

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT OF JUSTICE  
FAMILY DIVISION

*Suit No. 673 of 2003*

BETWEEN:

LEOPOLD ESDRAS BREWSTER

*Applicant/Husband*

And

MARCIA YVETTE BREWSTER

*Respondent/Wife*

Before:

The Hon. Mr. Justice Randall I. Worrell, Judge of the High Court

Appearances:

Ms. Marvalee A. Franklyn, Attorney-at-law for the Applicant/Husband

Mrs. Peta-Gay Lee-Brace, Attorney-at-law for the Respondent/Wife

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2009: May 6 and 18

June 3 and 17

2011: May 19

2014: January 9  
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JUDGMENT

[1] **Worrell, J:** Leopold Esdras Brewster (hereinafter referred to as "the Applicant") sought by his Application dated and filed June 14, 2004 the following relief from the Court pursuant to **sections 56 and 57** of the **Family Law Act, Cap 214 of the Laws of Barbados**:

- (i) A Declaration that the Applicant/Husband is entitled to a share and an interest in the matrimonial home situate at Lot 230 Maycock's Terrace in the parish of Saint Lucy in this Island;
- (ii) An Order pursuant to **section 57** of the **Family Law Act** altering the interest of the parties in the property situate at Lot 230 Maycock's Terrace in the parish of Saint Lucy transferring one half share to the Applicant/Husband;
- (iii) Further or in the alternative that the Respondent pay to the Applicant within 3 months from the date of the Order such sums as ordered by the Court representing his share and interest in the said property failing which the said property be sold and the proceeds of sale be apportioned between the Applicant and the Respondent; and
- (iv) Such further or other relief as the Court might consider just in all the circumstances.

[2] The Application was supported by the Affidavit of the Applicant filed on even date. On September 26, 2005, the Respondent, Marcia Yvette Brewster, filed an affidavit in response.

[3] Both parties have also filed Statements of Financial Circumstances and at trial they not only provided further evidence orally but were cross-examined on their evidence.

[4] To prove his case, the Applicant also called and sought to rely upon the evidence of Veron Thomas and Joseph Sonson, both of whom were also cross-examined by Counsel for the Respondent.

**BACKGROUND**

- [5] The parties to this action were married on December 25, 1983 when the Applicant was thirty-eight years of age and the Respondent 10 years his junior. Their first child, Nicholas, was born less than a year later on April 25, 1984 and he was subsequently joined by Rhea, born on November 24, 1986 and Jansen, who was born on August 8, 1988. All of the children have reached adulthood and are gainfully employed.
- [6] At the time of their marriage, the Applicant was employed by Tropic Filters for just over \$1,000.00 per month while the Respondent was a primary school teacher earning a similar salary. She has remained in the teaching service while he became a taxi driver for Paramount Taxi Services before purchasing and driving his own taxi. He also attempted, with the financial support of the Respondent, to buy, repair and sell used cars and subsequently tried to start his own business teaching people to drive. From 1997 until the date of trial, he has been employed as a security guard.
- [7] On or about 1999, after just over 16 years of marriage, the parties separated as a result of irreconcilable differences. The Applicant left the matrimonial home shared by the parties, leaving the Respondent and their children in occupation. He returned to the home five years later in January 2005 when he assumed occupation of a part of the home separate and distinct from that part occupied by the Respondent and their children. Co-habitation, however, was never resumed.
- [8] When the Applicant returned to the matrimonial home in 2005, the parties had by that time already divorced. The Applicant had applied to this Court for dissolution of the marriage on December 5, 2003. A *decreenisi* had been granted on May 3, 2003 and this decree had become absolute on June 4, 2004.
- [9] Upon the dissolution of their marriage, custody of the children to the marriage was vested jointly in the parties with care and control to the Respondent and access to the Applicant. At that time the Court also made an Order that the Applicant pay \$560.00 monthly towards the maintenance of the children and one half of all educational, medical, dental, pharmaceutical and ophthalmic expenses.

#### ISSUE

- [10] The broad issue left for the Court to determine in this action is how the matrimonial property of the parties should be divided pursuant to **sections 56 and 57** of the **Family Law Act, Cap 214 of the Laws of Barbados**.
- [11] The Applicant has claimed that it is just and equitable that he receive a half-share in the equity of the property while the Respondent has insisted that as a result of his contribution to its conservation and improvement and his sporadic contribution as homemaker and parent any interest to which he is entitled should be calculated at no more than 15%.

