

LIM CHAI HOCK

...Appellant

AND

JOSEPHINE HENG

...Respondent

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 4 of 2016)

Before: Mortimer P, Burrell and Seagroatt JJ A.
16th May 2016

Headnote: Matrimonial property – Transfer of matrimonial home to wife – Suitability of lump sum in lieu of monthly payments for maintenance.

Ms. Melissa Ang Yee Heng (Messrs. Melissa Ang & Co) for the Appellant
Mr. Lim Rui (Messrs. Ridzlan Lim Advocates and Solicitors) for the Respondent

Cases cited in the judgment

White v White [2000] 2 FLR 981.

Burrell, JA.:

This is an appeal by the Respondent husband Lim Chai Hok following a judgment from Judicial Commissioner Pg Hjh Rostaina bte Pg Hj Duraman delivered on 12 March 2016 pursuant to s.1 of the Matrimonial Causes Act 1973.

Having heard detailed evidence from both the petitioner wife, Josephine Heng, and the Respondent the learned Judicial Commissioner gave a careful and reasoned written decision dealing with five areas of dispute. Only two of those five concern this appeal. They are, first, the matter of the ownership of the matrimonial home and secondly, the question of maintenance for the petitioner wife. (I shall refer hereafter to the parties in this appeal simply as “husband” and “wife”).

Before outlining the material facts we set out the two issues to be determined by this court.

1. The Matrimonial home

The learned Judge ordered that ownership of the matrimonial home be transferred to the wife. It had been in the husband’s sole name since it had been purchased by him before the parties’ marriage in 2002. The wife came to live in it at the time of the marriage and it remained their home for the next 11-12 years, until they separated in 2013. The wife has continued to live there since the separation. It has

been valued of BD\$436,000. The husband's appeal is confined solely to the issue of the ownership of the matrimonial home.

2. Maintenance

The wife's cross-appeal however, filed on 26th April 2016, raises the question of maintenance. Even if she had not done so the court would have had to consider the question of maintenance as it would not have been realistic to consider the matrimonial home issue in isolation. The Judge ordered the husband to pay monthly maintenance at the rate of BD\$1,280.60. The wife's cross appeal seeks a lump sum payment instead, so as to achieve a "clean break" situation.

Key facts

- i. During the marriage neither party was employed. It was a second marriage for both of them. The wife has 3 adult children and the husband 4, from their previous marriages. Only the husband's youngest son is still dependent being at University in Singapore.
- ii. They enjoyed a comfortable lifestyle funded by rental income from properties owned by the husband. Almost all the properties had been inherited before the marriage. Occasionally a property was sold and the proceeds used to fund their day to day living and comfortable lifestyle.
- iii. Unfortunately, the information available to this court and to the court below concerning the value of the husband's assets is limited. Annexed to the husband's affirmation, filed for the purpose of the hearing before the Judicial Commissioner, is a list of 20 properties. Item 1 is owned by the husband's siblings. Item 2 is the matrimonial home. Items 3-5 are rent producing properties. The total monthly income from these rents is BD\$3,500. Items 6-20 are 15 properties described as "mainly plots of land in Temburong, jointly owned with siblings." Nothing further is known relating to their exact location, income potential, percentage ownership or development value.
- iv. The wife has no assets.
- v. The wife claimed for BD\$2,000 per month for maintenance. The Judicial Commissioner firstly reduced this to BD\$1,470 being the sum needed by the wife to meet her monthly outgoings.
- vi. This figure was further reduced to \$1,280.60 for the following reason. During the marriage a plot of land at Lamunin was sold for BD\$100,000. The husband gave \$50,000 of the proceeds to set up a joint account at the BIBD bank with the wife as a premier account holder. The husband also provided \$50,000 so that a \$100,000 joint account was arranged. Soon after the separation the wife withdrew the entire sum. There was a dispute at trial about this withdrawal. The Judicial Commissioner decided that it was done without the husband's consent and that she still owed him \$50,000 as a result. She spread the repayment over 22 years (being the wife's life expectancy according to Government statistics) which resulted in a reduction in the monthly maintenance from \$1,470 to \$1,280.60.
- vii. We make two observations in relation to this issue. First, it was a joint account which meant that the wife could withdraw any amount whenever she wanted to.

- Secondly, the resulting “repayments” order means that the wife’s income is insufficient to meet her financial needs, according to her evidence at trial.
- viii. Prior to the separation the wife enjoyed golfing membership at the Empire Hotel and Country Club. They also employed a resident domestic helper. At trial she claimed that these benefits should continue but no such orders were made in her favour.
 - ix. Finally, the Judicial Commissioner noted in her decision that the husband had BD\$100,000 in a savings account. Also, he had recently, since the separation, sold land in Temburong and purchased two condominiums in Thailand worth BD\$1.1 million and had two properties, worth BD\$700,000, under construction on the “Palm Development” due for completion in 3 years time.

Principles

In all matrimonial property cases, rather than pour over the invariably different facts in so called ‘similar’ cases, it is important to highlight the relevant principles and apply them as carefully and as fairly as possible to the particular facts of the case.

This court’s primary task is to decide whether or not the Judicial Commissioner was wrong in principle and thereby erroneously made an order which did not do justice between the parties.

In order to answer that question we shall consider those matters to which the court shall have regard, insofar as they are material to this case, as set out in s.25(1) of the Matrimonial Causes Act 1973, subject to the important principles laid down in *White v White* [2000] 2 FLR 981.

s.25, inter alia, provides for consideration by the court of the following:-

- “(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) – (h).”

