

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

Suit No. FL 125 of 2012

BETWEEN:

ANTONIA AVALEEN FRANKLYN

APPLICANT/SPOUSE

AND

MONFORD LENNOX MILLER

RESPONDENT/SPOUSE

Before The Honourable Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2021 March 04

Appearances:

Mr. Arthur E. Holder Attorney-at-Law for the Applicant/Spouse

Mr. Vincent D. Watson Attorney-at-Law Respondent/Spouse

DECISION

INTRODUCTION

- [1] The applicant/spouse, Antonia Franklyn (“the applicant”) and the respondent/spouse, Monford Miller (“the respondent”) were involved in a relationship which constituted “a union other than a marriage” within the meaning of section 39 of the Family Law Act, Cap. 214.
- [2] When the relationship broke down the applicant filed an application with the court, among other things, claiming a half-share in a property in which the parties cohabited at 179 8th Avenue Inchcape Terrace, St. Philip (“the Inchcape property”) and which at the time was registered in the name of the respondent alone.
- [3] With the consent of the parties, Chandler J. made an order on the 25 October 2013 in the following terms:
- “1. That the Applicant/Spouse and the Respondent/Spouse are the owners of the matrimonial property situate at Lot 179 8th Avenue Inchcape Terrace in the parish of Saint Philip.
 2. An order pursuant to Section 57 (1) of the Family Law Act Cap 214 altering the interest of the Applicant/Spouse and the Respondent/Spouse in the said property so as to vest a 30% share and interest in the said property to the Applicant/Spouse.
 3. That the Respondent/Spouse pays to the Applicant/Spouse her 30% share and interest in the said property within six months from the date of this order, at which time the Applicant/Spouse shall vacate the said property.

4. Liberty to apply.”

[4] Chandler J., no doubt thought that his order had disposed of this matter, but as it turned out the parties have been unable to agree on what comprised the equity in the property. And it is now the task of this Court to resolve this matter.

The Factual Background

[5] There is no significant dispute with respect to the material facts before the Court, which are now set out.

[6] It was agreed between the parties that the interests of the parties in the Inchcape property should be altered to give the applicant a 30% interest in the property, and that the respondent should pay to the applicant a sum representing her share in it. To carry out the order of Chandler J. the Inchcape property was sold on 9 February 2016 for the sum of \$308,000.00.

[7] On 2 March 2016, counsel for the applicant wrote to counsel for the respondent requesting a banker’s draft in the sum of \$92,400.00 representing his client’s 30 % share.

[8] On 16 March 2016, counsel for the respondent responded to the letter from the applicant and enclosed a cheque for the sum of \$42,004.72.

[9] Among the sums deducted from the purchase price was a sum of \$114,075.28 being the amount shown as owed to Republic Bank (“the bank”).

[10] It was obvious that the parties were at odds over the amount that was owed to the applicant.

[11] To attempt to resolve the matter, with the agreement of the respondent/spouse, I ordered the bank to provide to the Court a true and correct account of the amount of \$114,075.59 owed to the bank by the respondent/spouse along with the supporting documentary evidence.

[12] The correspondence from the bank which was filed with the court on 5 December 2019 recorded that on 24 March 2016 there were three loans outstanding with the bank as follows:

loan (1) secured by a first mortgage on the property	\$61,809.42
loan (2) secured by a second mortgage over the property (a loan to consolidate debts)	\$24,770.87
loan (3) a credit card loan	\$22,498.23

[13] In addition to the above sums, \$5,287.50 was outstanding for legal fees.

[14] The respondent also deducted \$10,411.00 from the sale price of the Inchcape property. This comprised the following:

1. Property Transfer Tax on the sale	\$6,875.00
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2. Stamp duty on the deed of transfer	\$3,080.00
3. Stamp duty on the discharge of charge	\$206.00
4. Recording the discharge of charge	<u>\$250.00</u>
TOTAL	\$10,411.00

[15] A further sum of \$22,096.31 was deducted to cover expenses incurred to facilitate the sale of the property. These expenses were:

(a) Barbados Light & Power	\$181.73
(b) Barbados Water Authority	\$32.00
(c) Flow/Cable & Wireless	\$422.61
(d) Land Tax arrears to Barbados Revenue Authority	\$2,403.10
(e) Barbados Revenue Authority Solid Waste Tax	\$209.87
(f) Real Estate Agent's Fee	\$18,095.00
(g) Real Estate Valuer's Fee	\$352.00
(h) Fee for industrial cleaning of the residence at Inchcape	<u>\$400.00</u>
	\$22,096.31

[16] The issue that the Court must resolve is which of the above sums are properly deductible from the value of the property to arrive at the equity. The parties were invited to make submissions.

The Submissions of Counsel for the Applicant

[17] Counsel for the applicant, Mr. Arthur Holder, in his written submissions filed 8 January 2020 contends that the only amount that is properly deductible is the sum which was secured by the first mortgage, which amounts to \$61,809.42.