#### THE APPROACH OF THE COURT

- [12] It is well established that a Court hearing an application for property settlement under the **Family Law Act** is required (i) to first identify and value the net assets of the parties; (ii) to then consider and evaluate their respective contributions under **section 57(3)** of the Act; and (iii) to finally consider the factors set out in **section 53(2)** insofar as relevant: ***Proverbs and Proverbs (unreported) Court of Appeal of Barbados, Civil Appeal No 7 of 2001, Decision of May 28, 2002 per Simmons CJ.***
- [13] It is clear that the structured approach recommended by ***Proverbs*** requires the Court to conduct a determination that contains a retrospective element, where the Court determines the value of past contributions made by each party, as well as a prospective element where it examines the future economic means and needs of both parties to determine whether an alteration of the parties' respective interests is just and equitable.
- [14] In conducting this determination any order made by the Court must only be made if it is just and equitable in all the circumstances: **section 57**. The requirements of justice and equity are therefore an overarching or overriding principle underlying the exercise of the Court's extraordinarily wide discretion over the division of matrimonial property.
- [15] Since what is just and equitable will depend on the particular facts and circumstances of a case and the contributions of the parties to the matrimonial property, previous precedents are of limited value. These precedents establish firmly, however, that in considering the contribution of each party under **section 57(3)**, the Court is not examining the evidence of each and every contribution in meticulous detail with the aim of conducting a precise mathematical exercise, but is instead taking abroad approach in which it examines each party's overall contribution to the acquisition, conservation and improvement of the matrimonial property in dispute.

#### NET MATRIMONIAL ASSETS

- [16] There is no difficulty in this case of identifying and valuing the net matrimonial assets of the parties. The sole asset of significant value owned by the parties, and thus the asset that is the subject of this dispute, is the parties' matrimonial home.
- [17] The matrimonial home consists of house and land situate at #230 Maycock's Terrace in the parish of St. Lucy. At present, the house is a walled structure with five bedrooms, two of which are in a self-contained apartment that had been constructed on the second floor of the house which has its own kitchen, dining room, living room and bathroom and can be accessed without going through the downstairs part of the house. It is in this apartment that the Respondent currently resides. The Applicant resides in the downstairs portion where there are three bedrooms and two bathrooms, as well as a washroom, kitchen, dining and living room.
- [18] Both parties have accepted that the matrimonial home is valued at \$390,000.00. The property is subject to a mortgage from the Bank of Nova Scotia and the parties have further agreed that the equity in the property amounts to \$335,599.00.

#### THE RESPECTIVE CONTRIBUTIONS OF THE PARTIES

- [19] Having ascertained the property owned by the parties and the value to be ascribed to it, I now turn to look at the actual contribution made by each of the parties to the matrimonial property pursuant to **section 57(3)** of the **Family Law Act**.
- [20] **Section 57(3)** provides as follows:

"In considering what order should be made under this

section the court shall take into account the following:

- (a) the financial contribution made directly or indirectly by or on behalf of a party to the acquisition, conservation or improvement or otherwise in relation to the property;
- (b) the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party including any contribution made in the capacity as homemaker or parent ...”

[21] **Section 57(3)** therefore requires the Court to identify and evaluate the direct and indirect economic contribution made to the acquisition, conservation and improvement of the property as well as the direct and indirect non-economic contribution made in relation to the same. The section specifically requires the Court to examine, in relation to the non-financial contribution under **section 57(3)(b)**, the contributions made by any party in their capacity as either homemaker or parent.

[22] In considering the contribution made in the capacity of homemaker or parent, I am guided by the observations of Simmons CJ in *Proverbs (supra)* that care should be taken to ensure that such contribution is not undervalued and is instead recognized in a substantial rather than token manner. I also accept the submission of Counsel for the Respondent, that given the gender-neutral terms of the Act, contribution made in this capacity by either party should be treated equally.

[23] It is also important to point out that contributions in the capacity of homemaker or parent are not limited to non-economic activities; the Court can and does take into account all contributions to the welfare of the property including any financial contributions made in this respect.

[24] Finally, the Court notes that the Act does not limit the Court to an examination of contributions made during the marriage or union and the Court may therefore have regard, where it is appropriate to do so, to contributions made before the parties began cohabitation and after they separated.

#### ***Acquisition of the Matrimonial Home***

[25] The parties agree that the land at #230 Maycock's Terrace, St. Lucy was acquired prior to their marriage. They accept that the Applicant not only acquired the land but that he also built a house on it before they married, although the Respondent maintains that when they got married, it was still incomplete.

[26] The Applicant testified that he constructed a 3-bedroom wood and walled house by working on it “*from month to month*” from 1981 until 1983 and that he had done most of the work himself but employed workmen to do what he could not manage on his own. He paid for the labour and all material used in the construction. His evidence on this point is not challenged and is accepted by the Court.

[27] It is likewise accepted (and undisputed) that the home could not have been acquired without the assistance of the Respondent. The Applicant deposed that the Respondent had “*assisted when she could*” while the Respondent alleged that the house was purchased as a result of their “*joint effort*”. While it is clear that the Applicant made the initial payments on the purchase of the land, it is also clear that he had to take out a loan of \$5,000.00 in order to pay the balance of the purchase price and obtain bathroom furnishings. This loan was repaid entirely by monthly deductions from the Respondent's salary. The Applicant did not assist in its repayment.

[28] The Applicant revealed in cross-examination that, to the best of his recollection, he had purchased the land at #230 Maycock's Terrace at the cost of \$1.00 per square foot. As land tax receipts submitted into evidence reveal that the property is by admeasurement 7, 735 square feet, the estimated cost of the property is, as Counsel for the Respondent rightly pointed out, approximately \$7,735.00 not including the expenses associated with its purchase.

