Defour et al v Helenair et al[9] *[(1996) 52 WIR 194]* and by this court in Golfview Development Limited v St. Kitts Development Corporation and Another.[10] *[Saint Christopher and Nevis Civil Appeal No. 17 of 2004 (20th June 2007), at paragraphs 23 and 24].* An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself or herself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Where therefore there is an appeal against the finding of facts, the burden upon the appellant is a very heavy one. An appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes more elegantly stated, exceeded the generous ambit within which reasonable disagreement is possible. These statements of principle on appeals from the fact-finding of a trial court are often referred to as the *Benmax principles*, from the *locus classicus*, Benmax v Austin Motors Co. Ltd.[11] *[[1955] A.C. 370; [1955] 1 All E.R. 326.]."*

Loan of $35,000.00

[14] The second ground of appeal was that the learned trial judge erred in fact and law when she decided that the sum of $35,000.00 was to be repaid to Mr. Bailey's father from the proceeds of sale of the matrimonial home prior to distribution to the parties.

[15] The learned trial judge had this to say about the loan of $35,000.00 from Mr. Bailey's father to him:

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[6] Saint Lucia High Court Civil Appeal SLUHCVAP2009/0011 (delivered 8th March 2011, unreported).

> "Mr. Bailey testified that his father, Mr. Raymond Bailey of Canada gave him a loan in January, 1995 to assist them with the purchase of the house and that he applied the loan to meet closing and other associated costs. This loan is for $35,000 and is evidenced by an agreement between Mr. Bailey and his father dated January 2005.[3] *[See page 67 of Exhibits to Mr. Bailey's First Affidavit].*
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> "Mrs. Bailey said that she was not aware of the loan. She has made no allegations that the documents were false and she testified that the signature on the agreement appeared to be that of Mr. Raymond Bailey. She only claims that this loan should be set off against Nicola's educational loan which she is paying but we shall deal with that issue separately.
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> "The couple purchased that house in 1995 for $135,000 and obtained a mortgage for $128,682.00. This meant that the loan proceeds did not meet the other costs associated with purchase, for example, legal fees. In the absence of evidence from Mrs. Bailey as to how these costs were met, I have to accept Mr. Bailey's evidence. Although Mrs. Bailey was not a party to the agreement on its face the loan was used for the benefit of both parties and each is responsible for repayment. Accordingly, the loan with interest accrued in accordance with the agreement must be paid to Mr. Raymond Bailey from the proceeds of sale of the house prior to any distribution to the parties."[7]

[16] It is of great significance that the trial judge stated the sum was used for "other costs associated with the purchase, for example legal fees." It is clear that the learned judge had in mind that there were additional costs other than legal fees. Such additional costs were the subject of oral evidence at the hearing.[8] In the circumstances we find no legal basis for upsetting this finding of the trial judge and hence would dismiss this ground of appeal.

Educational loan

[17] The third ground of appeal was that the learned trial judge erred in fact and in law when she found that Mrs. Bailey was to be solely responsible for the repayment of the educational loan of $30,000.00 taken out for purposes of education of the eldest daughter of the parties.

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[7] See first instance judgment at paras. 25-27.
[8] See pp. 412-421 of the Record of Appeal.

[18] If the Court may digress for a short while at this point, it would be to point out that the parties had two children of the union. The elder child, Nicola, it was mutually accepted, has a learning disorder and has special education needs. In 2004 the parties took out a loan from the Development Bank of the Virgin Islands which sum was used for Nicola's education in Canada. The loan was secured by a charge on Mrs. Bailey's land at Long Look and a promissory note executed by both parties. At the time of the hearing, there was a balance of that loan outstanding.