[18] Mr. Holder submitted that only the loan of \$61,809.42 for the purpose of house construction was deductible. Counsel contended that the credit card loan and the bank loan to consolidate debts were not relevant, and could not be deducted.

[19] According to Mr. Holder, the case of **Proverbs v Proverbs (2002) 61WIR (Barbados CA)** supports his view of the facts.

[20] In the instant case there were three loans:

Loan I was the mortgage loan for house construction;
Loan II was a debt consolidation loan;
Loan III was a credit card loan.

[21] The first two loans were secured loans. The first loan was secured by a first mortgage over the Inchcape property. The second loan was secured by a second mortgage over the Inchcape property. The third loan was unsecured.

[22] Mr. Holder cites the following passage from paragraph 59 of the judgement of the Court of Appeal in **Proverbs** in support of his submission that only

the first loan is relevant and can properly be deducted from the value of the property:

“Mrs. Walrond Q.C. invites us to accept that the equity in the matrimonial home is \$59,543.00. She computes it by taking the valuation of \$265,000 and then deducting therefrom: (a) the balance on the mortgage (130,000.00); (b) the balance on the bank loan (\$10,000); (c) payments by the husband towards the purchase price (69,307.00); and (d) the expenses of erecting a fence (\$6,150) – a total of \$205,457. Mr. Williams Q.C., on the other hand, submits that the net equity is \$125,000. He adopts the method traditional in this jurisdiction of taking the market valuation of the property (\$265,000) and subtracting outstanding debts thereon, namely, the balance due on the mortgage (\$130,000) and the bank loan (\$10,000) – a total of (\$140,000). We accept Mr. Williams methodology and, taking “Amberley” as we find it, namely, subject to the mortgage and the bank loan, we hold that the net value of the equity was, at the date of hearing, \$125,000.”

The Submissions of Counsel for the Respondent

[23] Counsel for the respondent, Mr. Vincent Watson in his written submissions filed 4 March 2020, framed the issue before the Court in these terms:

“Whether debts incurred by the parties to a union other than a marriage are restricted only to secured debts, or whether it is inclusive of all debts, including personal loans and credit cards, which must be taken into account and deducted

from the valuation or (sale price) of the former matrimonial property in order to arrive at the equity in the said property.”

[24] Mr. Watson submitted that the law permitted the deduction of the value of outstanding mortgages, debts and other liabilities from the value of the property to arrive at the equity.

[25] Counsel relies on the learned author, Anthony Dickey who sets out the practice in Australia in proceedings under the corresponding section of the Australian legislation at page 529 of the 5th edition of his book, **Family Law**.

Dickey writes:

*“In proceedings under s.79, the Court normally values the total property of each party to the marriage by deducting the value of **all** of the party’s liabilities from the gross value of his or her assets. The Family Court thus normally has regard simply to each party’s net worth. So for example, if a husband owns a house valued at \$250,000 and a car worth \$10,000 on the one hand, but he has a mortgage liability of \$45,000, a personal overdraft of \$10,000 and an outstanding tax liability of \$5,000 on the other, the total value of the husband’s property will normally be assessed at \$200,000.”*

The court, however has a discretion in respect of the recognition of unsecured liabilities, (it has no discretion in respect of secured liabilities because the court must take the property of the parties to a marriage as it finds it, which, as

has just been observed, means subject to any incumbrance on it.) The court may choose to ignore or at least to discount, an unsecured liability if it believes it proper to do so in the circumstances. In this case the net value of a party's property is deemed to be greater than his or her net worth."

[26] Counsel also referred to **Proverbs** where the Court of Appeal endorsed the method traditional in this jurisdiction of taking the market valuation of the property and subtracting outstanding debts thereon to arrive at the equity in the former matrimonial property.

[27] Counsel argues that all of the above authorities support the view that to obtain the equity in the property you must deduct the value of the party's liabilities from the gross value of his assets.

[28] Counsel submits that in the instant case all debt, including the credit card debt, should be deducted from the purchase price.

The Issue

[29] The issue that the Court is required to consider is how does one calculate the equity in the property where the Court has ordered that a party be given a defined share of that property.

[30] In Australia, there is little doubt about the legal position. In **Ascot Investments Pty. Ltd. v. Harper (1981) 148 CLR 337**, the High Court said

that “*the Family court must take the property of a party to a marriage as it finds it*” (per Gibbs L.J. at page 355).

[31] Essentially, therefore, the Family Court must take the property of a party to a marriage subject to any encumbrances thereon such as mortgages. In determining the equity in the property the outstanding mortgage debt secured on the property must be deducted.

[32] Moreover, the practice has developed in the Australian courts that in proceedings under section 79 (the corresponding provision to section 57 of the Family Law Act, Cap.214) in arriving at the equity the court deducts all the liabilities of a party from his gross assets. This process will usually involve all liabilities, including unsecured liabilities.