[29] The Court therefore finds that not only did the Respondent make a contribution to the acquisition of the matrimonial home, but her contribution is far from insignificant. It is unlikely that the Applicant could have purchased the land on which it stands without her or he would, in any event, have found it very difficult to do so. It is, however, also abundantly clear that the Applicant played a far greater role in the initial acquisition of the matrimonial home as he alone shouldered the responsibility for its construction.

[30] According to Ms. Franklyn, the Respondent had sought, somewhat unfairly, to downplay the contributions of the Applicant to the initial acquisition of the matrimonial home. She submitted that it was as a result of his efforts that the Respondent and their children had a roof over their heads for the bulk of the marriage and she urged the Court to give due regard to his contribution in this respect.

[31] While the Court accepts that the Applicant's role in acquiring the matrimonial home is indeed a fact carrying quite a bit of weight, it must be remembered that in long marriages, such as this one, the initial contribution made by any party carries far less weight than in a short marriage as the value of such contribution erodes “*not by the passage of time but by the offsetting contribution of the other spouse*”: ***In the Marriage of Lee Steere [1985] FLC 91-626 at 80,078.***

[32] The initial contribution of the Applicant to the matrimonial property, although greater than that of the Respondent, may well have been counterbalanced by the Respondent's subsequent contribution to the improvement and conservation of the matrimonial home and as homemaker and parent, the evidence of which is considered below.

#### ***Improvements and Conservation***

[33] After more than ten years of marriage the parties decided to undertake significant improvements upon their home by converting the wooden parts of the structure into concrete and extending the house upwards. At first they decided to add a roof deck to the house, but the Applicant managed to persuade the Respondent that it would be better to add a two bedroom apartment which could, on completion, be rented out to earn additional income. The Respondent says that she agreed to this change in their plans with some reluctance as she was unsure whether the mortgage they had taken out to complete the renovations would be adequate to cover the cost of constructing an apartment.

[34] To carry out the improvements on their home, the parties secured two mortgages from Scotiabank. The first mortgage was of

\$55,000.00 and when this mortgage proved insufficient, a second mortgage of \$65,000.00 was taken. These mortgages were used to pay the cost of materials and labour required for the improvements, although the Applicant has alleged that he also used some of his own money to pay for materials especially after the mortgage funds ran short.

