IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Matrimonial Case No. 06 of 2010

BETWEEN: PENELOPE BRADFORD
Petitioner

AND: DONALD EDWARD BRADFORD
Respondent

AND: NUNU LELUMET KARILOI PATAS
Co-Respondent

Before: ***Justice D. V. Fatiaki***

Counsels: *Mrs. MNF Patterson for the Petitioner*
Mrs. M. Vine of the USP Legal Centre – no appearance

Date of Delivery: *19 September 2014*

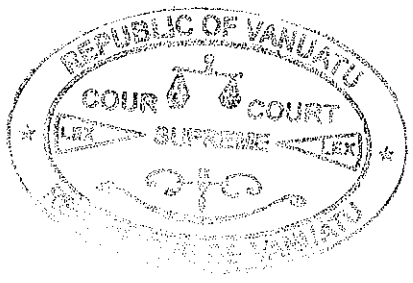
JUDGMENT

1. On 12 March 2010 the petitioner filed a petition for dissolution of her marriage with the respondent on the ground of his adultery with the co-respondent. The petition was filed in the Magistrate Court and sought dissolution of the marriage; custody of a dependent child of the marriage; monthly maintenance of **VT41,387** for the child; damage for the respondent's adultery and the division and distribution of matrimonial property acquired during the course of their 32 years of marriage.

2. The petition was verified by a sworn statement deposed by the petitioner which annexed a Separation Agreement entered into by the parties in April 2009 dealing *inter alia* with the disposal of matrimonial assets including 5 residential homes situated on three (3) separate leasehold title as follows: **Lease title No. 12/0844/179** at Valevale Bay, Pango with 3 houses erected on it (the "*Pango property*") and **Lease title Nos. 12/0913/502** and **12/0913/503** at Elluk area with 2 houses erected on them (the "*Elluk property*") , a vacant leasehold lot and a joint bank account under the supervision of an accountant James Kluck.

3. On 14 April 2010 the Magistrate Court granted the petitioner orders restraining the respondent from dealing with rental income from the residential properties that were tenanted at the time.

4. On 12 May 2010 the Magistrate Court granted an uncontested decree nisi on the petition dissolving the marriage. The Court also ordered the respondent to:-



"... pay maintenance for the children of the marriage until each child reach the age of 18 years old or cease formal schooling whichever shall occurred later in the sum of Vatu 41,387 per month".

5. On 14 September 2010 the final Notice of Dissolution of the parties' marriage was issued by the Magistrate Court and on 29 September 2010 with the agreement of the parties the file was referred to the Supreme Court to deal with "*issues in relation to matrimonial property*".

6. The jurisdiction or power of the Supreme Court to deal with the distribution and adjustment of matrimonial property was comprehensively investigated by the Court of Appeal in Joli v. Joli [2003] VUCA 27 where the Court said:

> "*In our opinion CAP 192* (the Matrimonial Causes Act of Vanuatu) *does not operate as a comprehensive code for all ancilliary property matters that arise in connection with decrees of nullity or dissolution of the marriage under Part I and II of CAP. 192. We consider that the 1973 English Act* (the Matrimonial Causes Act (UK)] *has a residual operation which empowers the Supreme Court to make property adjustment orders under the provisions of Part II of the 1973 English Act to bring about division or settlement of property between the parties to the former marriage*".

7. Earlier in speaking of the provisions of the 1973 English Act the Court of Appeal observed:

> "*It is s.24 that contains the power for a court to adjust proprietary interests in assets owned by one or both parties. Section 25 prescribes matters to which the Court is to have regaraded in deciding how to exercise its power under Section 24.*"

8. In this latter regard Section 25 expressly prescribes the following relevant non-exhaustive matters for the consideration of the Court:

> *"(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) *any physical or mental disability or either of the parties to the marriage;*

(f) *the contributions made by each of the parties to the welfare of this family, including any contribution made by looking after home or caring for the family;*

(g) *in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;"*

9. Finally, the Court of Appeal said:

> *"In our opinion there is no presumption of law that matrimonial assets are beneficially owned jointly, no matter whose name they are in and who paid for them.*
>
> *Where there is a dispute over ownership and division of assets, ownership is to be determined according to ordinary principles of law and equity. Those principles are also applied in disputes concerning the division of property between unmarried people who have lived together for an extended period of time: see for example Baumgartner v. Baumgartner [1987] HCA 59; [1987] 164 CLR 137. In the case of parties that have been married, the court has additional powers to make an adjustment order, applying the relevant provisions of the 1973 English Act.*
>
> *Depending on the length of time the parties have lived together, and their respective contributions the Court might reach a conclusion, as a matter of fact in the circumstances of the case, that matrimonial assets should be divided in a roughly equal fashion. However such a result is **not** because of any presumption of law, but because of the respective positions and contributions of the parties. Even where parties have never been married, the application of similar considerations in equity may lead to the imposition of a trust on assets such that assets acquired by the parties during their co-habitation will be divided roughly equally."*

10. At the first Supreme Court conference of the case after its referral on 22 October 2010, the matrimonial property issues were referred to mediation at the request of the parties. Following a successful mediation, the parties entered into an agreement detailing how the matrimonial assets were to be valued and disposed of and how any proceeds would be shared between the parties.

