THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2015/0018

BETWEEN:

JONATHAN DAVID LESFLORIS

Appellant

and

GLENDA DALE LESFLORIS (nee HENRY)

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mrs. Wauneen Louis-Harris for the appellant
Mr. Gerard Williams for the respondent

2018: July 4;
2019: December 13.

Civil appeal – Divorce – Property of parties to a marriage in Saint Lucia – Article 1192 of Civil Code – Community property – Separate property – Articles 1188, to 1301 of Civil Code – Ancillary relief – ss. 24 and 25 of Divorce Act – Applications under section 24 of Divorce Act – Applications under section 45 of Divorce Act – Whether learned trial judge erred in ordering transfer of a 40% share in the 36 acres of land to the respondent – Applications must state the law under which the application is made - Penal Notice – Whether endorsement of penal notice applies to matrimonial proceedings

The appellant and the respondent were married for 15 years before their marriage was dissolved on 15th April 2010. Prior to the marriage, but while living together with the respondent at her parents' home, the appellant purchased a portion of land in Vieux Fort. During the course of the marriage, the appellant constructed a house on that land, which became the matrimonial home of the parties. During the course of the marriage, the appellant

purchased 39 acres of land in Vieux Fort, which he stipulated in the deed of sale to be his separate property acquired with his separate funds and earnings. The appellant later sold approximately 3 acres of that land which he claimed was to enable him to bring his mortgage payments up to date, pay outstanding taxes, and purchase a motor vehicle to replace the more than 10-year old vehicle which he had been using to commute to and from Castries and Vieux Fort on a daily basis to service his 2 dental clinics.

On 2nd June 2009, the respondent filed a petition for divorce alleging irretrievable breakdown of the marriage and a decree nisi of divorce was granted on 15th April 2010, with ancillary relief matters adjourned for hearing in Chambers upon application by either party. On 22nd June 2010, he respondent filed a notice of application for ancillary relief seeking orders relating to custody of and maintenance for the two children of the family, and property orders relating to various assets.

The trial judge awarded joint custody of the children to the appellant and the respondent, with primary care and control to the respondent and specified periods of access to the appellant on weekends and during school holidays. She also ordered the appellant to pay $2,700.00 monthly for the maintenance of the children and $1,500.00 monthly towards the rental of premises to house the respondent and the children until the sale of the matrimonial home.

The trial judge having determined that the matrimonial home of the parties and an Isuzu motor car registered in their joint names were community property of the parties, ordered their sale and the distribution of the net proceeds of sale between the parties. Having determined that the other movable and immovable properties purchased by the appellant in the course of the marriage were his separate property, the trial judge ordered that a motor vehicle owned by him and habitually used by the respondent should be transferred to her for her sole use and benefit, that a fishing boat owned by him and used in his fishing business should be transferred to her, and that he transfers to her a 40% share in the portion of land in Vieux Fort consisting of approximately 36 acres.

The appellant appealed against the orders of the trial judge by which he was ordered to make a combined payment of $4,200.00 for the maintenance of the children and rental of premises to house the respondent and the children and against the transfer of property orders in respect of the car, the boat and the 36 acres of land, but only pursued the appeal against the orders for the combined maintenance and rental payments and the transfer of the 40% share in the land.

Held: allowing the appeal in part, setting aside and replacing the order of the trial judge and awarding costs to the respondent on the appeal in the sum of $3,250.00, representing two-thirds of the amount awarded to her in the court below, discounted by 20% to reflect the fact that the appellant was partially successful on the appeal, that:

1. In making applications to a court for relief, it is important to state in the application the provision of the law under which the application is being made and/or the relief is being sought, because failure to do so may lead to the sort of ambush that the CPR and other modern rules of practice and procedure aim to avoid. This is particularly important in the making of applications under the Divorce Act and Divorce Rules, because the requirements for the making of applications and for the grant of relief sometimes differ under different provisions of the Act and Rules. Important though it is to state the specific provision in the Act or Rules under which an application is being made or relief is being sought, the failure to do so will not necessarily be fatal to the application, particularly if the issue is being raised at the conclusion of the hearing of the application.

2. Unlike the situation in the UK and in the countries of the Commonwealth Caribbean with matrimonial property law identical to the UK, there is no concept of matrimonial property in Saint Lucia with respect to which a court can determine the extent of the ownership interest of the parties to the marriage. In accordance with article 1192 of the Civil Code, the property of parties to a marriage in Saint Lucia is either community property or separate property. If it is community property, then each party owns a community moiety or half share in the property; if it is separate property, then it is owned entirely by one or the other of the parties. The approach taken by the UK courts in cases like White v White, MAP (Petitioner) v MFP (Respondent) and Stack v Dowden that treat with the property of parties to a marriage as matrimonial property which can be distributed to the parties upon the dissolution of marriage as the court sees fit, cannot be applied to Saint Lucia.

   Article 1192 of the **Civil Code** Cap 4.01. Revised Laws of Saint Lucia 2013 applied; **White v White** [2001] 1 AC 596, **MAP (Petitioner) v MFP (Respondent)** [2015] EWHC 627 (Fam**)** and **Stack v Dowden** [2007] 2 All ER 929 distinguished.

3. A transfer of property order can be made under section 24 of the Divorce Act with respect to community property, because orders under section 24 are made upon or after the granting of a decree of divorce, which decree not only dissolves the marriage but also dissolves the community, thus terminating the community ownership of property by the parties and leaving it open to the court to order the transfer by one party to the other of the whole or part of any property which was community property prior to the dissolution of the marriage. A transfer of property order under section 24 can also be made with respect to the separate property of either of the parties.

   Section 24 of the **Divorce Act**, Cap.4.03 of the Revised Laws of Saint Lucia applied.

4. In exercising its powers to make a transfer of property order under section 24 of the Divorce Act, the court must have regard to the matters listed under section 25 of the Act, including: the income, earning capacity, property and other financial resources of the parties; the financial needs, obligations and responsibilities of the parties; the standard of living enjoyed by the family before the breakdown of the marriage; the age of each party to the marriage; the duration of the marriage; and the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family.

   Section 24 and 25 of the **Divorce Act**, Cap.4.03 of the Revised Laws of Saint Lucia applied.

5. Although the trial judge did attempt to factor in the matters to be considered by her, in accordance with section 25 of the Divorce Act, in the making of the transfer of property order under section 24 of the Act, she erred though by applying UK matrimonial law, rather than the provisions of the Civil Code dealing with the property of parties to a marriage in Saint Lucia.

   Articles 1188 to 1301 of the **Civil Code** Cap 4.01, Revised Laws of Saint Lucia 2013 applied; **White v White** [2001] 1 AC 596, **MAP (Petitioner) v MFP (Respondent)** [2015] EWHC 627 (Fam**)** and **Stack v Dowden** [2007] 2 All ER 929 distinguished.

6. The trial judge having erred in the exercise of the powers of the court under section 24 of the Divorce Act, the orders made by her in her judgment are set aside and replaced by the orders made in paragraph 131 of this judgment consistent with the regime of community and separate property under the Civil Code of Saint Lucia and in accordance with sections 23, 24, 25 and 42 of the Divorce Act.

JUDGMENT

[1] **MICHEL JA:** This is an appeal from a judgment of a trial judge in an ancillary relief application heard by the judge on 28th February 2012. The facts as they stood at the date of the trial are recited in paragraphs 2 to 10 hereof.

Background

[2] The appellant, Jonathan Lesfloris, is a dentist who operates two dental clinics from Monday to Saturday - one in Castries in the morning and the other in Vieux Fort in the afternoon. He also carries on a fishing business, using a fishing boat purchased by

him in 1999. The boat is worked by hired fishermen, but sometimes the appellant himself goes out to fish on weekends. Part of the catch from his fishing business is sold to the Fish Marketing Corporation in Vieux Fort. His business accounts showed that he earns approximately $8,000.00 per month from his dental practice, whilst the court assessed his income from his fishing business to be around $1,700.00 monthly.

[3] The respondent, Glenda Lesfloris, was the wife of the appellant and, in the course of their marriage, was primarily a homemaker and caregiver to the two children of the marriage. The trial judge found at paragraph 36 of her judgment that the respondent "sporadically worked outside the home for various periods although none appeared lengthy". According to an affidavit sworn to by the respondent on 22nd June 2010, she had recently obtained employment as an administrative supervisor of the Monrose Group of Companies at a salary of $2,500.00 per month.

[4] The parties were married for 15 years, from 1st March 1995 when their marriage was celebrated to 15th April 2010 when their marriage was dissolved. Prior to the celebration of their marriage, however, they had lived together in a common law relationship for 2 years, whilst prior to the dissolution of the marriage they had lived separate and apart from each other for 1 year.

[5] In August 1994, the appellant (then unmarried, though living with the respondent at her parents' home in Vieux Fort) purchased 16,639 square feet of land at Savannes Estate in Vieux Fort and, during the course of his marriage, constructed a dwelling house on the land, which became the matrimonial home of the parties from 2002.

[6] In December 1999, the appellant (then married, but still living with the respondent at her parents' home) purchased 39 acres of land in Vieux Fort, which he stipulated in the deed of sale to be his separate property acquired with his separate funds and earnings. Around 2010, the appellant sold approximately 3 acres of that land which, according to him, was to enable him to bring his mortgage payments up to date, pay outstanding taxes, and purchase a motor vehicle to replace the more than 10-year old vehicle which he had been using to commute to and from Castries and Vieux Fort on a daily basis.

[7] On 2nd June 2009, the respondent filed a petition for divorce alleging irretrievable breakdown of the marriage. On 15th April 2010, a decree nisi of divorce was granted and ancillary relief matters were adjourned for hearing in Chambers upon application by either party.