- [35] It is undisputed that both mortgages, which together total around \$120,000.00, were repaid solely by direct deductions from the Respondent's monthly salary. Although the mortgage was taken out jointly by the parties and it was the Respondent's understanding that it was to be repaid by both of them, the Applicant never made any effort to help her in its payment. She alone shouldered the burden of paying off the mortgages. She did so while the parties lived together, continued to do so when they separated and the Applicant left the matrimonial home and she alone continued to do even when the Applicant returned to live rent free in the matrimonial home after their divorce.
- [36] The fact that responsibility for the mortgage fell upon her alone is a significant contribution whose weight cannot be underestimated for there is no doubt in my mind that the improvements to the matrimonial home, which added significant value to the property, could not otherwise have been undertaken.
- [37] The Applicant deposed that he "*worked on the house [himself]*" in order to keep down the costs of labour. While he admitted that he had employed people to help him, he claimed that he "*worked side by side with them*" without receiving a salary or remuneration for the work he did. He further testified that he worked on the house so late into the night that the neighbours used to complain about the noise he made. As to the services he performed, his evidence was that he did the "*labour work*", plumbing, tiling and indoor painting and that he was also responsible for half of the electrical work. He said that he also constructed the cupboards in the house.
- [38] The evidence of the Respondent somewhat contradicted the Applicant's evidence of his involvement in the improvements. The Respondent accepted that the Applicant had been responsible for hiring the workers and had used the mortgage proceeds to pay their salaries and purchase the required materials. She accepted also that it was possible that the Applicant may have rendered some assistance in the construction of the home, but disputed the extent of his assistance. She firmly denied that he had ever worked on the house late into the night and further claimed that the renovations were actually done by the workmen who had been hired by him as the Applicant had in fact been "*gainfully employed driving taxi*" and could not have regularly worked alongside them as he had claimed. On this point, the Applicant disclosed in re-examination that he had not been employed when the renovations on the home were carried out but was instead engaged in the renovations.
- [39] As to the electrical work, the Respondent testified that this had not been personally done by the Applicant but that he had in fact gotten a friend of his to do it. The Respondent agreed that the Applicant had been responsible for the plumbing when the home was being renovated and extended, testifying that he had not wanted to use the mortgage proceeds to hire a plumber. She alleged, however, that he did not do the plumbing properly and not one of the bathrooms on the ground floor of the house was functional. It was in fact revealed in the Applicant's cross-examination that a number of the bathrooms had not been completed for a variety of reasons – failure to connect the shower, to connect the sink, to connect the toilet or not to put in any pipes at all.
- [40] On the issue of the work done by the Applicant on the improvement of the house, the Court has the benefit of the evidence of Verdon Thomas and Joseph Sonson, both of whom had been hired to work on the construction of the matrimonial home at entirely different stages. They claimed to have known the Applicant only because they had worked on the matrimonial home and were called to give evidence on his behalf. As witnesses called by the Applicant but otherwise unconnected in any way with the proceedings before this Court, their evidence is of some persuasive value.
- [41] Mr. Thomas was a contractor who had been hired to work on the home after the first mortgage was taken out. He testified as to working on the home for almost 7 weeks during which he employed between one to three people. He testified that he had to terminate people as the money which he received started going down and he himself was finally forced to leave as a result of not having been paid for his work for two weeks. Mr. Thomas admitted in evidence that he had received some help from the Applicant. The Applicant, he said, helped to dig the foundation and to mix concrete, both of which had to be done by hand. As Mr. Thomas' own work was confined to masonry he could not say whether the Applicant had done the electrical work and plumbing or some other person had been engaged to do so.
- [42] Like Mr. Thomas, Mr. Joseph Sonson, who was a mason, had worked on the matrimonial home for approximately 5 weeks and 3 days. He had not worked with Mr. Thomas but was hired after Mr. Thomas had left and the second mortgage had been secured. It was the evidence of Mr. Sonson that the Applicant helped when he was there. In particular, the Applicant had helped with the digging of the foundation, the masonry and labour and the plastering of the steel and ring beam. Mr. Sonson, again like Mr. Thomas, could not say whether the Applicant was responsible for the electrical work and the plumbing.
- [43] Counsel for the Respondent pointed out that while the Applicant's claim was founded on his indirect financial contribution as a plumber, mason and labourer on the improvement of the matrimonial home, neither he nor any of the witnesses he had called had actually provided the Court with satisfactory evidence on which to assess this contribution. No attempt had been made to ascribe a value to these services or the cost that would have been incurred by having another person perform them. In making this submission she directed the Court's attention to ***Wilson v Wilson (unreported) Court of Appeal of Barbados, Civil Appeal No. 5 of 2003, Decision of March 22, 2007.***
- [44] In ***Wilson*** one of the grounds of appeal was that the trial judge had undervalued the Appellant's indirect financial contribution in the form of labour provided during the construction of the matrimonial home. The Appellant had claimed that he had worked on the construction of the matrimonial home as a carpenter, mason and foreman without receiving any financial remuneration for the same.
- [45] The Court of Appeal noted that in making this claim the Applicant had failed to give any evidence of his experience in the construction industry, the services that he had performed on the matrimonial property or the value of those services and that the judge had therefore quite rightly found that there was no evidence to support his bare allegation. The Court of Appeal saw no reason to disturb the judge's finding, observing at para 32 that:

"It should have been possible for the husband, as workman and builder, to produce detailed evidence as to the costs of constructing the matrimonial home. He should have been in a position to describe and quantify the work that he did. In the absence of himself providing such evidence in support of his claim, he could have used the services of a quantity surveyor to cost the materials and labour and the use of plant, tools and equipment and to quantify the value of his services. The

judge would then have had expert evidence on which to assess his financial contribution..."

- [46] Ms. Franklyn, counsel for the Applicant, in attempting to distinguish the case of *Wilson*, pointed out that the Appellant in *Wilson* was described as a "virtual contractor" who had no prior history as a builder and claimed to have supervised the persons actually hired to work on the site. She argued that in contrast it was undisputed that the Applicant had constructed the first house and had worked on its renovations with Verton Thomas and Joseph Sonson.
- [47] It is clear that the Applicant has provided more than a mere allegation of his indirect financial contribution to the improvements made on the matrimonial property. He has given evidence of the services he has performed and called two witnesses who have been able to corroborate some of his evidence. He has, however, neglected to give any evidence whatsoever of either the value of these services or the cost that would have been otherwise incurred had the parties been required to hire another person to perform them. This is despite the fact that he called a contractor and mason of some experience to give evidence on his behalf. There was no effort made to inquire from either witness an estimated value of the work performed by the Applicant. In the absence of such evidence, it is not the responsibility of the Court to determine the value of these services. The Court can only make its decision on the evidence it has before it.
- [48] As to that evidence, the testimony of Mr. Thomas and Mr. Sonson did not indicate that the Applicant worked with either witness on a regular everyday basis as his evidence appeared to imply but that he assisted them either on specific tasks or when he was available to do so. It is nonetheless clear from their evidence that the Applicant was directly engaged in the improvements that were made to the matrimonial home, even if he may have exaggerated his involvement.
- [49] The Court accepts that while the Applicant did not work into the night and was not on site with the workmen all the time, he did carry out the tiling and plumbing, as he alleged, and also helped to dig the foundation, mix concrete and provide general labour. Given the evidence of a contractor and a mason employed on the house, the Court finds no difficulty in so holding. The Applicant has given no evidence of his ability to conduct electrical work; his witnesses were not able to say whether he was responsible for doing the electrical work on the matrimonial home. The Court does not therefore accept his evidence on this point.
- [50] There is no evidence before the Court as to the value of the services the Applicant performed or as to the money saved by his direct involvement in the improvements. In the absence of such evidence, while the Court finds that he worked on the renovation of the matrimonial home, it is unable to fully evaluate or assess this contribution or attach any value to it, although it has certainly borne this contribution in mind.