11. Two years passed without any apparent finalization of the matrimonial property issues and eventually on 12 January 2012 the petitioner issued an application for an enforcement order for the sum of VT821,300 which comprised arrears of unpaid maintenance accumulated over 20 odd months between May 2010 and January 2012.

12. In her sworn statement in support of the application the petitioner deposed to receiving from the New Zealand Inland Revenue Department ("*NZIRD*") a small contribution towards child maintenance that the respondent was required to pay to the NZIRD under the **Child Support Act 1991 (NZ)**.

13. On 3 August 2012 before the maintenance enforcement order could be finalized, the petitioner filed a further application for sale of the matrimonial assets which were registered in the joint names of the parties on the ground that the respondent was in breach of the consent orders agreed in the court mediation. This later application was adjourned to 7 September 2012 and the parties were ordered with the agreement of their respective counsels, to agree and file a consent order dealing with the accumulated arrears of maintenance.

14. On 7 September 2012 petitioner's counsel indicated that no agreement had yet been reached on the arrears of maintenance. For her part respondent's counsel frankly admitted that her earlier indication of settlement having been achieved in the case was based on a "*misunderstanding*."

15. Be that as it may on 4 October 2012 the respondent filed a defence opposing the petitioner's applications. As to the enforcement of the maintenance order the respondent deposed to paying child support as assessed against him by the NZIRD since December 2011. This is evidenced by a Notice of Determination successfully sought by the petitioner under the **NZ Child Support Act 1991** to depart from the maintenance assessment formula under the Act. The determination was delivered on 4 September 2012.

16. In ordering the departure and the substantial increase in the monthly child support payable by the respondent, the Commissioner noted inter alia that it was "*just and equitable*" to do so because:-

> *"(c) A Vanuatu Court had ordered Mr. Bradford to pay maintenance to Ms Bradford (V40, 000 or 42, 500 per month) which Mr. Bradford said was amended to payment of arrears only (at V30.000 per month). As there appeared to be no ongoing order in Vanuatu, Mr. Bradford was not required to pay double child support and a departure reflecting his "true" income and capacity to pay child support was "just and equitable".*
>
> *(d) Departure also affirmed Mr. Bradford's primary duty as a parent to support Nicholas as his child and objects of the Act such as Nicholas' right to receive support from him, his obligation to support Nicholas, Ms. Bradford's right to receive financial support for Nicholas from him, determining child support according to his capacity to pay and ensuring equity between him and Ms. Bradford in the costs of supporting Nicholas."*

17. As for his opposition to selling the matrimonial assets, the respondent whilst affirming the consent orders in the mediation agreement, nevertheless deposes that the properties were not sold ostensibly because they had not been strata-titled as planned and therefore the houses could not be individually sold. Furthermore if the properties were forced to be compulsorily sold as they are, there may be no profit or return to the parties which clearly would not be in their best interest.

18. In short, the respondent deposes that:

> "*... the current status of there being two jurisdictions seeking child maintenance is not sustainable ...*"

and the respondent seeks:

> "*... from 18 June 2012 to remain solely under the NZ Child Support Act and the administrative powers given to the Department of Inland Revenue*".

19. I have carefully considered the parties competing applications and the submissions of counsels. I have noted that the petitioner who is now 58 years of age and their sole dependant child Nicholas who was born on 4 January 1996 both reside in New Zealand since April 2009, whereas the respondent who is 59 years and the matrimonial assets are located in Vanuatu within the jurisdiction of this Court.

20. There is not the slightest doubt in my mind that this Court is the only appropriate court to enforce the consensual maintenance order entered in the Magistrate's Court at Port Vila, Vanuatu, especially, as it relates to accumulated arrears.

21. Equally, there is no doubt that the New Zealand authorities have some extra-territorial jurisdiction and the necessary powers and administrative structure to enforce child support payments under the **Child Support Act 1991** against the respondent whilst he remains a NZ citizen and for the benefit of the child to be supported who resides in New Zealand.

22. I note that the respondent accepts that he is amenable to the provisions of the **Child Support Act 1991** and has been meeting the monthly payments assessed by NZIRD under it. I have also noted that the child has attained his 18th year.

23. On the basis that the maintenance order is the order of a Vanuatu Court and the default of the resident respondent in not meeting the maintenance order is plainly and properly cognizable by this Court, I am satisfied that the petitioner has established that the respondent is in arrears of maintenance payments in the amount of **VT933,494** at the date of the amended application for an enforcement order ie. 6th December 2012.

24. I therefore enter judgment against the respondent in the sum of **VT933,494** together with interest of **5% per annum** calculated from 6 December 2012 and I fix 9 October 2014 at 11.00 a.m. for an enforcement conference.

25. As for any future enforcement of the Vanuatu maintenance order, I suspend the same subject to the respondent paying the assessed monthly amounts of Child Support to the NZIRD and I grant liberty to the parties to apply on three clear days notice in the event of any breach of this condition of suspension.

