



DIVORCE JURISDICTION

2001: No. 250

BETWEEN:

BEVERLY ANN MARIE BRANGMAN

Petitioner

-and-

NORRIS EUGENE BRANGMAN

Respondent

JUDGMENT

Date of Hearing: 3 April 2007

Date of Judgment: 1 June 2007

Mr. Michael Telemaque for the Petitioner

Mr. Lawrence Scott for the Respondent

The Background

1. These parties, to whom I will refer in the usual way respectively as “the Wife” and “the Husband”, were married in 1976. They separated in September 2001; decree nisi was pronounced on 26 April 2002, and made absolute on 7 June 2002. The Wife issued her notice of application for ancillary relief some four years later in July 2006. She swore two affidavits in support of her application, on 24 July 2006 and 24 November 2006, and the Husband swore one affidavit, on 26 October 2006. This appears to have been prepared by the Husband without the assistance of counsel, and contains much irrelevant material. Although the affidavits dealt with various aspects of the matrimonial history, the issue between the parties is a relatively straightforward one, concerning the jointly owned matrimonial home, which is at 5 Westering Lane in Warwick Parish (“the Matrimonial Home”).
2. There are three children of the family, to whom I will refer by their initials. J is now 26 years of age, and is studying off the Island. She returns two or three times a year, and when she does so stays with the Wife. A is aged 23, and now lives with the Wife. There had been an incident in April 2006 which had led to both she and the youngest child, M,

leaving the Matrimonial Home, but the position as described above is one which is agreed by counsel. M is 20 years of age, and apparently not now living with either party.

3. The Wife is employed as a nurse, and is now 53 years of age. The Husband, although qualified as a teacher, is now employed as a painter. He is 55 years old. Both parties have had mental health problems in the past which are referred to in the affidavits.

The Hearing

4. This was relatively short, and consisted only of submissions by counsel, both of whom took the view that there was no need for oral testimony. But there were some conflicts on the affidavit evidence, particularly in relation to the Husband's contribution to the maintenance of the Matrimonial Home post separation.

The Matrimonial Home

5. This was acquired in 1994, at a cost of \$200,000. By that time the parties had between them saved \$50,000, and it is common ground that the Wife provided \$35,000 of this sum, and the Husband provided \$15,000. They were able to secure a mortgage from the Bank of Bermuda in the sum of \$140,000, and a loan back from the vendor of \$10,000. In relation to this last amount, Mr. Telemaque advised that the repayment of this borrowing from the vendor had been the sole responsibility of the Husband, and he had discharged that amount.
6. The parties secured a valuation of the Matrimonial Home, which was agreed by counsel. Because of the contention made on behalf of the Wife that the relevant date for valuation purposes was the date of the separation in September 2001, figures were given for the market value as at that date as well as at the current date. The market value in September 2001 was put at \$265,000, thus showing a relatively modest increase in value since purchase, and the current market value put at \$575,000. So it can be seen that in a period of little more than five years, the value of the property has more than doubled. Mr. Telemaque for the Wife accepted that this substantial increase in value was solely in consequence of inflation in the housing market.
7. In relation to the mortgage, the current balance is just under \$80,000. At the date of the separation, September 2001, the balance was \$125,485. The position therefore is that at the date of hearing, the equity in the Matrimonial Home amounted to \$495,000, whereas at the time of the parties' separation, the figure was \$139,515. Counsel did not seek to adjust the figures to the net figure following a notional sale, so that the Court has no other figure to work from.

The Matrimonial Home and Contribution

8. I have referred to the proportions of the deposit paid by each of the parties, but it is necessary to say something more in regard to the contribution of each of the parties to the family finances. The Wife referred in her first affidavit to the fact that in the early days of the marriage, when the Husband had been working as a teacher, he had been the major breadwinner, while she had taken responsibility for managing the home and the family finances, and had been the primary caregiver for the children. During this period the Husband had been able to save \$20,000 which had been in a joint account, but which had been withdrawn by the Husband, without consultation with the Wife. The Husband's version of events was that the Wife had tried to withdraw the same \$20,000 without consulting him, although quite why the Wife should have had any difficulty in withdrawing funds from a joint account is unclear, when this was something that the Husband himself had subsequently been able to achieve. The Husband stated that the Wife had never forgiven him for withdrawing these monies.
9. According to the Wife, some of those monies were used by the Husband to buy a business van, and she believed that the remainder of the joint savings were used towards the purchase of the Matrimonial Home.
10. Following his father's death in 1996, the Husband had received an amount in excess of \$50,000. The Wife said that it was agreed that the Husband would retain these funds, and invest them for his future retirement. The Husband said that he had offered the Wife \$50,000 to put towards the mortgage but that she had refused to take this money. In the event, by the time of the hearing, the Husband had just over \$12,000 in his savings account, and approximately \$2,000 in his checking account. The Wife had total savings of approximately \$77,000.