#### ***Mortgage Proceeds***

- [51] As the Applicant and the Respondent jointly took out the mortgages on the matrimonial home. Both of their names were placed on the account in which the mortgage proceeds were held and both of them had access to the funds contained within it. On this fact there is no dispute.
- [52] It was the evidence of the Respondent that the Applicant alone undertook the responsibility of withdrawing money from the mortgage proceeds in order to pay the salaries of the workmen that had been hired and to purchase the required materials. She claimed that all she did was sign when necessary and further alleged that the Applicant had actually withdrawn some of the mortgage funds to use for his own purposes. She has alleged that she has as a result been compensated for the work he had done on the improvement of the home.
- [53] The Court notes that her allegation is supported by the evidence of Verton Thomas, the first contractor who had been hired to carry out the improvements. Mr. Thomas explained that he had quoted Mr. Brewster \$7,300.00 for the labour on the house and he was paid for this labour in different stages but did not receive payment for two of the weeks that he worked. He estimated the cost of the materials used to have been around \$30,000.00. However, the first mortgage, which was used to finance the stage of the work for which he was in charge, was for \$55,000.
- [54] The evidence of Mr. Sonson, who was paid with the money received from the second mortgage of \$65,000.00, was that he had given the Applicant the sum of \$4,500.00 as the estimated cost of his labour. Mr. Sonson employed less people than Mr. Thomas and also spent less time working on the house. Unlike Mr. Thomas, he was not asked to and did not give the Court any idea as to the cost of the materials that would have been used to carry out the renovation or even that specifically used by him and the apprentice labourer he employed. Like Mr. Thomas, he testified that he was informed by the Applicant, before he could complete his job, that the money being used to pay him had run out. He had therefore left the Applicant's employment before the job for which he had been hired was complete.
- [55] If the evidence of the contractors, and particularly Mr. Thomas, is accepted then it is quite reasonable to conclude that a portion of the mortgage proceeds remains unaccounted for, even with inadequate evidence as to the cost of the materials used on the house. Of course, this evidence alone may not have been sufficient to buttress the Respondent's allegation against the Respondent but it finds support in the evidence of the Applicant himself.
- [56] The Applicant revealed in cross-examination that he used money from the mortgage proceeds to pay for the light and telephone bills. The Respondent said he did this entirely without her knowledge and she had only discovered this after he had given his evidence in these proceedings. Given this evidence, the Court finds on a balance of probabilities that the Applicant used the mortgage proceeds for a purpose other than that for which it had been obtained and that he did so without the knowledge of the Respondent and thus in betrayal of her trust.
- [57] As to the effect of this finding, it amounts to what has been described as a "negative contribution" which may be offset against or discount his positive contributions: *Dickey, Family Law (Fifth Edition)* at pp. 576-577. The evidence clearly casts some doubt on the extent of his contribution to the utilities. Indeed, as the mortgage was financed solely by the Respondent it means that some of the utilities which the Applicant claimed to have paid are actually to be credited to her. Furthermore, this negative contribution may also be a factor to be considered under **section 53(2)** when the Court examines these factors below.
- [58] Moreover, in light of the fact that the Applicant also admitted to being in arrears of the utility payments for which he was responsible and required financial support from the Respondent for his business ventures, the Court is also unable to accept that he spent any significant portion of his own money, the exact amount having been undisclosed by him, on the purchase of materials to improve the

house.

### **House Insurance and Land Tax**

- [59] As a requirement of the mortgage, the parties were required to have the matrimonial home insured. The Applicant alleged that both parties assumed responsibility for the insurance policy and both made payments towards it. However, the Respondent says that the house insurance was his responsibility although she assisted him in paying for it when he found it difficult to do so. She further testified that it was only after she was informed in 2007 that the insurance had lapsed because of his failure to pay the insurance premium that she herself insured the house and she has since then assumed responsibility for the insurance. The Applicant has not disputed this. It is therefore not in dispute that the Applicant initially financed the insurance policy on the matrimonial home with the assistance of the Respondent but that she has now taken over responsibility for the same.
- [60] There is also little dispute on the payment of the land tax. The land tax bills were in the name of the Applicant but appeared to have been sent to the care of the Respondent (in her maiden name) at the address of her father's home in which she resided before her marriage to the Applicant. Both parties accept that the bills fell into arrears and they each claim to have paid the same. They have produced copies of the receipts as evidence of their payment.
- [61] The Court notes that the receipts entered into evidence by the Applicant were for payments for the tax years 1983-1988, as well as for the tax year 1995-1996. These payments were made either in 1992 or 1996 lending support to his evidence that he paid arrears after he sold his taxi in 2006.
- [62] The receipts produced by the Respondent are not for the same years. It is evident from her receipts that she paid the arrears for the tax years 1988-1999, save and except the year 1995-1996. She explained that the bills went into arrears in 1988, which is clear from a notice from the Land Tax Department dated December 2, 1998, and that she cleared the arrears using her back-pay and a loan from the credit union which was made into a draft for the Land Tax Department. She produced the receipt for this draft.
- [63] The Court finds, from the documentary evidence produced, that both parties paid property taxes although from the receipts the Respondent took a greater share of this responsibility. Her evidence was that she continues to make the payments and the Applicant has not alleged otherwise.