26. As for the petitioner's application to sell the matrimonial properties, I have considered the competing submissions and have noted the agreed valuations of the matrimonial assets including the Separation Agreement entered into by the parties before court proceedings, commenced, as well as the terms of the court supervised mediation agreement executed by the parties. I have also noted the previous failed attempts to either rent or sell some of the residential homes and jointly-owned matrimonial assets and the possibility that there are outstanding mortgages and other liabilities on the said properties for which the parties are presently jointly liable.

27. Upon a consideration of the various matters enumerated in Section 25 of the 1973 English Act, I have come to the firm view that the best outcome for the parties is to adopt measures that will achieve a "*clean break*" for the parties. In this way some finality can be brought to the division, distribution, and sharing of matrimonial assets which hopefully will enable the parties to move on with their respective lives without interference or indebtedness to each other and severing any remaining residual links existing between them.

28. The "*clean break*" principle owes its origins to Wachtel v. Wachtel [1973] EWCA Civ 10; [1973] 1 All ER 829: where Lord Denning MR in delivering the judgment of the Court of Appeal after tracing and discussing the "*one-Third Rule*"; the "*Lump Sum Provision*"; and the effect of "*Re-marriage*" on a divorced wife's share in matrimonial property accumulated during the course of her marriage, said (at p. 841):

> "*Another thing is this: When the husband has available capital assets sufficient for the purpose, the Court should not hesitate to order a lump sum. The wife will then be able to invest it and use the income to live on. This will reduce any periodical payments, or make them unnecessary. It will also help to remove the bitterness which is so often attendant on periodical payments. Once made, the parties can regard the book as closed. The third thing is that, if a lump sum is awarded, it should be made outright. It should not be made subject to conditions except when there are children. Then it may be desirable to let it be the subject of a settlement. In case she re-marries, the children will be assured of some part of the family assets which were built up for them.*
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> *But the question of a lump sum needs special consideration in relation to the matrimonial home. The house is in most cases the principal capital asset.*

Sometimes the only asset. It will usually have increased greatly in value since it was acquired. It is to be regarded as belonging in equity to both of them jointly. What is to be done with it? This is the most important question of all.

Take a case like the present when the wife leaves the home and the husband stays in it. On the breakdown of the marriage arrangements should be made whereby it is vested in him absolutely, free of any share in the wife, and he alone is liable for the mortgage installments. But the wife should be compensated for the loss of her share by being awarded a lump sum. It should be a sum sufficient to enable her to get settled in a place of her own, such as by putting down a deposit on a flat or a house. It should not, however, be an excessive sum. It should be such as the husband can raise by a further mortgage on the house without crippling him.

Conversely, suppose the husband leaves the house and the wife stays in it. If she is likely to be there indefinitely, arrangements should be made whereby it is vested in her absolutely, free of any share in the husband: or, if there are children, settled on her and the children. This may mean that he will have to transfer the legal title to her. If there is a mortgage, some provision should be made for the mortgage installments to be paid by the husband, or guaranteed by him. If this is done, there may be no necessity for a lump sum as well. Furthermore, seeing that she has the house, the periodic payments will be much less than they otherwise would be."

and later in the case of Hanlon v. Hanlon [1978] 2A ER 889 Lord Ormrod said (at p. 894):

"... this court in Wachtel v. Wachtel ... as appears clearly from the judgment of Lord Denning MR, contemplated that in a situation like this one of the ways of solving the problem would be to transfer the home to the wife and to relieve the husband, so far as it was possible or reasonable to do so, of the responsibility for making periodical payments. Of course, the court was not laying it down as law, or as a rule of practice or anything of the kind; it was set out there as one of the possible solutions, and one of the possible ways of meeting the requirements of s 25 in this type of case, and in my judgment it is very much more likely to produce in many cases a fair and just result ...

In those circumstances, the case for transferring this property to the wife, together with all the liabilities for its upkeep and for the mortgage, seems to me to be extremely strong ..."

Again, in Dunford v. Dunford [1980] 1 A.E.R. 122, Lord Denning M R at 125 said:

"It seems to me that the judge made his order in accordance with the modern principle of the 'clean break' so that both parties will know hereafter exactly where they stand."

29. Accordingly in light of the foregoing, I make the following orders:

(a) Within 21 days the respondent is to execute and deliver to the petitioner's legal counsel a registerable transfer of his share in the "*Elluk property*" in favour of the petitioner so that she shall become the sole registered proprietor and beneficial owner of leasehold Title Nos. **12/0913/502** and **12/0913/503**;

(b) Likewise, the petitioner within 21 days, is to execute and deliver to the respondent personally a registerable transfer of her share in the "*Pango property*" comprised within leasehold title No. **12/0844/179** in favour of the respondent who shall henceforth become the sole registered and beneficial owner of the said property;

(c) Any outstanding liabilities on the properties at the date of execution of the transfers shall remain the sole liability of the person who becomes the sole proprietor of the particular property;

(d) I make no order as to costs.

DATED at Port Vila, this 19th day of September, 2014.

BY THE COURT

D. V. FATIAKI
Judge.