[19] During the marriage the parties made certain arrangements regarding their finances. As the trial judge found:

> "the parties agreed to take out the loan for that purpose and also agreed that Mrs. Bailey [appellant] would be responsible for re-paying it having regard to the fact that Mr. Bailey [respondent] was meeting most of the financial needs of the family. At the time Mr. Bailey was paying the mortgage, the car loan and all household expenses to which Mrs. Bailey contributed $1,000 per month. However, she later reduced that sum to $470.00 per month for part of the duration of the marriage. The educational loan repayment was $526.00 per month. Therefore, it appears that Mrs. Bailey did not make any additional contribution to the family expenses by paying the loan for Nicola."[9]

[20] The learned trial judge went on to conclude that the parties had agreed on the manner in which they would meet their financial commitments during the marriage and both acted on that basis. She concluded that there was no reason to allow Mrs. Bailey to depart from that agreement.

[21] Learned counsel for Mrs. Bailey argued, and set forth in her skeleton argument, that the educational loan, which it was not disputed was taken out for the benefit of their child Nicola, ought to be borne equally by both parties. We would have no difficulty in agreeing with counsel for Mrs. Bailey, and disagreeing with the trial judge but for one matter to which we will come presently. We are of the view that the learned trial judge was wrong in principle in holding the parties to any sort of agreement as to how they would manage their finances during marriage after the

[9] See first instance judgment at para. 39.

break-up of the marriage. Excluding the paramount interests of the welfare of any children of the union, the Court must be guided only by the principles of fairness. People come to arrangements of all kinds for different reasons. It is not for the Court to cast those arrangements in stone in circumstances which, by definition, have fundamentally changed. With the greatest of respect to learned counsel for Mr. Bailey, he too falls into what we consider to be the same error in his submissions.

[22] The matter referred to in the previous paragraph which gives me pause, however, is the fact that the learned trial judge found as a fact that Mrs. Bailey took out further loans for her own purposes which she combined with the educational loan. This finding of fact has not been appealed and so stands. Unquestionably, if the loans have been combined, then it may well be difficult, if not impossible to segregate payments made to the loan account into that apportioned to the educational loan and that apportioned to the additional loans. In the circumstances we are of the view that a fair way out of the dilemma facing the Court is to order that Mr. Bailey do pay one half of the balance of the educational loan (shorn of any additional loans taken out by Mrs. Bailey) as existed at the date of the trial, namely 24th November 2008. To that extent, we would allow the appeal on this ground.

Insurance proceeds

[23] The fourth ground of appeal was that the learned trial judge erred in law and in fact when she found that Mrs. Bailey was to pay Mr. Bailey from her portion of the sale of the matrimonial home the sum of $3,500.00 which was one half of the sum realized by Mrs. Bailey from an insurance claim for the write-off value of a car jointly owned by the parties. We can do no better than quote from the judgment of the learned trial judge:

> "The parties owned a car jointly which Ms. Bailey continued to use after the divorce. The car was involved in an accident and written off. Thus both parties were entitled to share equally in the insurance proceeds. However, Mrs. Bailey obtained payment in her own name and she claims

> that this happened without any help on her part. This is questionable. It would also appear that a document was sent to the Licensing Department to have Mr. Bailey's name removed and that it was apparently signed by him. We accept Mr. Bailey's evidence that he did not sign it and that it is very likely that his wife forged his signature although she denied it.
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> "Mrs. Bailey attested that she paid the proceeds ($7,000.00) towards the mortgage on the house on her lawyer's advice. Immediately, she had to retract the latter part of that statement as it was obvious to all present that this was not true. Furthermore, Mrs. Bailey did not produce any supporting evidence to show that she paid the money into the mortgage account. Evidence by way of a deposit slip or a note from the bank confirming this would have been easily obtainable. I therefore find that Mrs. Bailey used the monies for her personal needs. Accordingly, Mrs. Bailey must pay to Mr. Bailey half of that amount in the sum of 3,500.00. This sum is to be paid out of her share of the proceeds of sale of the house."[10]