### **Contributions as Parent and/or Homemaker**

- [64] It is apparent from the evidence before the Court that both parties assumed the roles of parent and homemaker. The Applicant has specifically sought to rely on the contribution he has made in this capacity to justify the alteration of interests in the matrimonial property that he seeks.
- [65] It is undisputed that both parties furnished the original and the renovated matrimonial home. Similarly it is not in dispute that the Applicant bought and repaired used cars with financial support from the Respondent although they disagree on the amount of cars he purchased. It is agreed though that these cars were available for use and were in fact used by the Respondent.
- [66] The Applicant further testified that he helped in the housework by doing everything other than cook. He mentioned washing and pressing the clothes for the whole family and looking after the children so that the Respondent could rest when she came home but made no mention of cleaning.
- [67] As to the financial maintenance of the children, he claimed to have maintained the children to the best of his ability. He spoke of buying clothing for them, but accepted that he did not normally buy their school uniforms. He said that he gave the Respondent money for their schoolbooks but could not say how their school fees had been paid. He drew particular attention to money expended by him on music lessons, the purchase of various musical instruments (a recorder and harmonica) and on a trip abroad, most of which appears to have been for the parties' only daughter.
- [68] It cannot be disputed that the Applicant made some contribution as homemaker and/or parent. The Respondent accepted, for example, that he washed and ironed the children's clothes and either dropped them to and from school or provided money for their bus fare. She revealed that he even dropped her to school sometimes and also helped her purchase some course materials once but denied that he washed or ironed for her. She did not deny that he had paid for musical instruments and admitted that he had on occasion also chipped in with the purchase of the school uniforms. She firmly denied, however, that he spent any substantial time looking after the children.
- [69] The Applicant also gave evidence of repairing the house and maintaining the lawn even after he had vacated the matrimonial home in 1996. The Respondent explained that he had returned a few times "to cut the grass" and had also come back once "to deal with the pipes".
- [70] The Applicant agreed that the Respondent brought the groceries for the family but said that he assisted her in doing so. The Respondent's evidence was that she purchased the groceries every month; the Applicant never purchased the groceries from his pocket but only bought the occasional item that ran out.
- [71] The Respondent does not seek to contend that the Applicant neglected his obligations towards their children, but claims that his support and maintenance was sporadic and inconsistent. It is quite clear that the Applicant failed to follow the Order made by the Court on their divorce that mandated him to pay monthly maintenance of \$560.00. He admitted having no knowledge of the Order. He nonetheless testified that he gave money towards the Respondent, saying that the amount he gave her varied but could be \$70.00, \$100.00, \$120.00 or more, but he conceded that the majority of the support came from the Respondent as his money, he said, went towards the house.
- [72] While aware of the Order, the Respondent made no effort to enforce it, explaining that she became tired of asking the Applicant to contribute towards the children's expenses as he never seemed to have money to do so. She nonetheless accepted that she sometimes gave her around \$100.00 but stated that he only did so if it was a week in which she did not receive her salary.
- [73] As to the utility bills, the Applicant had claimed in his affidavit that while the Respondent undertook responsibility for the mortgage, he paid all the other bills. At trial, he explained that he contributed to the paying of the telephone bill and electricity bills not that he alone paid them.

[74] It is clear that the water, electricity and telephone bills were in the Applicant's name and that he was at some point intimate responsible for paying all of them. It is also clear that he found it difficult to do so. He admitted that the bills fell into arrears and the utilities were even disconnected at some point although he was unable to recall when this happened and, specifically, whether it was after renovation of the matrimonial home had commenced. It is reasonable to assume that it was because of his inability to pay the utility bills for which he had responsibility that he resorted to using the mortgage proceeds for these purposes.

[75] In light of the above, the Court finds little difficulty in accepting the Respondent's evidence that well before the Applicant left the matrimonial home, she had assumed responsibility for paying the utility bills and that she continues to do so with some assistance from the Applicant.

[76] The Court accepts the Applicant's evidence that he acted as parent and homemaker by helping to furnish the house, paying or contributing towards the payment of utility bills and assisting with the housework. This is, however, not a role that he appropriated from the Respondent but one that, on the evidence, he clearly shared with her and that she performed with equal or much greater zest.

[77] The Court further finds that although the Applicant has in fact provided financial support or maintenance to his children, the Respondent was the person on whose shoulders financial responsibility for the children primarily rested.

[78] Accordingly, while the contribution of the Husband in the capacity of homemaker and parent cannot be ignored, the credit he is to be accorded for this role is far from sufficient to justify the figure he has claimed as a result of his contribution to the matrimonial property.