[8] On 22nd June 2010, the respondent filed a notice of application for ancillary relief (together with an affidavit in support) seeking orders for custody of and maintenance for the two children of the family, and property orders involving land, boats and accounts at financial institutions. The appellant filed an affidavit in opposition on 10th November 2010, taking issue with several of the allegations made and relief sought by the respondent. The respondent then filed an affidavit in reply on 25th January 2011.

[9] Upon application by the respondent for interim relief filed on 21st January 2011, the learned judge made the following orders on 8th February 2011:

> "(1) The matrimonial home situate on Block and Parcel 1421B 198 at Savannes Estate in the Quarter of Vieux Fort be forthwith put on the market for sale. Both Parties are to consent to the sale price, and execute the Deed of Sale. From the sale price (a) any sums outstanding on the mortgage are to be paid off, (b) the Respondent is to be credited for any payments that he has made since the divorce was filed, (c) the Petitioner and the Respondent are to share equally by deduction from the sale price all expenses incurred in concluding the sale, and (d) that the balance of proceeds on sale is to be shared equally between the Petitioner and the Respondent.
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> (2) The Respondent is to continue to allow the Petitioner to have the use of the motor vehicle licenced PC 7571 until a decision is made [at] trial as to its disbursement.
>
> (3) The Isuzu vehicle is to be put on the market forthwith for sale. The Parties are to consent to the sale price. The proceeds of sale are to be shared equally after deduction of any expenses incurred in pursuance of the sale.
>
> (4) The Respondent is to file an affidavit for the sole purpose of disclosing (a) a certified statement of income and expenses/balance sheet for the business operating as 'Family & Cosmetic Dental Surgery' for the year ending December 2010, and his certified annual income tax return for the year ending December 2010, (b) all property subdivided and sold from Block and Parcel 1422B 1 as of 15th September 2011, (c) disclose registration of his 2 boats, a statement from the Fisheries department on whether or not he has sold fish to that department, and a valuation at 2011 for the 2 boats. This affidavit is to be filed on or before 30th September 2011.

(5) Save and except for the affidavit ordered herein, neither of the Parties are to file any further affidavits without the leave of the Court.

(6) The Petitioner is to deliver to the Respondent's Counsel the school books list for both children, uniform requirements, and other connected matters pertaining to the children's schooling by 30th June 2011, for him to purchase same on or before 31st August 2011, once supplies are available or shortly after they become available. The Respondent is to deliver the school supplied [sic] to his Counsel for delivery to the Petitioner.

(7) That for the school Easter and summer vacations 2011, the periods are to be shared equally between the Petitioner and the Respondent. The Petitioner shall have the second half of each vacation.

(8) That the Petitioner, the Respondent and the children of the family are to seek and attend counselling sessions with at least 1 session per week during the months of May 2011 through August 2011 and thereafter a report is to be filed in the Court by the agreed upon Counselor on or before September 30th 2011. The Counselor is required to appear at trial to assist the Court as an expert in making the decision as to what is in the best interest of the children of the family.

(9) The agreed and appointed Counselor is Dr. Urban Seraphine. The Respondent shall pay for all counselling sessions.

(10) All other ancillary relief matters are for determination at trial.

(11) The affidavits of the Petitioner and the Respondent are to stand as examination in chief. Both Parties must appear for cross-examination.

(12) Trial is fixed at 10th October 2011 at 9:00 a.m."

[10] The trial of the ancillary relief application took place on 28th February 2012, with the three affidavits filed by the parties serving as their evidence in chief and with cross examination of each of the parties by opposing counsel. For reasons not apparent from the record, the judgment of the court which is the subject of this appeal was rendered by the trial judge on 20th April 2015 (over 3 years after the trial). The trial judge made the following order :

"(1) That Mrs. Lesfloris is awarded a forty (40) percent share in the remaining approximate [sic] 36 acres of land identified as Block 1422B Parcel 1 and a transfer of same is to be completed within 6 months from the date of delivery of the Court's judgment. The costs of the survey to support the transfer is to be borne by Dr. Lesfloris.

(2) That Mrs. Lesfloris is awarded and there is to be transfer of the motor vehicle licenced/registration No. PC7571 to Mrs. Lesfloris for her sole use and benefit. Mrs. Lesfloris is to bear all responsibilities and costs attendant after the transfer. Transfer is to be completed within 30 days from the date of delivery of the Court's judgment.

(3) That Mrs. Lesfloris is awarded and there is to be transfer of the fishing boat/vessel registered with the Ministry of Agriculture, Land, Forestry and Fisheries. Transfer is to be completed within 30 days from the date of delivery of the Court's judgment. Any cost attendant to this transfer is to be borne equally by the Parties.

(4) That Mrs. Lesfloris is awarded a half-share of all of the contents of the matrimonial home and same is to be delivered to Mrs. Lesfloris within 30 days of delivery of the Court's judgement.

(5) Dr Lesfloris is to pay $1,500.00 monthly towards the rental of premises to house Mrs. Lesfloris and the children starting May 1st 2015, until the matrimonial home is sold.

(6) The Parties are awarded joint custody of the children with primary care and control to Mrs. Lesfloris. The Parties shall have alternate weekends with the children with Dr. Lesfloris' weekends beginning at 6.00pm on Fridays and ending at 6.00pm on Sundays. All school vacations are to be shared equally. Should any Party desire to remove the children or any of them while they are minors from Saint Lucia then the permission of the other Party must be sought. Dr. Lesfloris is required to ensure that the children are at all times supervised by someone 21 years or older when he is not able to be present. The holding of the children at his office for long periods is not acceptable and is not allowed.

(7) Dr. Lesfloris is to pay maintenance for the children in the sum of $2,700.00 per month and this sum is to be reduced by $850.00 once the eldest child ceases to attend high school or other tertiary education institution if she has pursued higher learning and has gained employment and all payments are to cease once the youngest child ceases to attend high school or other tertiary education institution if he has pursued higher learning.

(8) Mrs. Lesfloris is awarded costs in the sum of $6,500.00 and same is payable within 90 days."

The Appeal

[11] Being dissatisfied with the order of the judge, the appellant sought to have the entirety of the judge's order set aside on the following 9 grounds of appeal (slightly reworded for the purpose of clarity):

(1) The learned trial judge erred in law in concluding that the respondent is awarded a 40 per cent share in the remaining (approximately) 36 acres of land identified as Block 1422B Parcel 1, when the evidence did not disclose that the respondent was entitled to a 40% share or any share whatsoever in the said property of the appellant.

(2) The learned trial judge erred in law in ordering that the appellant do transfer the said 40% share of the 36 acres of land aforesaid to the respondent herein and that such transfer be completed within 6 months from the date of delivery of the court's judgment, whereas section 45(b) of the **Divorce Act**[1] (or the "Act") provides that the court is empowered to direct the sale of separate property and the division of the proceeds between the parties, or to direct that either party pays to the other party such sum as the court thinks fair and reasonable in return for the contributions made by that other party.

(3) The learned trial judge erred in law in ordering that the appellant do transfer the said 40% share of the 36 acres of land aforesaid to the respondent whereas the respondent had failed to establish that she had made substantial contributions (whether in the form of money payments, or service, or prudent management, or otherwise howsoever) to the improvement or preservation of such property in accordance with section 45(b) of the **Divorce Act**.

(4) The learned trial judge erred in law in awarding the respondent the claim for Block 1422B Parcel 1 which is separate property of the appellant, when the respondent had failed to invoke the lawful procedure of originating summons in conformity with rule 75 of the **Divorce Rules 1976**[2] (the "Divorce Rules") and there was therefore no legal basis to make the said orders.

(5) The learned trial judge erred in law in ordering that a penal notice be inserted in the said order since there was no application before the court

[1] Cap.4.03, Revised Laws of Saint Lucia 2013.
[2] S.I. No. 2 of 1976.

for the penal notice and there was no legal basis for a penal notice to be inserted in the said order.

(6) The learned trial judge erred in law in failing to dismiss the applications of the respondent which were in direct contravention with rule 50 of the Divorce Rules which requires that the reliefs claimed by the respondent shall be made in the petition and that where no such relief is claimed in the petition that such application may only be made with leave of the court and the court had not granted leave for the notice of application for ancillary relief to be made.

(7) The learned trial judge erred in law in ordering that the appellant is to pay the sum of $1,500.00 monthly towards the rental of premises for the respondent and the children, starting May 1st 2015, until the matrimonial home is sold, whereas the learned trial judge further ordered that the appellant is to pay maintenance for the children in the sum of $2,700.00 per month thereby ordering the appellant to pay a total of $4,200.00 per month, which is excessive in the circumstances, particularly in light of the evidence which revealed that the average salary of the appellant was computed between $8,200.00 and $8,500.00 and the appellant continues to be solely responsible for the mortgage payments for the matrimonial home.

(8) The learned trial judge erred in law in making the combined order for rental and maintenance in the sum of $4,200.00 by failing to accord due consideration to the factors elucidated in section 25 of the **Divorce Act**.

(9) The learned trial judge erred in law, if in any event the appellant was obligated to transfer a share in his separate property to the respondent by virtue of section 24 of the **Divorce Act**, in ordering the transfer of the 40% share of the 36 acres of land aforesaid to the respondent, by failing to consider the factors adumbrated in section 25 of the **Divorce Act** and, further, the learned trial judge failed to consider whether the appellant was in a financial position to pay the respondent the value of the share of the

property awarded to the respondent prior to the making of the award of a portion of the separate property of the appellant to the respondent.

The Issues in the Appeal

[12] Grounds 1, 2, 3, 4, 6 and 9 of the grounds of appeal are in respect of the judge's order that the appellant transfer a 40% share in his remaining 36 acres of land to the respondent. I do not propose to address this issue in the way in which it is dealt with in these 6 grounds of appeal. Instead, I will examine the nature of the application before the court on the basis of which the trial judge made the transfer of property order, together with supplementary issues like the requirement of leave to make the application and the form of the application. In the process of doing so, I will discuss sections 24 and 45 of the **Divorce Act** and the concepts of community and separate property in the **Civil Code**.[3] I will also discuss (somewhat tangentially) the meaning of ancillary relief in the **Divorce Act** and the Divorce Rules and mention the other orders made by the trial judge, apart from the transfer of property order, but it is this latter order that will essentially be addressed. I will conclude my treatment of the issue raised in these grounds of appeal by setting aside the trial judge's order and replacing it with a different order.