[24] In her skeleton argument learned counsel for Mrs. Bailey states that Mr. Bailey admitted that the $7,000.00 was paid towards the mortgage by Mrs. Bailey. We find it necessary to examine the evidence surrounding this transaction. As far as we can tell, the first reference to the payment of the $7,000.00 towards the mortgage is at paragraph 10 of Mrs. Bailey's affidavit in response to the affidavit of Mr. Bailey which affidavit is dated 17th November 2008 and starts at page 87 of the Record. At the mentioned paragraph, Mrs. Bailey speaks to receiving the $7,000.00 and using the same to pay off the arrears on the mortgage on the marital home. The next reference we are able to find is at paragraph 18 of Mr. Bailey's affidavit dated 17th November 2008[11] where Mr. Bailey states "I did not consent to the receipt of these monies by the Respondent [appellant] or to their application in this manner if indeed this is true". The next relevant reference to the $7,000.00 that we can find is in the transcript of the cross-examination of Mr. Bailey by learned counsel for Mrs. Bailey where Mr. Bailey states that he is asking for his half of the $7,000.00.[12] The final reference we can find is that to which learned counsel for Mrs. Bailey refers in her skeleton argument, namely at page 483 of the Record. It is worth reproducing:

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[10] See first instance judgment at paras. 23 and 24.
[11] See p. 322 of the Record of Appeal.
[12] See p. 465-466 of the Record of Appeal.

"BY MR. CARRINGTON:

Q. The question I asked you, Mr. Bailey, when last you are aware that Mrs. Bailey paid the mortgage?

A. Oh.

Q. That's the question I asked.

A. Well, if the money from the - -

Q. Just answer the question I asked you, please. When last are you aware that Mrs Bailey - -

A. Sorry. The money that she's put, $7,000 to paying the mortgage.

Q. Prior to that $7,000 Mr. Bailey

A She gave me on May 31st, September 31st, 2006, she gave me $470."[13]

[25] Unlike learned counsel for Mrs. Bailey, we do not find a clarity of admission by Mr. Bailey that the $7,000 was indeed paid towards the mortgage. The above excerpt from the transcript is less than a clear statement of admission. As the learned trial judge found, a deposit slip or a note from the bank would have put the matter beyond doubt. From the tenor of the learned trial judge's judgment, it is clear that she found Mrs. Bailey less than totally reliable as a witness. We are of the view that there is no sufficient reason to upset the learned trial judge's finding of fact on this issue. We would dismiss this ground of appeal.

Lump sum payment

[26] The fifth and last ground of appeal was that the trial judge erred in law and in fact when she found that Mrs. Bailey was not entitled to a lump sum payment.

[27] The learned trial judge in her judgment reminded herself of the criteria which section 26 of the Matrimonial Proceedings and Property Act, 1995[14] required that she consider in coming to a conclusion regarding periodical payments and/or a lump sum payment. It was found as a fact, which finding was not appealed, that the substantial family assets comprised only the matrimonial home and the car. The trial judge further found that Mrs. Bailey did not show any special contributions

[13] Lines 1-14.

[14] No. 6 of 1995, Laws of The Virgin Islands.

to the marriage nor any special need on her part which would entitle her to a lump sum payment over and above a half interest in the family assets. In her judgment the trial judge said:

> "she is young, intelligent, able-bodied and in lucrative employment. She now owns an expensive vehicle a Land Rover Defender since 2008 albeit she took out a loan to purchase it and retains the benefit of her pension and several thousand dollars worth of jewelry as I reject her evidence that this belongs to her siblings."[15]

[28] In her submissions, learned counsel for Mrs. Bailey pointed to no error of law of which it could be said the learned trial judge was guilty. Rather, counsel's submissions in substance, suggested different ways in which the trial judge's discretion might have been exercised. As stated above, an appellate court's function is not to second-guess a trial judge where that trial judge has exercised a judicial discretion within the confines of the law. We would dismiss this ground also.

[29] In the court below, there was no order as to costs, and no appeal was raised on this issue. In the circumstances, we would make no order as to costs.

[30] The Court apologises for the inordinate delay in the delivery of this judgment.

[15] See first instance judgment at para. 35.