TAN SUI SENG ... **Appellant**

AND

TAN SIEW KING ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 12 of 2013)

Before: Mortimer P, Davies and Burrell JJ A.
19th May, 2014

Order made for property settlement under Matrimonial Causes Act – judge referred to and applied correct principles – complaint by appellant about the manner of application – judge doing his best on inadequate evidence, the inadequacy contributed to by the appellant

Mr Philip Fong Yeng Fatt and Ms Nani Zuraila Hj Ismi (M/S HEP Law Office) for Appellant
Respondent absent

Davies, J.A.:

This is an appeal by a petitioner husband against orders made by the High Court on 19 October 2013 upon the cross petition of the respondent wife. The orders made were to allow the respondent's application, to order that the respondent is entitled to a half share of the matrimonial home free from mortgage to which the property was subject and to order that the parties each bear their own costs.

The order which the respondent had sought had been a transfer of the matrimonial home into her sole name. In lieu the appellant seeks the following orders from this Court:

1. Further discovery orders against the respondent so that she can provide full and frank disclosure in respect of inconsistent facts and provide more details on the matrimonial assets which have not been valued;

2. That this matter be returned to the High Court for such determination of the matrimonial assets in the possession of the respondent; or that this Court make such determination;

3. That the matrimonial assets should be divided in the proportions of 50-50;

4. That the respondent be ordered to contribute towards payment of the mortgage on the matrimonial home.

The trial was conducted on affidavits. Neither party sought to adduce oral evidence or to cross-examine the other on their affidavits.

As the learned judge noted, the evidence adduced on both sides was, in a number of respects unsatisfactory. However the judge was obliged to do the best he could on the evidence adduced.

In this Court the appellant was represented by counsel as he was in the Court below. His counsel has furnished us with a long and detailed written submission occupying 36 pages; and a further 6 page supplementary submission The respondent is not represented before us and has not filed any written submissions.

The appellant's submissions to this Court start with and are based on two propositions. These are:

1. That in determining the respondents claim, the High Court was required to consider all of the circumstances related to the financial position of the parties; and to have regard to the starting point of equality.

2. That, in consequence, the Court was required to make a division of all of the assets of the parties as opposed to only of interests in the matrimonial home.

In his oral submissions Mr Fong helpfully clarified his argument. He submitted that had the court below dealt with the matter in the way described, a fair outcome would have been that (a) the matrimonial home would only have been divided 50/50 after the respondent had paid off the bank loan of $63,309.53 and also made a payment to the petitioner in the sum of $73,000 or, in the alternative, the house be divided 80/20 in the petitioner's favour and (b) a payment to the petitioner in excess of $250,000 would have resulted after a careful examination of the respondent's assets.

For the reasons which follow we consider this submission to be untenable.

The first of the above propositions is unassailable. But it is plain from the learned judge's quotation from the speech of Lord Nicholls in *White v White [2001] 1 AC 596* that he was adverting to and seeking to apply this principle.

In applying this principle, the learned judge saw reason for departing from the starting point of equality in circumstances in which the petitioner had, throughout his career, gone through five bankruptcies and, on the contrary, the respondent had, by working, earned money which she contributed to his business and to the finance of the household and maintenance of the matrimonial home. In other words, the learned judge seems to have thought that the respondent had made a greater contribution to the family finances than had the appellant and that this was a sufficient reason for departing from the starting point of equality of distribution. There was evidence which justified this conclusion and which the learned judge was entitled to accept.

The second of these propositions is, in our opinion, wrong. Indeed it might be unfair to either or even both parties to seek to divide up all of the assets or even most of them if a simpler form of order would achieve justice between the parties.

On the other hand, the appellant is correct in submitting that any division between the parties of, for example, the matrimonial house, in total disregard of other matrimonial assets, would be wrong. But there is no reason to think that the learned judge did that. On the contrary, he did refer to other matrimonial assets. Nevertheless he was entitled to make an order only with respect to the matrimonial home and he was not obliged, in doing so, to refer specifically to all of the other assets of the parties to which he had regard in making such order.

The evidence about the respective assets of the parties and their value was unsatisfactory. The learned trial judge referred to one aspect of this. But if the unsatisfactory nature of the evidence of the respondent's assets was prejudicial to the appellant, then the appellant should have taken action in respect of this either before trial or at trial. But he did not do is. He did not, before trial, seek an order for discovery or seek to interrogate the respondent. Nor did he himself give evidence of this or cross-examine the respondent on her affidavit of means. It is not, in our opinion, open to him at this stage to complain about the unsatisfactory nature of the evidence.

Otherwise, the contention by the appellant that the respondent should have been ordered and should now be ordered to contribute to the mortgage payments on the matrimonial home appear to involve a re-argument of inferences of fact reached by the learned primary judge; for example *"the wife respondent has not paid any money in the purchase of the matrimonial home, nor provided for the house expenses."* As we stated earlier we think that the learned judge was justified in concluding, on the evidence before him, that the respondent had made a greater contribution to the matrimonial assets than had the appellant. In particular he noted in the conclusion to his judgment that this was a *"clean break"* situation after the children had all grown up and that both parties had made contributions to the marriage and to the welfare of the family.

In a case involving a long marriage, which this was, these are relevant and important factors. In endeavouring to do justice between the parties it is plain, as the judge said, that he gave them due weight when making his order.

There is no reason to think that the learned judge did not, in making the order which he made, take into account all relevant factors including the assets of the respective parties and, more generally, their present financial circumstances, to the extent that these were in evidence before him.

The appeal must be dismissed.

Orders

1. Appeal dismissed.
2. Order the appellant to pay the respondents costs.

Mortimer, P.

Davies, J.A. **Burrell, J.A.**