[13] Grounds 7 and 8 of the grounds of appeal are in respect of the judge's orders that the appellant pay to the respondent $1,500.00 monthly towards the rental of premises to house the respondent and the children of the family until the matrimonial home is sold, and $2,700.00 per month for maintenance of the children, resulting in an aggregate payment of $4,200.00 per month. I will examine the authority for and justification of these 2 awards and will conclude my treatment of the issue raised in these grounds with an affirmation of the maintenance order for the children and a repositioning of the rental payment order.

[14] Ground 5 of the grounds of appeal is in respect of a penal notice inserted in the overall order of the judge. I will examine the relevant principles and will conclude with an affirmation of the insertion of the penal notice.

[3] Cap 4.01, Revised Laws of Saint Lucia 2013.

[15] I will now discuss the issues which I have identified for the Court's consideration in this appeal.

Nature of the Application

[16] The first question to be asked and answered in the determination of this appeal is – what is the nature of the application that the trial judge had before her on the basis of which she made the orders that she did?

[17] The answer to this question must commence with the title of the application which came before the court on 22nd June 2010. The application is titled "NOTICE OF APPLICATION FOR ANCILLARY RELIEF AND CUSTODY, CARE AND SUPERVISION".

[18] One next looks at the orders which were being sought in the application. These are - (1) that the respondent be granted custody of the children of the family and the appellant be given reasonable access to them; (2) that the appellant pays to the respondent the sum of $3,500.00 per month for the maintenance of the children; and (3) that the respondent be granted "her half share" in the matrimonial home and its contents, in 3 parcels of land registered in the name of the appellant, and in any movable or immovable property acquired by the appellant "during the currency of the marriage that falls under community property", including 3 fishing boats, the proceeds of bank accounts, credit union accounts, and any other accounts held in the name of the appellant at any financial institution. The application also asks that the appellant pays the respondent's costs of the application and "further or other relief that the court thinks just in the circumstances". The application does not state, however, the specific provisions of the **Divorce Act** and/or Divorce Rules under which the application was made, which is usually important to the determination of the orders which a court can make pursuant to an application, but which, in proceedings under the **Divorce Act**, is even more important, because there are different requirements to be met for the making and granting of applications under different sections of the Act.

[19] I will address first the respondent's application for custody, care and supervision of the children of the family. Provision is made for such an application under section 42 of the **Divorce Act**. Custody, care and supervision of the children of the family are not

considered to be ancillary matters in divorce proceedings; they are a necessary part of divorce proceedings once there are minor children of the family. The court in divorce proceedings may make orders granting ancillary relief in accordance with rule 2 or rule 50 of the Divorce Rules, but they must make orders relating to the custody and care of any minor children of the family. Indeed, barring special circumstances, section 41 of the Act precludes the court from making absolute a decree of divorce without the court being satisfied with the arrangements made for the children of the family.

[20] No issue was taken with the judge's order on custody, care and supervision or with the section of the Act under which the application was made and the order was granted, so we need not dwell on it further.

[21] The other part of the respondent's application is for ancillary relief. In her judgment, the trial judge correctly treated with the application for maintenance of the children as an application made under section 23, and there is no dispute about that. The judge did not address the issue of the respondent's claim to a half share in the matrimonial home, because this had already been addressed and determined by her in an interim order which she made on 8th February 2011. As to the respondent's application in relation to a half share in movable and immovable properties acquired by the appellant during the currency of the marriage, the judge referred to sections 24 and 45 of the Act as being the possible sources of the court's power to make such an order, but never stated whether she was treating the application as having been made under section 24, 45 or both, and whether her order was being made under either or both sections.

[22] By his notice of appeal, the appellant objected to the award of a 40% share to the respondent of the portion of land identified as Block 1422B Parcel 1 and to the order that he transfer this share to her within 6 months of the date of the judgment. In ground 2 of his grounds of appeal, he asserts that the judge erred in ordering him to transfer a 40% share in the land to the respondent when section 45(b) of the Act only empowers the court to direct the sale of separate property and the division of the proceeds between the parties, or to direct that either party pay to the other party a fair and reasonable sum in return for the contributions made by the other party. In his ground 3, he asserts that the judge erred in ordering the transfer of the 40% share to the respondent when the respondent had not established, in accordance with section

45(b), that she had made a substantial contribution to the improvement or preservation of the land. In ground 4, he asserts that the judge erred in granting the respondent's claim with respect to the land, which is his separate property, although she had failed to invoke the lawful procedure of originating summons in conformity with rule 42 of the Divorce Rules and that there was therefore no legal basis to make the orders which she did. In his ground 9 though, the appellant switched his focus to section 24 of the Act and asserted that the judge erred by failing to consider, among other things, the factors set out in section 25, if in any event, by virtue of section 24 he (the appellant) was obligated to transfer a share in his separate property to the respondent.

[23] It is apparent from the phrasing of his grounds of appeal that, at the time of the filing of his appeal, the appellant was uncertain as to precisely what was the application which the respondent had made in the court below and, specifically, whether her application in relation to property was made under section 24 or 45 of the Act. The appellant was also uncertain as to the section under which the trial judge had made the orders that she did in relation to his 36 acres of land and the fishing boat.

[24] I will address in due course what the trial judge had to say about the section of the Act under which she treated with the respondent's application, but, before doing so, I think it is important to examine what the parties had to say about the nature of the application before the court.

The Parties' Positions on the Nature of the Application in Relation to Property

[25] The appellant's position on the nature of the respondent's application has been inconsistent. In his skeleton arguments filed on 27th February 2017, the appellant argued that the judge made orders under section 24, but that in making these orders she did not consider the relevant factors that she was required to consider under section 25. This appears to be a concession, or an acknowledgement, that the application was made and considered under section 24, with issue being taken only with the judge's consideration of the factors identified in section 25.

[26] Quite differently from that position, in his submissions filed on 3rd July 2018, the appellant submitted that it was impermissible for the judge to invoke section 24 of the Act and to make orders under that section when the application made by the

respondent did not mention section 24, or any section of the **Divorce Act**. He further submitted that the respondent's application was only for a share of community property, as defined by the **Civil Code**, and not for a share of his separate property. Accordingly, he contended, by the very nature of the application before the judge, she was precluded from making orders under section 24 of the Act, because section 24 does not apply to community property, but applies only to separate property. In essence, the appellant's contention is that there is no basis on which the judge could have made orders under section 24 and so the orders purported to be made thereunder should be set aside. The appellant relied on the cases of **Barnard v Barnard**[4] and **Darcheville v Darcheville**[5] as authorities for the proposition that applications for community property do not fall under section 24.

[27] On the other hand, the respondent consistently argued that the judge properly treated the application as having been made under section 24 of the Act and gave fair consideration to the factors to which she had to have regard in accordance with section 25.

The Judge's Position on the Nature of the Application

[28] What then did the trial judge have to say about the section under which she considered that the respondent had made her application for ancillary relief and in accordance with which she (the trial judge) was making her order?

[29] Paragraphs 97 and 99 are the only places in the judgment where the judge deals with the issue of the court's power to make the orders sought by the respondent in relation to property. It would therefore be useful to reproduce the relevant portions of these two paragraphs.

[30] At paragraph 97 of her judgment, the learned judge said the following:

> "Where there is a claim as here by Dr. Lesfloris of separate property, the starting point for the Court in deciding ancillary relief pertaining to immovable property and moveable property is sections 24, 25, and 45 of the Divorce Act 1973 and the procedure in rules 50 and 75 of the Divorce Rules 1976."

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[4] SLUHMT2001/0131 (delivered 5th May 2006, unreported).
[5] SLUHMT2003/0034 (delivered September 2006, unreported).

[31] At paragraph 99, the learned judge said (in part) that:

> "The Court observes at this juncture that Mrs. Lesfloris' application did not identify whether her claim for ancillary relief in relation to the property which Dr. Lesfloris has identified as his separate property was being made pursuant to section 24 or 45 or both of the Divorce Act. Ordinarily pursuant to the Divorce Rules 1976 rule 75, an application pursuant to section 45 ought to be made by way of originating summons."

[32] Having made the statement which she did in paragraph 97 of her judgment and the observation which she did in paragraph 99, the trial judge did not then proceed to say whether she would treat with the ancillary relief matters under section 24 or 45 of the Act or under both sections. What is clear though is that, for the reasons which will be expounded later in this judgment, the application for ancillary relief could only properly have been made and granted under section 24 and not under section 45 of the Act.

Section 24 of the Divorce Act

[33] The appellant submitted that it was impermissible for the judge to make an order under section 24 of the Act when the application before the court did not even mention section 24. This submission might carry some weight if made at the commencement of the hearing of an application, because the respondent to the application may be able to plead his incapacity, or at least his difficulty, in being able to defend an application when he does not know under what provision of the law that the application is being made to the court. The undesirability of this cannot be overstated, but the response of the court to this submission will, at the very least, be influenced by the stage of the proceedings at which the issue is raised. I consider the position in law to be that in making applications to a court for relief, it is important to state in the application the provision of the law under which the application is being made and/or the relief is being sought, because failure to do so may lead to the sort of ambush that the **Civil Procedure Rules 2000** and other modern rules of practice and procedure aim to avoid. This is particularly important in the making of applications under the **Divorce Act** and the Divorce Rules, because the requirements for the making of applications and for the grant of relief sometimes differ under different provisions of the Act and the Rules. Important though it is to state the specific provision in the Act or the Rules under which an application is being made or relief is being sought, the failure to do so will not necessarily be fatal to the application, particularly if the issue is being raised at the conclusion of the hearing of the application or, worse, on appeal.