### **Conclusion**

[79] Ms. Franklyn submitted that given the Applicant's contribution to the acquisition of the property, his substantial contribution to its renovation, improvement and maintenance and the financial and non-financial contributions he had made to the maintenance of his children and the upkeep of his family, there is no basis for an award of less than half of the share and interest in the property. Mrs. Lee-Brace, however, argued that on the evidence before the Court, the Applicant's contribution to the acquisition, conservation and improvement of the matrimonial property merited an award of no more than 10% of the equity in the property.

[80] The Court has carefully considered the submissions of both counsel, as well as all the evidence before it. It has found that despite the primary role played by the Applicant in acquiring what was the original matrimonial home, this initial contribution is overshadowed by the contribution of the Respondent. The Respondent alone has carried the mortgages jointly secured on the property by the parties. She has done so while caring and providing for the Applicant and the children of the marriage, supporting the Applicant in his business and assuming payment of the utilities and land taxes when they fell short. She has been, like many women in this region, the financial backbone of her family. This is not to say, however, that the Applicant has neglected his role. He was responsible for the paying the utilities for a significant portion of their marriage and provided support to his children when he could, but it is clear to the Court that he was not as consistent in doing so as she has been. The Court also cannot ignore the services he provided in the improvement and maintenance of the home.

[81] Accordingly, on the basis of all the evidence before it, the Court finds that the Applicant is entitled to 20% share in the equity of the matrimonial home. It now turns to consider whether it is just and equitable to alter each party's share in the equity of the matrimonial property on the basis of the **section 53(2)** factors.

### **THE SECTION 53(2) FACTORS**

[82] **Section 57(3)(d)** provides that the factors set out in **section 53(2)** of the **Family Law Act**, the factors to be considered when determining maintenance, i.e. financial resources, the means and needs of the parties and other matters, are also to be taken into consideration by the Court when it is seeking to exercise its discretion to alter interests in matrimonial property. The Court examines these factors to determine whether they justify an adjustment being made to the entitlement of each party to the matrimonial property on the basis of their respective contributions: ***Wilson v Wilson (unreported) Court of Appeal of Barbados, Civil Appeal No. 5 of 2003, Decision of March 22, 2007, per Williams JA at para 35.***

[83] The factors listed in **section 53** which are of relevance to an application under **section 57** are as follows:

- (a) the age and health of the parties;
- (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
- (c) the financial needs and obligations of each of the parties;
- (d) the responsibilities of either party to support any other person;
- (e) the eligibility of either party for a pension, allowance, or benefit under any act or rule, or any superannuation fund or scheme, or the rate of such pension allowance or benefit being paid to either party;
- (d) a standard of living that is in all the circumstances reasonable;
- (e) the duration of the marriage;
- (f) any facts or circumstances that in the opinion of the court the justice of the case requires to be taken into account.

[84] Williams J stressed at para 17 of ***Noel v Noel (unreported) Court of Appeal of Barbados, Civil Appeal No. 27 of 2001, Decision of December 17, 2004*** that there is "no hierarchy in relation to the [section 53] factors" and the weight to be accorded to a given factor will therefore vary depending on the facts and circumstances of a given case.

[85] In relation to the first factor of **section 53**, the Applicant is now 68 and the Respondent 58. Given the difference in their ages, it is clear that the Respondent will be likely to remain employed and receive a salary for some time after the Applicant's retirement. No evidence was adduced at trial as to the health of the parties and, in the absence of any evidence to the contrary, the Court can only assume that the parties were in good health and are not faced with any serious health challenges.