[33] The position in Australia with respect to liabilities is stated by Evatt CJ in **Prince v Prince (1984) FLC 91-501** at page 79,076, where she said:

“What are the practicalities of the matter? Unless and until a stay is ordered, the outcome of the wife’s application will depend upon findings made by the Court as to the parties’ assets and liabilities, their contributions and their respective financial resources, means and needs. It would be necessary for the Court to determine so far as is possible the value of the property held by each party. In accordance with the usual practice this would have been done by deducting the value of outstanding mortgages, debts and other liabilities (e.g. Albany and Albany (1980) FLC 90-905, p. 75,717). The Court may have

to determine, as between the parties, the existence of a particular liability (Af Petersens and AF Petersens (1981)FLC 91-095)."

The above view is also reflected in **Biltoft v Biltoft (1995) FLC 92-614**.

[34] Anthony Dickey cites the cases where the Family Court has stated that it may disregard an unsecured liability as follows:

- *"If it is unlikely to be enforced – as may be the case with a loan by a parent to a married son or daughter, especially where the parent is in comfortable financial circumstances and it is contemplated that the debt be repaid by the married child only at his or her convenience."*
- *Where the liability results from a deliberate or reckless disregard by one party to a marriage of the other party's potential entitlement under s.79;*
- *Where the liability has no connection with the marriage; for example, a tax liability in respect of post-separation income used solely for the benefit of the party who earned it;*
- *Where the liability is too vague or uncertain to be taken into account."* (Anthony Dickey, *Family Law 5th Edition* pp 529-530)

[35] In Barbados I have not been able to find a case in which this issue has been central to the Court's decision.

[36] In **Proverbs**, the Court of Appeal did appear to suggest that the practice here is different. This is a possible interpretation of Sir David Simmons' statement at paragraph 59 of the judgment of the court, where he responded to an invitation from Mrs. Walrond Q.C. to subtract certain payments, including the cost of the erection of a fence from the value of the matrimonial home.

[37] The learned Chief Justice said:

“Mr. Williams QC, on the other hand submits that the net equity is \$125,000. He adopts the method traditional in this jurisdiction of taking the market valuation of the property (\$265,000) and subtracting outstanding debts thereon, namely the balance due on the mortgage (\$130,000) and the bank loan (\$10,000) a total of \$140,000.”

[38] While I do not interpret **Proverbs** as precluding the deduction, in an appropriate case, of other liabilities, I am of the view that in our case the same methodology employed in **Proverbs** should be adopted and that the sum due on the first and second mortgage should be deducted to determine the equity.

[39] The third loan, being the credit card debt is unsecured. The correspondence in the sworn testimony before the Court indicates that the approved credit card limit was \$3,000.00.

- [40] No case has been put forward by the respondent to justify this debt being deducted other than to refer to the practice in Australia. In this regard, Mr. Watson argues that there is no evidence that this debt was unreasonably incurred and that on that basis the debt should be allowed.
- [41] In considering whether the credit card debt should be deducted, I have considered that this was an order that was made by the court after it had become fully aware that the respondent was alleging that there were several loans that he had incurred. The order of the Court would, therefore, have contemplated that the “established practice” would have been employed in arriving at the equity. Moreover, the order did not in anyway attempt to reflect the full state of the financial position of each party, but dealt specifically with the matrimonial home. In my opinion, the practice that is traditional in Australia, would not be appropriate in this case.
- [42] There is a tendency in this jurisdiction for the parties to dispute the interests in the matrimonial home but either expressly or impliedly agree to an amicable distribution of the other assets. In the circumstances of this case I therefore hold that the sums secured by the first and second mortgage are to be deducted from the value of the Inchcape property but the credit card debt should not.

[43] When the order for the alteration of interests in the Inchcape property was made it did not seem to contemplate that the said property would be sold. Once it was determined that the property would be sold it seems reasonable to deduct the expenses incidental to the realization of the sale. Therefore, expenses such as property transfer tax and stamp duty would be properly deducted.

[44] Additionally, the real estate agent's commission and other expenses incurred to facilitate the sale of the property would be deductible.

[45] Based on the above criteria, the following sums would be deducted from the gross value of the Inchcape property:

monies due on the first mortgage:	\$61,809.42
monies due on the second mortgage:	\$24,770.87
statutory taxes on the sale of the property	\$10,411.00
expenses incurred in realizing the sale of the property	<u>\$22,096.31</u>
	\$119,087.60

The equity in the Inchcape property is therefore, \$308,000.00 less \$119,087.60 = \$188,912.40.

[46] Chandler J. had ordered that the respondent be paid a sum representing 30% of the value of the property.

DISPOSAL

[47] The equity in the property is \$188,912.40, and 30% of that sum is \$56,673.72: I therefore order the respondent to pay to the applicant such further sum as would bring his payments up to that amount.

[48] The payment to the applicant shall be made within one month of the date of this order.

[49] Both parties shall have liberty to apply.

Cecil N. McCarthy
Judge of the High Court