[34] In divorce proceedings, a judge has a range of opportunities and material to make an assessment and determination of the section of the Act under which an application for relief is made, particularly a contested application, even if the application is silent in that regard. Prior to the making of an order, the judge will have received a filed application, affidavits in support of and in opposition to the application. The court will also likely have the benefit of oral evidence and oral and (sometimes) written submissions. With all of this material, and with the opportunities which will be presented at the hearing for the judge to enquire into the nature of the relief sought and the section under which the application is brought, the judge is well positioned to make a determination as to the section invoked by the application before the court. The judge may get it wrong, but he is not likely to be short of material on the basis of which he could make a determination as to the section invoked by the application before the court.

[35] The appellant argued that the respondent's application was for a share of community property – as defined by the **Civil Code** – and not for a share of the appellant's separate property, and that section 24 applies only to separate property and not community property. This argument appears to be attractive when one considers the nature of community and separate property as set out in articles 1188 to 1301 of the **Civil Code**, particularly articles 1190 and 1228 dealing with the establishment and dissolution of the community.

[36] Article 1190 provides essentially that community of property is established upon marriage by the mere fact of the marriage and, in the absence of any stipulations to the contrary.

[37] Article 1228 provides essentially that the community is dissolved by divorce, judicial separation, separation of property (which applies not to a single item of property but to the property of the community as a whole) and the absence (in the context of articles 75 and 76) of one of the spouses.

[38] The provisions of these articles lead one to a conclusion that you cannot simply transfer a share in community property from one party to the next. The property of married persons is either community property, in which each holds a moiety (which is a

right exactly equal to the right of the other) or is the separate property of one of the parties. Parties do not hold percentage shares in community property, you either hold a community half share or the property is separate property.

[39] If it is not possible to hold a percentage share in community property, then a court cannot transfer a percentage share in community property to one of the parties. In any event, by virtue of the property being community property, the party to whom the transfer would be made would already be the holder of an equal share in the property with the transferring party.

[40] The attractiveness of the appellant's argument disappears though on closer examination of article 1228, which provides for the dissolution of the community upon divorce.

[41] Section 24 of the **Divorce Act**, in so far as it is material, provides that:

> "On granting a decree of divorce … or at any time thereafter (whether … before or after the decree is made absolute), the Court may ... make any one or more of the following orders, that is to say –
>
> (a) an order that a party to the marriage shall transfer to the other party … such property as may be so specified, being property to which the first-mentioned party is entitled …"

A transfer of property order can only be made under section 24, therefore, upon or after the grant of a decree of divorce, in other words, upon or after the dissolution of the community. Accordingly, a court can make a transfer of property order under section 24 in respect of property which, until the dissolution of the marriage, was community property.

[42] The conjoint effect of article 1228 of the **Civil Code** and section 24 of the **Divorce Act** is that a transfer of property order can be made under section 24 of the Act with respect to community property, because orders under section 24 are made upon or after the granting of a decree of divorce, which decree not only dissolves the marriage but also dissolves the community, thus terminating the community ownership of property by the parties and leaving it open to the court to order the transfer by one

party to the other of the whole or part of any property which was community property prior to the dissolution of the marriage.

[43] Having established that it is open to a judge to make a transfer of property order with respect to property which was community property until the dissolution of the marriage, on the facts of this case, no such order was made by the judge in her judgment of 20th April 2015. The only property which the judge treated as community property in her judgment was the matrimonial home situated at Savannes Estate in Vieux Fort and the 21-year old Isuzu motor vehicle, both of which she had disposed of in her order of 8th February 2011, and which order was not appealed.

[44] Just as it is open to a judge in ancillary relief proceedings to make a transfer of property order under section 24 with respect to property which had been community property, so is it open to a judge to make a transfer of property order under section 24 with respect to property which is separate property. This was not contested by the appellant, but he submitted that it was not possible to make an order under section 24 when no mention of the section was made in the application for relief and when no leave was granted to make the application outside of the divorce petition. I have already disposed of the argument that it was impermissible to make an order under section 24 without mention of the section in the application, so I will deal now with the question of the grant of leave to make an application for ancillary relief under section 24.

[45] Before delving into the issue of the requirement for leave to make an application for ancillary relief, I want to first look at what – in matrimonial proceedings in Saint Lucia – is ancillary relief.

Ancillary Relief

[46] Ancillary relief is defined in rule 2(1) of the Divorce Rules as meaning:

(a) an avoidance of disposition order;
(b) a lump sum order;
(c) an order for maintenance pending suit;
(d) a periodical payments order;
(e) a secured periodical payments order;

(f) a settlement of property order;

(g) a transfer of property order;

(h) a variation of settlement order; or

(i) a variation order.

[47] A listing in rule 50(1) of the Rules of the ancillary relief claims which must be made by a petitioner in a petition for divorce and by a respondent in an answer to the petition, does not include avoidance of disposition orders and variation orders; but none of these arise in this case.

[48] Section 32 of the **Divorce Act** deals with proceedings under sections 21, 22, 23 and 24 of the Act, and defines ancillary relief, for the purpose of section 32, as relief under these sections.

[49] All three of these definitions or descriptions of ancillary relief exclude orders concerning the custody, care and supervision of children, which are orders made under section 42 of the Act, but include orders concerning the maintenance of children and transfers of property. Orders concerning the maintenance of children (as opposed to their custody, care and supervision) are ancillary relief orders by virtue of rules 2(1)(d), and 50(1)(b) of the Rules and section 32(3) of the Act (being orders made under section 23 of the Act), whilst transfer of property orders are ancillary relief orders by virtue of rules 2(1)(g) and 50(1)(f) of the Rules and section 32(3) of the Act (being orders made under section 24 of the Act).

The Requirement of Leave

[50] In ground 6 of his notice of appeal, the appellant asserted that the trial judge erred in failing to dismiss the application for ancillary relief when the application was not made in the divorce petition and no leave was granted for it to be made subsequently, in accordance with rule 50 of the Divorce Rules.

[51] In his skeleton arguments, the appellant submitted that rule 50 of the Divorce Rules requires that an application for ancillary relief should be made within the petition for divorce, and can only be made separately with the leave of the court. He contended that the respondent did not seek ancillary relief in her divorce petition; she applied for

ancillary relief outside the petition for divorce; she did not seek leave to apply for ancillary relief outside the divorce petition; and, as a result of the foregoing, her application for ancillary relief was a nullity.

[52] In support of this submission, the appellant relies on the case of **Barnard v Barnard**, where Edwards J (as she then was) observed that rule 50 requires that an application for ancillary relief made outside of a divorce petition can be made only with the leave of the Court.

[53] In her submissions in response, the respondent contended that she had been expressly given leave to file the application for ancillary relief in the decree nisi order dated 15th April 2010. She contended that the judge acknowledged that fact and correctly proceeded to consider the application on the basis that leave had been granted. She further contended that the objection taken by the appellant to any alleged procedural defect was far too late, because procedural issues ought to have been dealt with prior to or during the trial of the matter. She also contended that by failing to raise the procedural issues at an earlier stage, the appellant must be taken to have acquiesced those procedural defects and cannot now challenge the application.

Discussion and Analysis of Requirement of Leave

[54] By virtue of rule 50(1) of the Divorce Rules, a petitioner in divorce proceedings who wishes to apply for ancillary relief must make the application in the divorce petition. Rule 50(2) of the Rules provides, however, that an application for ancillary relief which should have been made in the petition may be made subsequently with the leave of the court or where the parties are agreed upon the terms of the proposed order.

[55] There was no allegation or evidence of any agreement between the parties upon the terms of any proposed order. In fact, the parties appear to have been in disagreement with each other on every aspect of the claim brought by the respondent.

[56] This means that, by virtue of rule 50 of the Divorce Rules, there being no agreement on the terms of any proposed order, the respondent did require the leave of the court to make the application that she made for ancillary relief orders, that is to say, the order for periodical payments to be made to the respondent for the benefit of the

children of the family and the order for transfers of the whole or a share of certain properties acquired by the appellant during the currency of the marriage. Notably though, a party is required by rule 50 to obtain leave, but is not required to make an application for leave.

[57] It is clear that the respondent's application of 22nd June 2010 was an application for ancillary relief in which she sought one or more of the orders listed in rule 2 of the Divorce Rules. It is also clear that the application was filed outside of the divorce petition. In fact, it was filed just over 2 months after the grant of the decree nisi. Accordingly, by virtue of rule 50 of the Divorce Rules, the respondent was required to obtain the leave of the court before making her application for ancillary relief. There is nothing on the record in this case, though, nor is there any argument advanced by or on behalf of the respondent, that she had made an application for leave to file ancillary relief proceedings. However, as noted above, rule 50 requires that leave be obtained, but does not require that an application for leave must be made.

[58] Upon examination of the decree nisi of divorce, one notes that the judge made an order that "Ancillary relief matters are adjourned for hearing in Chambers upon application by either party". This, in my view, is clearly a grant of leave to either party to pursue ancillary relief outside of the divorce petition. This view was in fact taken by the trial judge when she said at paragraph 101 of her judgment that:

> "The Court observes that Mrs. Lesfloris' application was made post the decree nisi, however, by rule 50 (2) she was permitted to file an application seeking ancillary relief post the decree of divorce with the Court's leave and the Court's decree nisi order gave both Parties leave to file an application for ancillary relief. The application is therefore in order."

[59] In the circumstances, I am satisfied that the respondent did obtain the leave of the court to apply for ancillary relief under section 24 of the Act, outside of the divorce petition.

Section 45 of the Divorce Act

[60] Having concluded in paragraph 41 above that it was permissible for the judge to have made a transfer of property order under section 24 of the Act, and that the respondent

had the leave of the court to make the application, I need now to determine whether it was also permissible for the court to make such an order under section 45 of the Act.