- [86] Their marriage was long, spanning 16 years induration. During that time the parties appeared to have enjoyed a reasonable standard of living but one that was very far from luxurious.
- [87] At the time of trial, the Applicant was working as a security guard earning approximately \$1,200.00 per month but has likely now retired and is living instead on a pension. This pension was expected to be around \$750.00 per month. On the other hand, the Respondent, now 58, was employed as a teacher employed by the Ministry of Education and attached to Selah Primary School and received a salary of approximately \$3,500.00 per month. She had been working as a teacher for over thirty-five years now and is likely to join the Applicant in retirement within a few years, if she has not already done so.
- [88] While it was accepted that the Respondent would receive a pension, there was no evidence before the Court as to the amount she expected to receive. However, given the amount of years she has dedicated to the public service and the fact that both parties appeared to accept that she was entitled to not one, but two pensions, it is reasonable for the Court to conclude that her expected pension is significantly greater than that of the Applicant.
- [89] As a result of her three decades in the civil service, it was also anticipated and agreed that she would receive a gratuity of around \$110,325.00. Both parties accepted that the expectation of the gratuity could be properly considered by the Court although the Applicant has made no claim to any share of it.
- [90] The Court now turns to consider the property and financial resources of the parties and their financial needs and obligations under **sections 53(2)(b) and 53(2)(c)**. There is no doubt that the asset of greatest value to which either party has a claim is the house and land forming the subject of the dispute before the Court. The Applicant in his Statement of Financial Circumstances has disclosed the existence of no other assets of value. The Court notes, however, that he has listed vehicular expenses as his greatest single expense but his failure to list the said vehicles as assets casts some doubt on whether all assets to which he may have been entitled have indeed been disclosed.
- [91] In contrast to the Applicant, the Respondent's Statement of Financial Circumstances revealed that although she has shouldered the burden of all the mortgages alone, because of her steady and higher salary, she still appeared to have greater financial resources than the Applicant. She has disclosed that she has accounts to the credit of \$11,241.41 and insurance policies valued at \$125,000.00. However, her expenses are also greater than that of the Applicant with her single largest expense being mortgage payments of approximately \$12,108.90 per annum the burden of which she alone continues to bear. From the evidence before the Court, it is unclear for how long she will have to continue making mortgage payments before the mortgage is entirely paid off.
- [92] Although the Respondent received care and control of the children of the marriage after the parties' divorce, these children are now all adults and gainfully employed and, while they reside in the matrimonial home, there is no indication that they continue to require support from either the Applicant or the Respondent. Neither the Applicant nor the Respondent has claimed responsibility for supporting any other person.
- [93] Finally, Counsel for the Respondent argued that as a factor under section **53(2)(n)** the Court should take into account the Applicant's treatment of the mortgage funds and the fact that he has deceived his wife and abused her trust by squandering the proceeds of the mortgage and using these funds as his own "*personal piggy bank*". She submitted that on the circumstances of this case, the factor carrying the greatest weight in this case should not be financial resources of each of the party.
- [94] **Section 53(2)(n)** confers a wide discretion that permits the Court to take into consideration any facts or circumstances that in its opinion the justice of the case requires to be taken into account. The Court accepts that the section is broad enough to permit the Court to consider any negative contributions made by a party to matrimonial property and also accepts that where one party has behaved in such a way as to lead to the deliberate diminution of the matrimonial assets this is a factor which it is just and equitable for the Court to take into account under **section 53(2)(n)**. The Court cannot generally use this section, however, to have regard to financial loss where this loss was not the result of blameworthy conduct on the part of a party but arose simply from unsuccessful investments as like economic gains, economic loss is expected to be shared by the parties to a marriage neither of which can be made to pay the other for the vagaries of fate: Dickey, Family Law (Fifth Edition) at p. 595.
- [95] It is apparent from the evidence in this case that a significant portion of the mortgage funds, particularly those funds received under the first mortgage, appear not to have been used on the renovations of the matrimonial home for which they were obtained. It is undisputed that the account in which these funds were placed could only be accessed by the parties and the Court accepted the evidence of the Respondent that it was the Applicant who primarily withdrew money from the account to pay for the labour and material used in the house.
- [96] As the Court noted earlier, the Applicant has actually admitted to taking the money and using it for purposes other than for which it was intended to be used. It is unclear from the evidence when and how often he did so. It is clear, however, that in some of these instances, the money went for the payment of the utility bills. Such a use indirectly benefited both parties and their family.
- [97] The Court accepts on a balance of probabilities, and without any evidence to the contrary, that it is likely that the Applicant did use this money for other purposes as well. This is a factor that the Court may rightfully consider but, despite the submissions of Counsel for the Respondent, it is not a factor that significantly outweighs the others.
- [98] The **section 53(2)** factor carrying greatest weight in this case is without doubt the disparity in income and financial resources between the parties. Through no fault of the Respondent, the Applicant is in a substantially weaker economic position than she. The Court stresses that, in exercising its discretion under **section 57**, its aim is not to equalize the financial position of the parties. The Court does, however, have to consider how to apportion the matrimonial property in which both parties have invested considerable time, resources and effort so as to ensure an apportionment which is not only fair but will allow both parties to adequately satisfy their future economic needs.
- [99] In considering **section 57**, the Court had to ask itself whether there are any **section 53(2)** factors that would convince the Court that it would be just and equitable to alter the interest of the parties to the equity of the matrimonial property. The Court finds that despite the Applicant's role in the diminution of the mortgage proceeds, the burden of which the Respondent continues to shoulder, the significant disparity in the financial resources of the Applicant and the Respondent favours an alteration of 10% in his favour.

## DISPOSAL

- [100] In light of the foregoing, the Court declares that the Applicant is entitled to 20% of the equity of the matrimonial home which equity has been accepted as being \$335,599.00.
- [101] On the basis of the **section 53(2)** factors, however, I hereby order that the interest of the parties in the equity of the matrimonial property be altered pursuant to **section 57** of the **Family Law Act** so as to vest 30% in the Applicant, and 70% in the Respondent.
- [102] It is accordingly ordered that on a value of \$335,599.00, the Respondent pay to the Applicant \$100,679.70 in a lump sum payment within 6 months of the date of the order, failing which the property is to be sold by public auction or private treaty and the net proceeds distributed according to the percentages outlined at paragraph 101 of this judgment.

#### **COSTS**

- [103] In accordance with **section 94(1)** of the **Family Law Act**, each party will bear his or her own costs of these proceedings.

**Randall I. Worrell**

**Judge of the High Court**