In *White v White* these provisions were considered at length. In so far as they assist in this case it was held that:

- “(1) The objective implicit in the provisions of Part II of the Matrimonial Causes Act 1973, s.25 was to achieve a fair outcome in financial arrangements on or after divorce.
- (2) Fairness required the court to take into account all the circumstances of the case. In seeking to achieve a fair outcome, there was no place for discrimination between husband and wife and their respective roles. Fairness required that their division of labour should not prejudice or advantage either

party when considering their contributions to the welfare of the family under s.25(2)(f). if each in their different spheres contributed equally to the family, then in principle it mattered not which earned the money and built up the assets. Before making an order for division of assets, a judge should check his tentative views against the yardstick of equal division. As a general guide, equality should be departed from only if, and to the extent that, there was good reason for doing so. The need to consider and articulate reasons for so doing would help the parties and the court to focus on the need to ensure the absence of discrimination.

- (3) *Section 25(2) did not rank the matters listed therein in any hierarchy and other matters might also be relevant. The importance and weight to be attached to them depended on the facts of the particular case. Financial needs was only one of the several factors to be taken into account in determining a fair outcome. The available assets of the respondent did not as a matter of principle become immaterial once the claimant's financial needs were satisfied. When considering s.25(2)(b), confusion would be avoided by courts ceasing to employ the expression 'reasonable requirements' and returning to the statutory language of 'needs', which preserved the necessary degree of flexibility.*
- (4) *.....*
- (5) *A parent's wish to leave something to the children would not normally be treated as a financial need, but where resources exceeded needs, that wish could be included as a relevant factor and given appropriate weight.*
- (6) *The fact that property was inherited was one of the circumstances of the case, to be given the weight appropriate in the circumstances. Inherited property could be seen as a contribution made to the welfare of the family by one party to the marriage. However, where the claimant's financial needs could not be met without recourse to the property inherited by the respondent, its source would carry little weight.*
- (7) – (9)....”

Discussion

We now turn to the application of these principles to the facts of this case. We do so by posing three questions:

1. Was the Judicial Commissioner wrong to order the matrimonial home be transferred to the wife?
2. Was she wrong not to award a lump sum payment in lieu of monthly maintenance so as to achieve a clean break?
3. Was she wrong to award \$1,280.60 per month for the wife's maintenance?

After careful consideration we have concluded that the answer to each of the above questions is no. The questions cannot be considered separately, they must be considered together.

The husband has no objection to his ex-wife remaining in occupation of the house. The best outcome for him would have been that the house be put into 50/50 joint ownership with a right of occupation for life to the wife. We do not think that it was

wrong in principle to increase the wife's interest from the minimum to which she was entitled, namely 50%, to the 100% as ordered.

Her resulting acquisition of an additional 50% should be balanced against the following factors.

- i. The husband has interests in many (albeit not detailed and not valued) other properties. The fact that they were inherited and acquired before the marriage does not mean they should be wholly excluded from consideration. The court should be satisfied that the distribution of assets has been fair following the divorce. In the present case all of the husband's asset have remained unaffected save for 50% of the matrimonial home.
- ii. By the same token the court may look at the value of the assets acquired since the separation. The fact that they were acquired post separation does not render them irrelevant. In this case the Judicial Commissioner was aware of \$1.1 million's worth of property in Thailand and \$700,000's worth of future property in Brunei. These cannot be ignored when considering the whole picture to answer the question posed at (1) above.
- iii. It can fairly and relevantly be argued that following the court's order, the husband's lifestyle and financial comfort remains unaffected. He is asset rich and is now liable for a reduced monthly payment to his ex-wife. The life-style of the wife, on the other hand, has been adversely affected in two respects. She no longer enjoys the golf membership at the Empire and the social and recreational facilities that go with it. Also, she no longer has and can no longer afford a domestic helper.
- iv. Whilst remaining fair to the husband, if it is possible to provide both security and independence to the wife, the court should strive to do so. With this in mind we turn to the questions at (2) and (3) above concerning maintenance and a possible 'clean break' by way of a lump sum.
- v. We find ourselves in agreement with the Judicial Commissioner that this is not a case which is suitable for a lump sum. First, there is no agreement between the parties as to how a lump sum should be calculated. Secondly, it is doubtful that the sort of lump sum which might be ordered in this case would truly provide secure finance for the wife for the rest of her life. Thirdly, and most significantly, the husband seeks a three year postponement of payment which, he claims, is the sort of time he may need to accumulate the necessary sum. Such an arrangement is unsatisfactory when balanced against the relative certainty of monthly payments.
- vi. As for the quantum of the monthly maintenance we have concluded that, for present purposes, it should remain as ordered by the Judicial Commissioner. We have not overlooked our observations at (vii) on page 2 above but nonetheless make no adjustment to the maintenance which we regard as reasonable and affordable in all the circumstances. It is, of course, always open to the parties at any time in the future to apply for a variation in maintenance or even to come to an agreement between themselves about a lump sum in substitution of the court's order.

Order

We dismiss the husband's appeal with a costs order nisi in the wife's favour.

We dismiss the wife's cross appeal with a nisi order that there be no order as to costs on the basis that, in any event, it would have been necessary to consider the question of maintenance in the context of the husband's appeal.

Any application concerning costs to be made on or before 19th May 2016 upon notice to the court and the opposing party. Otherwise the order of costs will be made final on 21st May 2016.

Mortimer, P.

Burrell, J.A.

Seagroatt, J.A