[61] The first hurdle to be cleared in making this determination is to ascertain whether it was permissible for the judge to have made an order under section 45 of the Act when no mention was made of section 45 in the application for ancillary relief. I take the view that the clearance of this hurdle in relation to section 24 of the Act suffices to give clearance of the same hurdle in relation to section 45, so that it was permissible for the judge to make a section 45 order despite the section not being mentioned in the application.

[62] The second hurdle to be cleared is to ascertain whether an application for ancillary relief can be made under section 45. This hurdle appears to be more challenging than the first, because the orders which the court can make under section 45 do not appear to include orders for ancillary relief as defined in the Act or the Rules.

[63] Section 45 of the Act allows the court to make one or more of the following orders: (1) directing that either party shall be entitled to the use or usufruct of a part or the whole of any community property of the parties; (2) declaring that either party forfeit to the other his or her share of a part or the whole of any community property of the parties; (3) directing the sale of any separate property of one of the parties and the division of the net proceeds of the sale between the parties in such proportion as the court thinks fit; and (4) directing that either party pay to the other such sum as the court thinks fair and reasonable in return for the contributions made by that other party to the improvement or preservation of the separate property of the first party. None of these orders are ancillary relief orders as defined in rule 2 or rule 50 of the Divorce Rules or section 32 of the **Divorce Act**.

[64] There are 3 property orders which can be made by way of ancillary relief. In accordance with rule 50 of the Divorce Rules, the relief which a court can grant by way of ancillary relief includes a transfer of property order, a settlement of property order, and a variation of settlement order. Although settlement is not defined in the **Divorce**

Act or Divorce Rules, it is defined in **Halsbury's Laws of England**[6] as "any disposition of property, of whatever nature, by any instrument or instruments, by which trusts are constituted for the purpose of regulating the enjoyment of the settled property successively among the persons or classes of persons nominated by the settlor". Relief by way of a settlement order and, by extension, a variation of settlement order, clearly therefore cannot be granted under section 45. A transfer of property order does not need definition to determine that it cannot be made under section 45, which makes no provision for the transfer of any property by or to one party or the other.

[65] Section 45 of the **Divorce Act**, which is not contained in the UK Matrimonial Causes Act, from which most of the other provisions of the **Divorce Act** are copied, and which was added to the **Divorce Act** by amendment in 1988, was an attempt by Parliament to legislate a provision into the **Divorce Act** which is more in keeping with the regime of community property and separate property contained in the **Civil Code**. The 'property transfer powers' of the court under section 24 are somewhat incongruent with the provisions of articles 1188 to 1301 of the **Civil Code** which deal with community property and separate property of husband and wife. But, although incongruent with, they are not inconsistent with, the provisions of the **Civil Code** and in any event they are all that we had between January 1977 when the **Divorce Act** came into force and May 1988 when section 45 was introduced. So, although the judge was entitled to make orders under section 45 of the Act, even though that section was not mentioned in the Act, she was not entitled to make property transfer orders under section 45, because such orders are ancillary relief orders which section 45 does not empower the judge to make.

[66] Even if the first and second hurdles to be cleared for the judge to have made an order under section 45 had in fact been cleared, there would still have been another hurdle to be cleared, that is, whether the respondent had leave to make an application for an order under section 45 of the Act.

[67] In paragraph 58 of this judgment, I concluded that the respondent did have leave to make an application to the court under section 24 of the Act because, although rule 50(1) of the Divorce Rules stipulates that applications for ancillary relief "shall be made

[6] See: 4th edn. (reissue), vol. 42, at para. 601.

in the petition or answer as the case may be", rule 50(2) provides that "an application for ancillary relief which should have been made in the petition or answer may be made subsequently … by leave of the Court", and that the decree nisi order granted leave to either party to make an application for ancillary relief. The grant of leave in the decree nisi order to make an application for ancillary relief does not, however, empower the court to make a transfer of property order under section 45, for the reasons which follow.

[68] The first reason is that the leave granted was for the parties to make application for ancillary relief, but the orders which the court is empowered to make under section 45 are not ancillary relief orders as defined in the **Divorce Act** and Divorce Rules.

[69] The second reason is that the provision for the grant of leave under rule 50(2) to make applications for relief only applies to "an application for ancillary relief which should have been made in the petition or answer" and, under section 24 of the Act, to an order which could be made "on granting a decree of divorce … or at any time thereafter". But an application for relief under section 45 is not required to be made in the petition or answer, only that it must be made "before the decree of divorce or nullity is made", and the court can only make an order under section 45 "on making a decree of divorce or nullity of marriage" and not "at any time thereafter" (as in section 24). In the present case, an application for relief was made after the decree of divorce was made and the court could not, in any event, have made an order on the subsequently-filed application at the time of the making of the decree of divorce. It appears that the trial judge did not seek nor find what may be considered to be a nuanced but, nonetheless, legally significant difference between the possibility of getting leave to make an application under section 24 and under section 45 of the Act. But, although the trial judge did appear, in paragraph 101 of her judgement, to treat rule 50(2) as enabling the court to grant leave to apply for relief under section 45 after the making of a decree of divorce, or as enabling the court to make an order under section 45 other than on the making of the decree of divorce, she did not make any specific finding based on that treatment of rule 50(2) and so her order cannot be faulted on that basis.

[70] For either or both of the foregoing reasons, it was impermissible for the court to have made an order in this case under section 45 of the Act. In any event, an examination

of the orders made by the trial judge and of the orders which could have been made under section 45, would reveal that none of the orders made by the court could have been made under section 45.

Property Transfer Orders

[71] In one of his grounds of appeal, the appellant challenged the judge's award of a share in his separate property to the respondent on the basis of the respondent's failure "to invoke the lawful procedure of originating summons in conformity with Rule 75 of the Divorce Rules 1976.[7] In his submissions on appeal, the appellant pressed this argument to the point of contending that, on this basis, the respondent's application for a share of the appellant's property must fail.

[72] I am not of the view that a defect in the form of an application is determinative of the fate of the application. I am of the view, however, that an application which seeks orders that are impossible for the court to grant must be dismissed. The dismissal of the application will not, in such a situation, be on account of a procedural defect in the making of the application by the applicant, but rather on account of a jurisdictional defect in the determination of the application by the court.

[73] Having previously determined that the judge was empowered to make property transfer orders under section 24 of the Act; having now determined that the judge was not empowered to make property transfer orders under section 45, I will proceed to address the property transfer orders made by the judge in accordance with the provisions of section 24 of the Act.

[74] As I stated earlier, there were two items of property (one movable and the other immovable) which the trial judge treated as community property, namely, the matrimonial home at Savannes Estate and the Isuzu motor vehicle. The judge dealt with these two items of property in her interim order made on 8th February 2011 and never revisited them. The interim order was never appealed and so the property treated by the judge as community property formed no part of her 20th April 2015 judgment, which is the subject of this appeal.

[7] See Record of Appeal, p. 471.

[75] The remainder of the properties with which the April 2015 judgment and this appeal are concerned are the following:

(1) A portion of land located at Vieux Fort, originally comprising approximately 39 acres, but now reduced to approximately 36 acres, by virtue of the sale of a portion of it by the appellant.

(2) A motor vehicle bearing registration number PC7571 which was habitually driven by the respondent.

(3) A fishing boat registered with the Ministry of Agriculture, Land, Forestry and Fisheries.

(4) The contents of the matrimonial home.

[76] The original 39 acres of land were purchased by the appellant during the currency of his marriage to the respondent, by a deed of sale recording him as "stipulating herein with regard to his separate property acquired with his separate funds and earnings".[8] There was no averment or evidence that the respondent made any financial contribution to the acquisition, improvement or preservation of the property. The judge awarded the respondent a 40% share in the remaining 36 acres of land, with a transfer of the 40% to the respondent to be completed within 6 months of the date of the judgment, and with the survey cost for the dismemberment to be borne by the appellant.

[77] The motor vehicle, PC 7571, was purchased by the appellant during the currency of the marriage, with no stipulation as to whether it was being purchased for the community or as the separate property of the appellant. The judge ordered that it be transferred by the appellant to the respondent for her sole use and benefit within 30 days of the date of her judgment.

[78] The fishing boat was purchased by the appellant during the currency of the marriage, with no stipulation as to whether it was being purchased for the community or as the separate property of the appellant. The judge ordered that it be transferred by the appellant to the respondent within 30 days from the date of delivery of her judgment.

[8] See Record of Appeal, p. 49.

[79] The contents of the matrimonial home appear to have been acquired by the appellant and the respondent during the course of their marriage. The judge awarded a half share to the respondent and ordered that "same is to be delivered to [her] within 30 days of delivery of the Court's judgment".

[80] In his submissions, he appellant did not challenge the trial judge's orders with respect to the motor vehicle, the boat or the contents of the matrimonial home, but he mounted a multifaceted challenge to the award of the 40% share in the land to the respondent.

[81] I have already addressed the appellant's challenges to the power of the court to make the transfer of property order and determined that the court did not have the authority to make the order under section 45 of the Act, but that it had the authority to do so under section 24 of the Act. The remaining challenges to the award and transfer of the 40% share in the land to the appellant are in grounds 1 and 9 of the appellant's grounds of appeal. I will deal first with the ground 9 challenge.

[82] In ground 9 of his grounds of appeal, the appellant challenged the judge's award of the 40% share to the respondent in the 36 acres of land on the basis that, if the appellant was obliged to transfer a share in his separate property to the respondent by virtue of section 24, the judge failed to consider the factors adumbrated in section 25 of the Act and, further, failed to consider whether the appellant was in a financial position to pay the respondent the value of the share in the land awarded to the respondent, prior to making the award of a portion of his separate property to the respondent.

[83] The trial judge never made any order that the appellant pay to the respondent the value of the share in the land awarded to her and there is no basis, therefore, for the complaint made in the second limb of ground 9. So, the only question to be answered in ground 9 is whether, in making the award of a 40% share in the land to the respondent, the trial judge considered the factors adumbrated in section 25 of the Act.