The Husband's Inheritance Expectation

11. The Husband also has an interest in a property which had originally been owned by his mother, at 55, West Side Road in Sandy's Parish. The Wife had first of all indicated simply that the Husband stood to inherit his mother's home on her death, she then being 80 years of age. The Husband's affidavit was not clear as to the position, and the Wife's reply affidavit put the Husband to proof of his interest. In the event, Mr. Scott explained the position. Apparently the property at West Side Road had originally been owned by the Husband's mother, and she had then chosen to convey one half of the property to her daughter and son-in-law, and the other half had been conveyed to the Husband, subject to his mother retaining a life interest for herself. There were apparently other dealings, but counsel agreed that the present position is that the Husband does have a one half remainder interest in the West Side Road property, which will fall in at the time of his

12. In the event, counsel were able to agree the position, and advised the Registrar by letter dated 25 April 2007 that the value of the Husband's interest in the West Side Road property was \$330,000. There was then some confusion as to whether the parties had simply reached an agreement as to this figure, or whether the dispute as a whole had been compromised. By letter dated 21 May 2007, Mr. Telemaque confirmed that the parties wished judgment to be delivered in the matter.

Contribution

13. In my view, this is a case where both parties contributed as best they could in their different ways to the acquisition of the Matrimonial Home and to the build up of equity in that property. The Wife no doubt undertook the major burden of raising the children, but the Husband undertook extensive maintenance work. The Wife had direct responsibility for the mortgage, but the Husband contributed his income for the benefit of the family in various ways. At this point in time it is of no significance that they contributed to the deposit in unequal shares. This was a long marriage, and the Court necessarily approaches this application on the basis that a fair starting point in relation to the division of the joint family assets between the parties will be equality.

The Relevant Date

14. There remains an issue between the parties as to the date on which that equity should be calculated. Mr. Telemaque for the Wife contended that since the Wife has been solely responsible for payment of the mortgage since the separation in September 2001, and for all other payments in respect of the property, the interests of the parties should be fixed at that time, with reference to the September 2001 valuation.

15. During the course of argument, I referred Mr. Telemaque to paragraph 5.55 of the 7th Edition of Jackson's Matrimonial Finance and Taxation, which confirms that the court is normally concerned with the value of the assets at the date of hearing. Such an approach reflects the wording of section 29 (1) (a) of the Matrimonial Causes Act 1974. Particularly, I referred Mr. Telemaque to the following passage from Jackson:

“It has been said that it is only where there has been a very significant change accounted for by more than just inflation or deflation that the court must

have an eye to the valuation at the date of separation. If there has been an increase due to the efforts of a party it would fall to be taken into account as part of that party's contribution".

16. As indicated above, Mr. Telemaque conceded that the very substantial increase in the value of the Matrimonial Home since the date of the parties' separation had not been in consequence of any efforts on the Wife's part, but was solely a consequence of inflation. This obviously makes it more difficult for the Wife to achieve her stated objective of buying out the Husband, but that does not seem to me to be a good reason to deprive the Husband of his share of the increased value in the Matrimonial Home. I suggested during the course of the hearing that the Wife's contribution in terms of the reduction in the amount of the mortgage principal between the date of separation and the date of hearing could be dealt with by an adjustment, and Mr. Scott for the Husband indicated that he agreed that such an adjustment was appropriate. I regard that as just, given that for much of this period the Wife was providing a home for the children.

The Position of the Parties

17. At least on the basis of the affidavits, the position of the parties was that they each wished to buy out the interest of the other. Mr. Scott indicated that his view was that it was doubtful whether either would in fact be able to buy out the interest of the other, but conceded that the Wife was probably in a better position than was the Husband in this regard.

Finding as to Relevant Date

18. Against that background, I first find that the relevant date to be considered in relation to the value of the Matrimonial Home is the date of hearing, and I do not accept that the value of the Matrimonial Home as at the date of separation has any relevance for the purpose of these proceedings. However, I would add the caveat that in my view the Wife should be given credit for the reduction in the amount of the mortgage principal as between the date of separation and the date of hearing, in the sum of approximately \$46,000. The position then is that of the equity in the Matrimonial Home of \$495,000, the Wife's share is \$270,500 and the Husband's share is \$224,500.

The Parties' Assets

19. It is then necessary to look at the total assets of each party. The Wife's assets total \$347,500, representing her interest in the Matrimonial Home, and her savings of \$77,000. The Husband's assets total \$568,500, representing his interest in the Matrimonial Home, his savings of \$14,000, and his interest in the West Side Road property of \$330,000.

Consequently, the total value of the joint family assets is \$916,000, of which the Husband has approximately 62%, and the Wife approximately 38%.