Section 25 of the Divorce Act

[84] In exercising its powers to make a transfer of property order under section 24 of the **Divorce Act**, the court must have regard to the matters listed under section 25 of the Act, including the income, earning capacity, property and other financial resources of

the parties; the financial needs, obligations and responsibilities of the parties; the standard of living enjoyed by the family before the breakdown of the marriage; the age of each party to the marriage; the duration of the marriage; and the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family.

[85] Section 25(1) of the **Divorce Act** sets out the factors to be considered by the court, as follows:

> "It is the duty of the Court in deciding whether to exercise its powers under sections 22, 23 or 24 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say—
>
> (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;
>
> (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
>
> (g) in the case of proceedings for divorce or nullity of marriage, the value of either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring;
>
> and so to exercise those 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."

[86] Subsection (2) of section 25 deals with orders made by the court under section 23 or 24 in relation to a child of the family, whilst subsection (3) deals with orders made by the court under section 23 or 24 in favour of a child of the family who is not the child of the party against whom the order is made. No such orders were made by the court below and so we need not trouble ourselves with subsections (2) and (3) of section 25. The enquiry to be made at this juncture, therefore, is whether the trial judge, in exercising her powers under section 24 of the Act to make a transfer of property order had regard to the specific matters enumerated in section 25(1) (a) to (g).

[87] The answer to the above enquiry is provided in paragraphs 112 to 122 of the judgment in which the trial judge singled out all but one of the matters enumerated in section 25 to which regard was to be had en route to arriving at the exercise of placing 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".[9] The only matter which the trial judge did not explicitly mention in her judgment is "the value of either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring".[10] The trial judge probably did not mention this because there was no evidence that there was any benefit (like a pension) which either party will lose the chance of acquiring because of the breakdown of the marriage. The challenge to the trial judge's consideration of the factors mentioned in section 25 of the Act must therefore fail.

Award of Share in Appellant's Land

[88] This then leaves ground 1 as the only remaining challenge to the judge's order of a transfer by the appellant to the respondent of a 40% share in the 36 acres of land. Ground 1 of the appellant's grounds of appeal reads:

> "The Learned Trial Judge erred in law in concluding that the Respondent is awarded a 40 per cent share in the remaining approximate 36 acres of land identified as Block 1422B Parcel 1 whereupon the evidence did not disclose that the Respondent was entitled to 40 per cent share or any share whatsoever in the said property which said property was the separate property of the Respondent."

[9] Divorce Act Cap.4.03 of the Revised Laws of Saint Lucia, Section 25(1).
[10] ibid Section 25(1)(g).

[89] Unlike the situation in the UK and in the countries of the Commonwealth Caribbean with matrimonial property law identical to the UK, there is no concept of matrimonial property in St Lucia with respect to which a court can determine the extent of the ownership interest of the parties to the marriage. In accordance with article 1192 of the Civil Code, the property of parties to a marriage in St Lucia is either community property or separate property. If it is community property, then each party owns a community moiety or half share in the property; if it is separate property then it is owned entirely by one or the other of the parties. The approach taken by the UK courts in cases like **White v White,**[11] **MAP (Petitioner) v MFP (Respondent)**,[12] and **Stack v Dowden**[13] that treat with the property of parties to a marriage as matrimonial property which can be distributed to the parties as the court sees fit, cannot be applied to St Lucia.

[90] According to **Halsbury's Laws of England**, Vol. 72 (Fifth Edition) at paragraph 278 (referencing the case of **Stack v Dowden**):

> "Disputes between spouses and civil partners rarely require resolution of their strict property rights under trust law as the court has wide discretionary powers in proceedings for divorce, dissolution, nullity or judicial or legal separation to distribute the property as it sees fit without having to ascertain the shares of the parties to the property."

[91] In St Lucia though, the strict property rights of the parties need to be resolved before the court in divorce proceedings can distribute property "without having to ascertain the shares of the parties to the marriage". The court in St Lucia must first determine what (if any) property is the community property of the parties and what (if any) is the separate property of each or either of the parties.

[92] In the present case, the trial judge evidently determined that the matrimonial home and the Isuzu motor vehicle were community property and ordered their sale and the equal distribution of the net proceeds to the parties. The judge was entitled to do so and there is no appeal against her order in that regard. The trial judge also evidently determined that what she described as "the remaining approximate 36 acres of land identified as Block 1422B Parcel 1" ('the 36 acres of land'), "the motor vehicle

[11] [2001] 1 AC 596.
[12] [2015] EWHC 627 (Fam).
[13] [2007] 2 All ER 929.

licenced/registration No. PC7571" ('PC7571') and "the fishing boat/vessel registered with the Ministry of Agriculture, Land, Forestry and Fisheries" ('the fishing boat') were separate property of the appellant. This determination too, the judge was entitled to make, and there is no appeal against her order in that regard. Was the judge entitled, however, to award a 40% share in the 36 acres of land, and the entirety of PC7571 and the fishing boat to the respondent?

[93] The question as to whether the judge was entitled to award PC7571 and the fishing boat to the respondent is rendered academic by the fact that, although the orders made with respect to them were included in the listing in the notice of appeal of orders appealed, these orders were not mentioned in the grounds of appeal, the skeleton arguments filed on 27th February 2017 or the legal submissions filed on 3rd July 2018. The orders therefore are treated as not having been appealed, leaving only the award of the 40% share and the consequential direction for its transfer to the respondent as the transfer of property order being appealed.

[94] Let me now, more closely, examine this specific order which has been appealed, the section of the relevant legislation on the basis of which the order was made, and the ground of the appeal against the order.

[95] The specific order under consideration here is contained in paragraph 1 of the Order of Wilkinson J dated the 20th day of April 2015 and entered on the 5th day of May 2015 and in paragraph 132 subparagraph 1 of the judgment. The order states:

> "That Mrs. Lesfloris is awarded a forty (40) percent share in the remaining approximate 36 acres of land identified as Block 1422B Parcel 1 and a transfer of same is to be completed within 6 months from [the] date of delivery of the Court's judgment. The costs of the survey to support the transfer is to be borne by Dr. Lesfloris."

[96] The particular section of the **Divorce Act** (so far as is relevant) under which the order was made is section 24(1)(a) which states:

> "On granting a decree of divorce … or at any time thereafter … the Court may … make any one or more of the following orders, that is to say – (a) an order that a party to the marriage shall transfer to the other party … such property as may be so specified, being property to which the first-mentioned party is entitled …."

[97] The ground of appeal against the order is ground 1 of the appellant's grounds of appeal, reproduced in paragraph 86 above.

[98] The success or failure of this ground of appeal turns on the extent to which the evidence in the case justified an award to the respondent of a share in the 36 acres of land and, if so, the extent of the share which is justified by the evidence.

[99] As I stated earlier, there was no evidence disclosed in the case of any contribution made by the respondent to the purchase of the land. The respondent, however, said in her affidavit evidence that it was she who negotiated with Vivian Molinaro, who was in charge of the land and was a close friend of her mother and father, "to sell it to us at such a low price". She also said in her affidavit that the appellant was not keen at the time to purchase the land and that she convinced him to do so. The appellant denied this and said that the vendor was also his friend and had approached him to sell the land and that the respondent had no interest in his purchasing of the land.

[100] The judge evidently did not consider it necessary to make a factual finding on the question of who was approached to purchase the land and who was hesitant to make the purchase, and she made none. I do not myself believe that anything would turn on a factual finding on this issue. The judge did, however, consider it to be relevant that at the time that the appellant purchased the land he was living at the home of the respondent's parents and so was able to save money.

[101] I will make two comments on this. The first is that, under cross examination, the respondent's mother appeared to have acknowledged that, whilst the appellant lived at her home, he was the provider for the household and "he gave as much as he got". The second is that the trial judge found that the appellant living at the home of the respondent's parents for 9 years, from 1993 until the matrimonial home was built in 2002, allowed him to save money to build the matrimonial home, and she used this finding as a primary basis for treating the matrimonial home (valued at $1,219,000.00) as community property. It could then be considered (at the very least) to be double counting if that same residence at the home of the respondent's parents for 9 years could be used to 'buy a share' in the appellant's land purchased from his separate

income and earnings derived from his daily operation of 2 dental clinics, plus operating a fishing business in which he sometimes worked personally on weekends.

[102] Bereft of any evidence of a contribution by the respondent towards the purchase of the 39 acres of land by the appellant, justification of an award to the respondent of a share in the appellant's separate property then hinges on the matters to which the court must have regard in deciding whether to make a transfer of property order in favour of the respondent. These matters are contained in section 25(1) of the **Divorce Act** and are reproduced in paragraph 83 above.

[103] In terms of the income and earning capacity which the respondent has or is likely to have in the foreseeable future, the trial judge found that, based on the evidence of his dental practice and his fishing revenue, the appellant earned a substantial income and, barring sickness, and with no evidence to the contrary before the court, he could continue to practice his profession for a considerable time in the future. In terms of the respondent, the trial judge found that she holds no specific qualifications and holds a job at a clerk level, earning $2,500.00 per month. The judge did not proceed to make findings on the property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future. Instead, she addressed the issue of their property in looking at the lifestyle and standard of living of the parties. In so doing, she identified the matrimonial home, 3 cars, a pleasure craft, a fishing boat, and a large lot of land measuring 39 acres which was free of mortgage. She also mentioned family vacations overseas and shopping in Miami for furniture for the matrimonial home as evidence of a reasonably high standard of living.

[104] In terms of the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future, the trial judge addressed principally the financial needs of the respondent and the children and the financial obligations of the appellant to the respondent and the children, but did so primarily in the context of an order for maintenance and not a transfer of property order.

[105] In terms of the ages of the parties and the duration of the marriage, the trial judge found that at the date of her judgment, the appellant was 54 years old and the

respondent was 37 years old, and they had been married for 15 years. The judge considered that the marriage was not particularly long, but it could not be described as short either. She did not, however, indicate any significance that she was ascribing to the age disparity of the parties.

[106] In terms of the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family, the trial judge found that the respondent made a substantial contribution to the welfare of the family by looking after the home and caring for the children. The financial and material contribution by the appellant to the welfare of the family was undoubtedly substantial.

[107] As previously stated, the trial judge did not address any benefit which either of the parties was likely to lose the chance of acquiring by reason of the divorce, because there was no evidence of any.

[108] Having considered all of the factors which she was required to consider by virtue of section 25(1), the judge then proceeded to apply what she considered to be the applicable law to the facts as found by her. She erred though in the law which she applied.

[109] In paragraph 105 of her judgment, the trial judge said that "[t]he Court's task in this fine balancing act to find what is fair for the Parties in distribution of property and maintenance for the children is not an easy one." She then proceeded to refer to and quote extensively from the cases of **White v White** and **Stonich v Stonich**[14] which deal with the distribution of matrimonial property upon the dissolution of marriage, in the distribution of which the court will tend towards an equal distribution.

[110] The laws of Saint Lucia do not provide for the distribution of matrimonial property upon the dissolution of marriage. In fact, the laws of Saint Lucia do not even recognise the concept of matrimonial property – the property of parties to a marriage is either community property or separate property and distributes itself fifty-fifty in the case of

[14] Civil Appeal No. 17/2002.

community property and one hundred - zero in the case of separate property. Section 24 of the **Divorce Act** enables a court, on an ancillary relief application, to order that one party transfers to the other property which is owned by the first party. This transfer can be a transfer of the whole or any part of the property; but there is no distribution of matrimonial property by a court in St Lucia; and a court in St Lucia does not have "wide discretionary powers in proceedings for divorce … to distribute the property as it sees fit without having to ascertain the shares of the parties in the property."

[111] It would appear that in the present case, although the trial judge did attempt to factor into the consideration of her transfer of property order the matters required to be considered by her in accordance with section 25, she erred however by applying UK matrimonial property law, rather than the provisions of the Civil Code dealing with the property of parties to a marriage in St Lucia..

[112] It is not that a court in St Lucia cannot make an order transferring a share of the separate property of one party to the other. Indeed, the court is clearly permitted to do so by section 24 of the **Divorce Act**. In making such an order, however, the court must start off from the perspective that it is not distributing matrimonial properties between parties, but is exercising a power to transfer property which belongs to one party in whole or in part to the other party, having regard to certain clearly identified matters to which regard must be had in determining whether a transfer should be ordered and, if so, in what amount or percentage.

[113] Having determined that the trial judge erred in awarding a 40% share of the 36 acres of land to the respondent, and in ordering the appellant to transfer the said share to her, I will set aside judge's order so that this Court can make its own determination as to whether any of the appellant's 36 acres of land should be transferred to the respondent and the quantum or percentage, if any, to be transferred.

[114] In terms of the factors to which regard must be had in deciding whether to exercise the power under section 24 to make a transfer of property order, the following are to be noted:

(1) the appellant has a far greater income and earning capacity than the respondent, although his capacity to maintain the level of his income

and earnings can be significantly affected by advancing age, because of its potentially inhibiting effect on his ability to commute from Vieux Fort to Castries and back 6 days a week to sustain his double dental practice and even to do commercial fishing on weekends;

(2) as per the provisions of the judge's order with respect to which no appeal was proceeded with, the appellant owns a half share in the net value of the matrimonial home and its contents, a half share in the net realizable value of the Isuzu motor vehicle, a Honda Ridgeline pick up vehicle and his 36 acres of land, whilst the respondent owns a half share in the net value of the matrimonial home and its contents, a half share in the net realizable value of the Isuzu motor vehicle, the motor vehicle PC7571 ordered to be transferred to her by the appellant, and the fishing boat ordered to be transferred to her by the appellant;

(3) the parties will both require the means, so far as practicable, to live at their accustomed standard of living and will have the obligations and responsibilities involved in doing so;

(4) the obligations and responsibilities of the parties to the children are addressed elsewhere, but there is little doubt that the greater portion of the financial burden involved in so doing will be carried by the appellant;

(5) as found by the trial judge, the parties enjoyed a reasonably high standard of living during the currency of their marriage, maintained in large measure by the income and earning of the appellant, which is not transferable to the respondent under section 24;

(6) the appellant was 34 years old at the date of marriage and about 49 years old at the date of the decree nisi of divorce, whilst the respondent was 22 years old at the date of marriage and about 37years old at the date of the decree nisi of divorce, and they had a relatively long marriage, which endured for 15 years;

(7) both parties made significant contributions to the welfare of the family, the appellant doing so mostly by providing the financial wherewithal to provide and maintain a good standard of living for the family, whilst the respondent made her contribution mostly by her work as a homemaker and caregiver to the children;

(8) there is no evidence of any physical or mental disabilities of either of the parties or any benefit (like a pension) which either of the parties will lose by reason of the dissolution of the marriage.

[115] Taking all of these factors into consideration and noting that, on the evidence, apart from the fact of the appellant having sold 3 acres from what was originally 39 acres of land, the proceeds of which sale he said he used to enable him to bring his mortgage payments up to date, pay outstanding taxes, and purchase a motor vehicle to replace the more than ten-year old vehicle which he had been using to commute to and from Castries on a daily basis, there is nothing to indicate that the possession of the 36 acres of land had any bearing on the lifestyle or standard of living of the parties; it is land that the appellant acquired 4 years after the marriage and owned since then, and it is land that the respondent never owned and still does not; I am of the view that the respondent will be able to remain in the financial position that she would have been in if the marriage had not broken down, if she had some realizable asset of value after the sale of the matrimonial home. I note that 3 acres of the original parcel of land were sold for $261,360.00, so if there is any parity in the acre value of the land, each acre should be worth approximately $87,120.00. Considering then that the land is the separate property of the appellant, acquired from the fruits of his industry, which industry may be compromised by advancing age, but considering too that the land was acquired by the appellant in the course of his marriage to the respondent, even though acquired as his separate property, I believe that an award of one quarter of the appellant's 36 acres of land should provide the respondent with an asset with a potential value of up to $784,080.00, and should achieve the goal of enabling her to remain in the financial position that she would have been in had the marriage not broken down. In fairness to the appellant, I will order that the costs of partition and survey of the land to extract and transfer the one-quarter share to the respondent shall be borne equally by the parties.

Periodical Payment Orders

[116] The next issue to be determined is whether the trial judge erred in the orders which she made with respect to the monthly rental payment and the monthly maintenance payments for the children of the family.

[117] Oddly, in his 2 grounds of appeal complaining about the rental payment order and the maintenance of children order, the appellant does not challenge either order, but merely complains about the combined effect of the 2 orders yielding an aggregate monthly payment of $4,200.00, which he complains in ground 7 is excessive, and in ground 8 that due consideration was not accorded to the factors elucidated in section 25 of the **Divorce Act**. Although the appellant did not separate the 2 orders in his challenge to them, the 2 must be separately addressed because the authority of the court to make them would be derived from different provisions of the **Divorce Act**.

[118] The authority of the court in divorce proceedings to make orders for the maintenance of children is contained in section 23 of the **Divorce Act**. Although the section is fairly lengthy, I consider it necessary to set it out in full. The section, which is headed "Financial provisions for child of the family", states:

> "(1) Subject to the provisions of section 28, in proceedings for divorce or nullity of marriage, the Court may make any one or more of the orders mentioned in subsection (2)—
>
> (a) before or on granting the decree of divorce, or of nullity of marriage, as the case may be, or at any time thereafter;
>
> (b) where any such proceedings are dismissed after the beginning of the trial, either or within a reasonable period after the dismissal.
>
> (2) The orders referred to in subsection (1) are—
>
> (a) an order that a party to the marriage shall make to a person specified in the order for the benefit of a child of the family, or to such a child, such periodical payments and for such term as may be so specified;
>
> (b) an order that a party to the marriage shall secure to a person specified for the benefit of such a child, or to such a child, to the satisfaction of the Court, such periodical payments and for such term as may be so specified;

(c) an order that a party to the marriage shall pay to a person specified for the benefit of such a child, or to such a child, such lump sum as may be so specified.

(3) Without prejudice to the generality of subsection (2)(c), an order under this section for the payment of a lump sum to any person for the benefit of a child of the family, or to such a child, may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this section to be met.

(4) An order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the Court.

(5) Where the Court has power to make an order in any proceedings by virtue of subsection (1)(a), it may exercise that power from time to time; and where the Court makes an order by virtue of subsection (1)(b) in relation to a child it may from time to time make a further order under this section in relation to him or her."

[119] It is also necessary to set out in full section 28 of the Act. The section, which is headed "orders in favour of children", states:

"(1) Subject to subsection (3) –

(a) No order under sections 23, 24 (a) or 26 shall be made in favour of a child who has attained the age of eighteen, and

(b) The term for which by virtue of an order under section 23 or 26 any payments are to be made or secured to or for the benefit of a child may begin with the date of the making of an application for the order in question or any later date but shall not extend beyond the date when the child will attain the age of eighteen.

(2) The term for which by virtue of an order under section 23 or 26 any payments are to be made or secured to or for the benefit of a child shall not in the first instance extend beyond the date of the birthday of the child next following his attaining the age of eighteen years.

(3) The Court may make such an order as is mentioned in subsection (1)(a) in favour of a child who has attained the age of eighteen, and may include in an order made under section 23 or 26 in relation to a child who has not attained that age a provision extending beyond the date when the child will attain that age, the term for which by virtue of the

order any payments are to be made or secured to or for the benefit of that child, if it appears to the Court that –

(a) That child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also or will also be, in gainful employment, or

(b) There are special circumstances which justify the making of the order or provision.

(4) Any order made by virtue of section 23 (2) (a) or section 26 (6) (d) shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order, except in relation to any arrears due under the order on the date of such death."