20. The next question which falls to be considered is whether the difference between the assets of the parties is such that it should affect the interest which each of them has in the Matrimonial Home. Put in percentage terms, the Husband's assets are approximately 70% greater than the Wife's, although it must be borne in mind that the value of the Husband's interest in the West Side Road property is illiquid.
21. I bear in mind in considering the Wife's application for ancillary relief that she does not seek a lump sum payment from the Husband, but rather seeks to be able to purchase his interest in the Matrimonial Home. In her first affidavit the Wife said in paragraph 15 both that she needed to draw down on her time deposits in order to find the money to pay a lump sum to the Husband, and that this was a case for a "clean break" by payment of a capital lump sum. She then made it clear in paragraph 16 that she was asking the Court to fix the size of the lump sum to be paid to the Husband, obviously in respect of his interest in the Matrimonial Home. And this was the position contended for by Mr. Telemaque, albeit on the basis of the 2001 value, since he submitted that the Wife could not afford to buy out the Husband on the basis of current market value.
22. At least in theory, the Husband had a corresponding objective, namely to buy out the Wife's interest in the Matrimonial Home. However, in practical terms, clearly Mr. Scott is right, and the Husband, with his relatively modest savings, is not likely to be able to raise the sum which he would need to buy out the Wife's interest in the Matrimonial Home. On the other hand, it may well be that the Wife will be able to arrange financing in a sufficient amount to enable her to buy the Husband's interest in the Matrimonial Home. Given that the wife has continued to live in the Matrimonial Home since the separation, it seems to me just that she should be given the opportunity to buy out the Husband's interest.

Finding as to the Appropriate Sum to be Paid

23. It can be seen from the figures set out earlier in this judgment that the Husband's financial position is substantially enhanced by virtue of his interest in the West Side Road property, and this is not something which the Court can properly ignore. He should be able to meet the cost of his future housing needs from the combination of the sum to be paid to him by the Wife, and the realisation of his inheritance expectation at some future date. At the same time, it seems to me that one must bear in mind that there is a significant unknown in terms of the realisation of that inheritance expectation. The exercise undertaken by counsel is the best that can be done, but it has to be recognised that in practical terms there is a wide range of possibilities which will have the effect either of the Husband's housing position being assured in the relatively near future, or

potentially of that not being the case for many years. In those circumstances, I think that some discount should be applied.

24. If one were to do a strict mathematical exercise in regard to the value of the parties' assets, and proceed on the basis that each would be entitled to one half of the total assets, that would produce an amount of \$458,000. That would mean that an equal division of the parties' assets would involve the Husband paying the sum of approximately \$110,000 to the Wife, so that if one were then to be looking at the position in relation to the Wife buying out the Husband's interest in the Matrimonial Home, instead of the Wife paying to the Husband the value of his share of the Matrimonial Home in the sum of \$224,500, she would instead pay him the sum of \$114,500.
25. The problem with making any significant discount in relation to the value of the Husband's interest in the West Side Road property is that it has the effect of changing the above figures dramatically, and this is no doubt because the value of the Husband's interest in the West Side Road property is relatively high compared to the figure for the equity in the Matrimonial Home. If, for instance, one were to discount the value of the Husband's interest in the West Side Road property by one third, and carry out the same mathematical exercise which I have done on the basis of the figures without any discount, the sum to be paid by the Wife to the Husband would rise to \$169,500. I think that that is too great a figure, and in my view the just order to be made in this case is that the Wife should make a payment to the Husband of \$125,000, in return for which the Husband should convey to the Wife his interest in the Matrimonial Home, subject to the existing mortgage. Such order is conditional on the Wife's ability to borrow sufficient funds to buy out the Husband's interest. In this regard I bear in mind her evidence that she would only be able to obtain a 12 year mortgage on account of her age. I also bear in mind that the amount of the present mortgage will effectively be added to the amount of any further borrowing which the Wife may need to undertake, although in practical terms this could be said to be offset by the level of the Wife's present savings. On the other hand, it may be possible for the Wife to incorporate the existing mortgage into the new one. It is only after the Wife knows the sums required, and has been able to make application to the appropriate lending institution that she will know whether she will be able to buy out the Husband's interest. I would fix a period of 90 days from the date of this judgment within which the Wife should complete such purchase, but with liberty to apply in the event that financing is possible but the Wife needs more time to complete the necessary arrangements.
26. In the event that it is not possible for the Wife to secure the necessary financing, then the order which inevitably has to be made is that the Matrimonial Home should be sold, and the net proceeds divided between the parties, on the same basis as would pertain if the Wife were to buy out the Husband's interest. The Wife should be given credit for any further reduction in the mortgage principal, but subject to that caveat the proceeds should

be divided as if the Husband's share of the equity of \$495,000 was \$125,000 and the Wife's share \$370,000. In percentage terms that would give the Husband just over 25% and the Wife just under 75% of the net proceeds of sale.

Costs

27. I am of course prepared to hear the parties on costs, although my preliminary view is that this is a case where it is appropriate to make no order as to costs.

Dated the 1st day of June 2007.

Hon. Geoffrey R. Bell
Puisne Judge