[120] The trial judge in this case did not make a secured payments order, as provided for in section 23(2)(b), or a lump sum payment order, as provided for in section 23(2)(c), she made a periodical payments order, as provided for in section 23(2)(a). In the making of such an order she was required to comply with the provisions of sections 23 and 28. By virtue of section 23(2)(a), the order must specify the person to whom the periodical payments must be made for the benefit of the child and the term for which the payments must be made. By virtue of section 28, the term for which the payments are to be made shall not extend beyond the date when the child attains the age of 18 years, unless it appears to the court making the order "that [the] child is, or will be … receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation …" or "there are special circumstances which justify the making of the order ….". In accordance with the applicable law and relevant facts, the trial judge was therefore required to make an order that the appellant pay to the respondent (or some other named person) for the benefit of the children, a specified sum of money in respect of each of the children until the child attains the age of 18 years or completes his or her education, whichever is the later. This she did not do, and the periodical payments order which she made must be varied accordingly.

[121] I propose to vary the judge's order by specifying that the appellant (as the respondent in the court below) will pay to the respondent (as the petitioner in the court below) the sum of $1,350.00 per month for each of the 2 children of the family from the 20th day of

April 2015, until each child attains the age of 18 years or completes his or her education (whether at the secondary or tertiary level), whichever is the later.

[122] As to the order for the payment by the appellant of $1,500.00 towards the rental of premises to house the respondent and the children until the matrimonial home is sold, there is no specific provision under the **Divorce Act** for such an order, especially having regard to the fact that no application was made for the payment of any maintenance by the appellant to the respondent. An order to this effect is reasonable, however, but only in the context of the matrimonial home being dealt with as the community property of the parties to be sold and the net proceeds being distributed equally between the parties. Since the appellant is in exclusive occupation of the matrimonial home until its sale, and since the mortgage payments that he makes between the filing of the divorce and the sale of the property will be reimbursed to him upon the sale, it is only reasonable that provision is made for residential accommodation for the respondent and the children until the sale. The order for the rental payment should however be made as part of the arrangements with respect to the sale of the matrimonial home. I propose therefore to place this order within the provisions for the sale of the matrimonial home and its occupation prior to sale.

The Penal Notice

[123] The appellant complained that a penal notice was inserted in the court's order of 20th April 2015 without any application having been made and with no legal basis for its insertion. He contends that the endorsement of an order with a penal notice is done under Rule 53.3 of the **Civil Procedure Rules 2000** ("CPR") and that, by virtue of rule 2.2(3), the CPR does not apply to matrimonial proceedings. The appellant accordingly contended that the penal notice was improperly inserted.

[124] The respondent says that it is trite that a penal notice can be endorsed on a court order. She contends that the insertion of a penal notice serves to place the party against whom an order is made on notice of the penalty that he or she can face for failure to comply with the order. The respondent acknowledges that divorce proceedings are governed by the **Divorce Act** and the **Divorce Rules** and not the CPR. She submits, however, that if there is a failure to obey an order of the court made in divorce proceedings, committal proceedings may be instituted under Part 53

of the CPR. Alternatively, the respondent contends that, in any event, the insertion of a penal notice does not offend the contents of the order and should not therefore be a basis upon which the order can be impugned.

[125] The general purpose of endorsing an order with a penal notice was expressed by Luxmore J in the case of **Iberian Trust Ltd, v Founders Trust and Investment Co, Ltd,**[15] where he stated that: [t]he object of the indorsement is plain - namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences."[16] Williams JA put it this way in the Jamaican Court of Appeal in the case of **Ranique Patterson v Sharon Allen:**[17] "the penal notice is designed to benefit the recipient of the order. It warns him of the possible result of a disobedience of the order."

[126] Committal proceedings are very popularly commenced in proceedings governed by the CPR. As the appellant contended, the CPR is not applicable to matrimonial proceedings. Committal proceedings in matrimonial cases are governed by rule 65 of the Divorce Rules. Rule 65 states:

> "**Attachment or committal.** Notwithstanding anything in R.S.C. Order 73 rule 2 (1) (which requires an application for an order of committal to be made by motion) but subject to rule 6 of that order (which except in certain cases, requires such an application to be heard in open court) an application for an order of committal in matrimonial proceedings pending in the Court shall be made by summons."

[127] Whereas there is an express requirement for the insertion of penal notice as a pre-condition for committal proceedings under the CPR, the endorsement of an order with a penal notice is not expressly stated as a pre-condition to the commencement of committal proceedings under the Divorce Rules or the **Rules of the Supreme Court 1970**, to which the Divorce Rules make reference.

[128] It is clear though that the purpose of endorsing an order with a penal notice is to enable a party against whom a certain type of order is made to protect himself from exposure to the court's committal jurisdiction. The notice also enables the court to feel

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[15] (1932) 2 KB 87.
[16] (1932) 2 KB 87 at p. 97.
[17] [2016] JMCA Civ 29.

satisfied, prior to making a committal order, that the party was aware of the consequences of his default in complying with an order of the court, which is important to the balancing of the party's personal liberty against the court's interest in preserving the sanctity of its orders.

[129] Since penal notices are by nature protective of the party put on notice of the consequences of his failure to obey the order of the court, the usual complaint in appellate proceedings is that an order for committal was made in the absence of the committed party being forewarned by way of a penal notice endorsed on the order, and that in the absence of this warning, the committed party suffered some prejudice. As outlined above, the appellant claims the opposite in this case, that is, that the insertion of the penal notice was improper or made the order irregular.

[130] Given the nature of penal notices, it is difficult to conceive a circumstance in which genuine prejudice can arise from the endorsement of an order with a penal notice, as opposed to the failure to include one. It is true that, as both the appellant and the respondent contended, penal notices are ordinarily incidental to committal proceedings under the CPR (which does not apply to matrimonial cases), and are not a requirement under the Divorce Rules or the **Rules of the Supreme Court 1970**, but in the absence of any evidence that endorsement with a penal notice was prejudicial to the appellant or had any other effect on the validity of the order, the appellant's arguments on this issue are entirely without merit. If anything at all is to be said of the insertion of penal notices in orders made under the Divorce Rules, it is that the party against whom an order is made would stand to benefit from the endorsement of the order with a penal notice, by the fact that he or she is made aware of the consequences of non-compliance with the order, notwithstanding that there is no express requirement under the Divorce Rules for the insertion of such a notice.

[131] There appears therefore to be no merit in the complaint that the insertion of the penal notice had a negative impact on the order or made the order irregular. Accordingly, the appellant's challenge on this ground must fail.

Conclusion

[132] For all of the foregoing reasons, I would allow the appellant's appeal with respect to the extent of the share in the approximately 36 acres of land which he is to transfer to the respondent, but I would dismiss the appeal in all other respects. In order to give clarity to the trial judge's order, however, and to make adjustments to the positioning and expression of some of the orders made by the judge, I propose to set aside the 20th April 2015 order of the trial judge as worded and to make a tidied-up order, which includes both the provisions of the 20th April 2015 order and the provisions of the interim order of 8th February 2011 which subsist beyond the interim period.

[133] My order is as follows:

(1) The matrimonial home situate at Savannes Estate in Vieux Fort, consisting of 16,639 square feet of land, together with the dwelling house erected thereon, shall be sold by the parties and the proceeds of sale divided equally between them after the payment of the mortgage loan, the reimbursement of Dr. Lesfloris for all payments made by him towards the mortgage loan since the date of the filing of the divorce, and the payment of all expenses incurred in concluding the sale.

(2) The contents of the matrimonial home are to be divided equally between the parties.

(3) Dr. Lesfloris shall pay to Mrs. Lesfloris the sum of $1,500.00 per month towards the rental of premises to house Mrs. Lesfloris and the children from 1st May 2015 until the sale of the matrimonial home and the disbursement to Mrs. Lesfloris of her share in the proceeds of sale.

(4) The Isuzu motor vehicle shall be sold by the parties and the proceeds of sale divided equally between them.

(5) Dr. Lesfloris shall transfer to Mrs. Lesfloris a one-quarter share in the approximately 36 acres of land remaining from the 39 acres purchased by him on 30th December 1999.

(6) Dr. Lesfloris shall transfer to Mrs. Lesfloris motor vehicle registration number PC7571 for her sole use and benefit.

(7) Dr. Lesfloris shall transfer to Mrs. Lesfloris the fishing boat registered with the Ministry with responsibility for fisheries.

(8) The parties are awarded joint custody of the two children of the family, with primary care and control to Mrs. Lesfloris. The children shall be with Dr. Lesfloris every other weekend from 6 pm on Friday to 6 pm on Sunday and for half of every school vacation. Should either party desire to have any of the children travel outside of the country while he or she is still a minor, the permission of the other party is required.

(9) Dr. Lesfloris shall pay to Mrs. Lesfloris the sum of $1,350.00 per month for each of the two children of the family from the 20th day of April 2015 until each child attains the age of 18 years or completes his or her education (whether at the secondary or tertiary level), whichever is the later.

(10) Dr. Lesfloris shall pay costs to Mrs. Lesfloris in the sum of $6,500.00.

[134] Costs are awarded to the respondent on the appeal in the sum of $3,250.00, which represents two-thirds of the amount awarded in the court below, discounted by 20% to reflect the fact that the appellant was partially successful on the appeal, with respect to a financially significant order.

[135] I cannot conclude this judgment with the common expression of appreciation to counsel for their assistance to the Court for their oral and written submissions and authorities in support. Indeed, I found it necessary to research and prepare this judgment 'from scratch', which delayed even further an already-delayed outcome of this appeal.

[136] By way of epilogue, it should be noted that by the time this judgment is delivered some of its provisions will have become spent, but others will still be extant, and in some cases to be implemented retroactively.

I concur
Davidson Kelvin Baptiste
Justice of Appeal

I concur
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar