



In The Supreme Court Of Bermuda

DIVORCE JURISDICTION

2019: No. 29

BETWEEN:

S

Petitioner

-and-

S

Respondent

JUDGMENT

Before:

Hon. Alexandra Domingues, Assistant Justice

Appearances:

**Mrs Georgia Marshall of Marshall Diel & Myers, for the
Petitioner**

Mr Cameron Hill of Spencer West, for the Respondent

Dates of Hearing:	29 April 2022
	3, 5, 6, 16, 19 and 20 May 2022
Date Draft Circulated:	21 December 2022
Date of Judgment:	23 December 2022

*Final Application for Ancillary Relief; Section 29 Checklist;
Matrimonial and Non-Matrimonial Assets; Matrimonial Home; Principle of Fairness;
Needs and Sharing; Full and Frank Financial Disclosure; Adverse Inferences*

Assistant Justice, Alexandra Domingues

INTRODUCTORY

1. The parties commenced their relationship in May 2001 and were married in December 2003. This was the Respondent's (hereinafter referred to as **the Husband**) second marriage having been divorced in or about 1996 from his first wife (**First Wife**). He had two children from his first marriage, one girl and one boy who will be referred to as **A** and **B** respectively. **A** is over the age of eighteen years old and in full-time employment. The Petitioner (hereinafter referred to as **the Wife**) has one child from a previous relationship, who will be referred to as **C** (who is one of the children declared as a child of the marriage) is currently 22 years old. The second child of the family, who the parties had together and will be referred to as **D**, is currently 16 years old.
2. In 2010, the Wife discovered that the Husband had been unfaithful to her with a woman who resides in the USA and that the affair had led to the conception of a child who was born in 2011. Despite this, the parties reconciled the relationship and carried on with the marriage. In or about September or October 2017, a paternity test was undertaken which confirmed that the Husband was in fact the father of the said child. Although the parties do not agree on the circumstances of the paternity test, they agree it was taken in September or October 2017.

3. Unbeknown to the Wife, the affair had continued after the conception of the first child outside of the marriage. The Husband confirmed that his relationship continued and resulted in the birth of a second child born in 2016. The ongoing relationship and the existence of the second child were not known to the Wife until January 2019 at which time the second child was three years old.

4. The Wife filed her petition for divorce on the 19 March 2019 (**the Petition**), which proceeded undefended, the Husband having failed to file an Acknowledgement of Service indicating an intention to defend the divorce or to apply for any forms of financial relief. When the Petition was heard on the 27 September 2019, the Orders on making of the Decree Nisi, *inter alia*, the Court made a declaration pursuant to Section 45 of the Matrimonial Causes Act 1974 (**MCA**) declaring it was satisfied that there are three children of the family, namely, B, C and D. Subsequently, the eldest child of the family, B, has completed full time education and as such is no longer considered a child of the family for the purposes of financial relief. Of the two remaining children of the family, D is under the age of eighteen years old and C, the age of eighteen years old and enrolled in full-time education.

5. Ancillary Relief was adjourned to Chambers and thereafter, by Notice of Application for Ancillary Relief dated 28 September 2020 (**the Wife's Substantive Application**) the Wife applied to his Honorable Court for the following relief:

- a) Child maintenance for C and D, such maintenance to be backdated to the date of the filing of the Petition;
- b) Variation of a purported settlement of a trust which was purported to be created in February 2020 (**the Trust**) which may hold the former matrimonial home located in Hamilton Parish (**the FMH**);
- c) An order pursuant to Section 41 of the MCA that the purported transfer of the FMH into the Trust be set aside so that the financial claims of the Wife could be satisfied;
- d) Property adjustment order relating the FMH, lump sum provision; and
- e) Costs.

6. Albeit the Wife is entitled to seek maintenance for C, she confirmed at the outset of the hearing she is only seeking child maintenance from the Husband for D.
7. The Husband filed documents referred to as a “*Notice of Intention to Proceed with an Application in His Own Right for Ancillary Relief for Himself and the Children of the Family*” on 19 April 2022 (**the Husband’s Substantive Application**). The Husband’s Substantive Application was made returnable the first day of the final hearing of the Wife’s Substantive Application on 25 April 2022. Mrs Marshall, for the Wife, confirmed at the commencement of the hearing that she had yet to be served with the Husband’s Substantive Application. The Husband’s Substantive Application stated he is seeking the following relief:
- a) A lump sum provision;
 - b) A Property Adjustment Order¹;
 - c) Secured periodical payments for himself;
 - d) Secured child maintenance payments for D and for his two children whom he fathered outside of the marriage who reside in the United States²;
 - e) A shared pension order; and
 - f) Variation of any settlement or nuptial settlement.
8. Mrs Marshall noted at the outset of the hearing the issue of whether the Husband actually has the ability to make an Application for Ancillary Relief. Having failed to file an Acknowledgement of Service or an Answer, is moot, as his evidence at the hearing was not seeking a Property Adjustment Order or maintenance for his two “outside” children or for A. The only relief being sought by the Husband is therefore, for a lump sum provision which he can join issue with the Wife’s Substantive Application.

¹ No reference was made to what property the Husband was seeking such an adjustment order for.

² These children were born to the Husband by his girlfriend who resides in the United States during the marriage and who have not been declared children of the family in accordance with Section 45 of the MCA.

9. The Wife filed two affidavits in support of the Wife's Substantive Application, the first on the 25 September 2020 (**the Wife's First Affidavit**) and the second on 4 June 2021 (**the Wife's Second Affidavit**). In addition to these, the Wife also filed a third-party affidavit dated 4 June 2021 (**the Third-Party Affidavit**) which gave evidence largely relevant to the Section 41 Application regarding a meeting between the Wife, the Third-Party, with Ms Angelita Dill of AAA Law.
10. It must not go unsaid given the history of these proceedings and my previous rulings in this matter, that I was required to make four orders between the first return date of the Wife's Substantive Application and 16 February 2021 for the Husband to file his affidavit evidence. On that date, both the Husband and Mr Hill failed to appear which resulted in an unless order being made for the Husband to file his affidavit by close of business on the 23 February 2021. If this was not done, the matter would immediately thereafter be remitted to a judge for hearing and consequential directions for that hearing were given. The Husband's Affidavit was sworn on 22 February 2021 and was filed on the 23 February 2021 at 4:12 p.m. (**the Husband's Affidavit**).
11. In respect of the Husband's Affidavit, Mrs Marshall also raised that whilst the Husband was giving his evidence in chief relating to the Section 41 Application, the Husband stated in clear terms that he provided to his attorney a marked-up copy of his Affidavit which he had sworn noting the errors and incorrect statements in the Affidavit. This was after the Husband swore the Affidavit, after it was filed with the Courts as well as after it having being served on the Wife's attorneys. Mrs Marshall suggested it was questionable whether the Husband had even read the Affidavit before having it sworn. The Husband confirmed he was told by Mr Hill upon bringing these errors to his attention that he would "*sort it out*". Such corrections (and by implication the incorrect and untrue portions of the Husband's Affidavit) were never brought to the attention of the Wife's attorney nor to the court at the commencement of the proceedings. The erroneous Affidavit as filed was never withdrawn and replaced with a corrected Affidavit as is required. Even though this issue was raised during the course of the Section 41 Application as well as the Substantive Application, neither the Husband nor Mr Hill attempted to rectify the position.

12. Notably, there was no attempt whatsoever to take the Court through the Affidavit to identify what portions may have been inaccurate. Mr Hill would on occasion submit during cross-examination that what was being questioned was a portion of the Affidavit which was not accurate, which appeared to be a self-serving position. Mrs Marshall therefore submitted that in these circumstances, the Court has no way of knowing what portions of the Husband's Affidavit are correct and those which are not.

THE FACTS

ASSETS

FMH

13. The Husband is the sole owner of the FMH. The FMH had been the matrimonial home of the parties throughout the duration of the sixteen-year marriage. The Husband vacated the FMH in 2018 and the Wife, C and D continue to reside in the FMH with A living there from time to time.
14. Mr Hill for the Husband reiterated the FMH was brought into the marriage by the Husband and submitted it was derived from a source entirely outside of the marriage. The FMH was acquired by the Husband in or around 1983/1984 with a loan of approximately \$80,000 at which time the property was a bare lot with shared access to water. The lot contained no dwelling at the time of its acquisition.
15. The Husband's evidence is that the FMH was designed and built by himself over a period of some ten years. The Husband says he built the house with "his bare hands" as the materials for the slate and the block were quarried from the land itself and those materials were used to construct the home. Cement and other construction materials were purchased from available savings as the project advanced. Any borrowings, or the vast majority of borrowings, that were used for the purpose of the construction of the FMH was funded from cash payments of the Husband.

16. A number of improvements had been carried out on the FMH between its purchase and the date of marriage. The Husband carried out these improvements personally including the installation of a pool and the installation of a basketball court. The evidence during the trial was that the parties had made further improvements to the FMH including the building of a substantial extension.
17. At the time of marriage, the outstanding mortgage on the FMH stood at approximately \$500,000. In his evidence, the Husband confirmed that he had initially borrowed \$380,000 to build on the land but due to construction cost overruns, the construction of the pool as well as an investment in one of his businesses, the mortgage was increased to \$500,000. Under cross-examination, the Husband accepted that the value of the property at that stage was between \$600,000 and \$650,000.
18. The parties' evidence differed drastically as it relates to the substantial extension of the FMH completed during the marriage. The Husband says that with the assistance of friends and outside tradesmen, he built the extension with his own hands. It was his evidence that he had purchased the materials and paid the tradesmen that assisted from his own resources. He suggested the only contribution made by the Wife to this project was by designing and decorating the rooms within the new extension. The Husband's position is that all cash he earned was placed into the house and he invested more in the FMH than the Wife.
19. The Wife's evidence is that she contributed considerable funds, approximately \$250,000, towards renovations to the FMH throughout the marriage. In addition, her evidence is that she met the children's expenses and school fees without contribution by the Husband as well as most if not all the household expenses for the family. The Wife was never challenged in her cross-examination about the contributions that she said she made of approximately \$250,000. It was only in the Husband's cross-examination that he suggested he did not accept the Wife made this contribution and said "*I've never seen those receipts*".
20. At the commencement of the marriage they moved into the lower apartment of the FMH. For the time they lived there, the upper unit was rented and the rent was sufficient to meet

the mortgage payments. Within six months of being there the family moved to the larger upper unit and the lower apartment was rented. The rental income from the lower apartment was insufficient to cover the monthly mortgage payments resulting in a shortfall being met by the parties. The Wife's evidence is that she always deposited \$1,500 into the mortgage account even if her fifty percent share was less than this in order for there to be an accumulation of monies to meet other household expenses.

21. Within the first year of their marriage the existing mortgage held by Bermuda Savings & Loan (**BS&L**) was transferred to HSBC. When that occurred, the parties increased the debt by approximately \$110,000. This was made up of the following: \$40,000 to discharge a home equity line secured on the Wife's mother's house for a parcel of land that the Wife had previously purchased in St David's (**the St David's Property**); \$40,000 to meet the settlement lump sum due to the First Wife; and the remainder was to meet the penalty for early settlement of the BS&L mortgage. Therefore, the mortgage was increased to \$610,000 and the Wife was a guarantor.

22. As it relates to the lump sum payment to the Husband's First Wife, on 15 July 2002, six years following their divorce, the Husband settled the First Wife's matrimonial claims by entering into a Consent Order of that date (**the Consent Order**). The terms of which were that he was to pay to her of a lump sum of \$40,000. The funds were to be paid by an initial payment of \$30,000 within 60 days followed by twelve monthly payments of \$833.33. The settlement was expressly stated to be on a full and final, clean-break basis settling any and all claims which the First Wife had against the Husband with the Husband retaining all his assets and property free from any claims by the First Wife. The relevant provision was set out at paragraphs 2 and 3 of that Consent Order as follows:

- "2. *The Petitioner and the Respondent shall each keep the assets that are in their name and possession as their own property absolutely without any claim thereon by the other party.*
3. *The terms of this Consent Order are in full and final settlement of all outstanding claims of ancillary relief between the Petition and the Respondent including the right to claim periodical payments against the other on behalf of both the Petitioner and the Respondent which claims are hereby dismissed."*

23. Despite the Consent Order being produced, the Husband did not accept a portion of the refinancing was to pay the lump sum to the First Wife as he stated he had paid the First Wife prior to marrying the Wife.
24. In any event, taking into consideration the increased financing of the mortgage and the market value of the FMH at that time, after taking into consideration the costs of sale, there was no equity in the FMH.
25. The Wife gave evidence that she paid for most, if not all, of the household expenses including utilities and child related expenses as well as school fees for C and D. This was not disputed by the Husband. The Husband paid for the household gas and was responsible for maintaining the home doing what he could himself, but when workmen were hired he paid for the labour and the Wife paid for the materials. The Husband retained the balance of his income to meet his other commitments with his businesses as well as for the educational expenses of his two children, A and B, he had with his First Wife.
26. However, the Husband's evidence is that he invested all of his earnings into improvements of the FMH during the marriage. His evidence is that he built the large extension and says he currently has no savings because they were all invested in the FMH. He dismissed the Wife made a significant contribution to the value of the FMH and stated "*every penny of the \$1.4m above the \$610,000 mortgage was value that I pumped into that home*".

27. The value of the property is currently \$1,400,000. The net value of the FMH can therefore be calculated as follows:

Gross Value	\$1,400,000
Less	
½ legal fees	\$4,612
½ Stamp Duty	\$29,000
Realtor commission	<u>\$70,000</u>
Total Net Value:	<u>\$1,296,388</u>

Wife's Property

28. In 2021 the Wife settled a trust and is one of three beneficiaries (**Second Trust**). The Second Trust holds the legal title to a property located in Hamilton Parish (**Wife's Property**). The other two beneficiaries are C and D. The Wife's Property was purchased for \$850,000 of which \$85,000 was paid by way of cash deposit and the balance by mortgage. The deposit was derived from the liquidation of two mutual funds which the Wife had prior to the marriage and which were kept as her separate property during the marriage never having been mingled with matrimonial savings. The Wife made no further contributions to these funds during the marriage and the balances reflected growth in the investment over time. The Wife also drew \$12,000 from her pension as well as an additional \$10,000 of her post separation savings to make up the difference from the two liquidated mutual funds. The Wife's Property is rented for \$5,400 per month which is applied against the monthly mortgage payments of \$6,800 per month. The difference between the rental income and the monthly mortgage payment is made up from the Wife's income. The Wife's position is that this is not matrimonial property and, in any event, avers there is no equity in it.

St. David's Property

29. The Wife owns a parcel of land in St David's (**St David's Property**) which she purchased prior to the marriage for \$95,000 with a home equity loan secured against the home of her mother. The outstanding balance of the loan was \$40,000 was discharged at the time the refinancing of the mortgage secured against the FMH. The St David's Property is currently valued at \$65,000.

Husband's Property

30. The Husband has a joint interest together with his brother in a property inherited from their mother located in Pembroke (**Husband's Property**) in which the Husband resides when he is in Bermuda. The Husband's Property is valued at \$500,000.

Education Savings

31. In order to raise the mortgage for the Wife's Property, BNTB, the mortgagee, required the Wife to establish a banking relationship with BNTB. In order to do that she set up a savings account into which her salary is now deposited and she also transferred the funds held as a college fund for D to that account. There is a "block" on that account by which the Wife is not able to reduce the account below \$170,000 so as to ensure that D's college funds are not touched and remains intact for the purpose of meeting her university fees in due course. D has indicated that she wishes to pursue veterinary medicine after she completes high school.

Pensions

32. As at the date of separation, the Wife's pension with Freisenbruch Myers had a balance of \$401,813.
33. The Husband's evidence as to his pension can be found paragraph 55 of the Husband's Affidavit where he gives an estimate of the current value of his pension being \$80,000; however, there is a footnote to this figure which states as follows:

"This is an estimate as we have had administrative difficulties and account balances have ceased to be fully identifiable- this is presently being resolved."

No evidence supporting the Husband's "estimate" was produced as an exhibit to the Husband's Affidavit.

34. In cross examination, the Husband admitted that for many years his businesses have not been making pension contributions. It was pointed out to him that this is in violation of the National Pension Scheme Act, but he assured the court that he had "smoothed the waters" with the Pension Commission. He asserted the Pension Commission have made an exception for him and his company and indicated there is an agreement that the company can make contributions when it is feasible to do so. The Husband produced a statement from Argus indicating that his pension contributions stand at \$61,897.11 with no contribution having been made for many years.

Businesses³

35. One of the greatest hurdles in this case was to get the Husband to provide full and frank disclosure regarding the businesses he owns. The Husband's Affidavit only contained one paragraph relating to his income from these businesses (paragraph 72) and gave no disclosure whatsoever regarding his ownership or the like of these businesses. It was only through numerous orders (which will be addressed further below) that the Husband produced documents from the business in a piecemeal fashion during his cross-examination.
36. The Husband is the second largest shareholder of the business I will refer to as F Ltd. which was incorporated in July 1999. He is the President/Chairman of the company. He holds 540,000 voting shares out of a total issued of 2,001,000. As such he holds 27% of the issued voting shares. In his evidence the Husband said that the financial statements for F Ltd could not be relied on due to the manner in which the debt due to Ms Poe was treated and due to the absence of any indication of where the Husband's salary is accounted for. It would appear that the debts of this company outpace the equity and that it is illiquid.
37. Until recently, the Husband was the 100% shareholder of the business I will refer to as N Ltd, but advised the court that 25% of the shares were being transferred to a colleague at no cost to him to reward him for past performance. The Husband is the President of the company. N Ltd was incorporated in April 2002. The total equity of N Ltd is stated to be \$322,202 as at February 2021.
38. The Husband is also a 40% shareholder of what I will refer to as I Ltd. He is the Executive Manager of this business. His shares were purchased during the marriage for approximately \$140,000 and a sum of about \$20,000 remains outstanding in relations to their purchase. The total equity of the business as at 31 December 2021 is said to be \$390,050.
39. The Husband is the 100% shareholder of the company I will refer to as A Ltd. This company was incorporated in 2007. He is the President of the company having been

³ I refer to F Ltd, N Ltd, I Ltd and A Ltd collectively as the **Businesses**.

appointed as such on 15 December 2009. The Husband indicated that no balance sheet has ever been created for this business although it holds the Husband's shares in N Ltd and by virtue of that, his interest in the Telecommunications license it holds the value of which we are told is not reflected in the financial statements of N Ltd.

INCOME AND EXPENSES

40. The Wife is a Financial Underwriter earning a gross wage of \$192,000. Her net monthly salary is \$15,589.54. In addition to this, she receives a housing allowance of \$21,000 per annum as well as an annual bonus of \$30,000 as part of her Discretionary STI. She receives no further remuneration and has no LTI.

41. The Wife's outgoings are set out in the Wife's First Affidavit at pages 15 to 17 of the Exhibit. This evidence was neither challenged by the Husband in the Husband's Affidavit nor by his attorney in his cross examination of the Wife. The household expenses amount to \$4,133.08. The direct expenses for C inclusive of his university fees amount to \$3,589.01 (although the Wife has confirmed she is no longer seeking child maintenance from the Husband for C). The direct expenses for D, (inclusive of her school fees and a monthly contribution of \$1,000 towards her college fund) amount to \$3,609.91 per month. D's indirect expenses are reflected in one-third of the household expenses i.e., \$1,378 in accordance with *M v W Civil Appeal No. 14 of 2009*. D's total outgoings therefor amount to \$5,510 per month.

42. The Husband's evidence as to his income was only corroborated at the hearing by his employer. He says in his Affidavit at paragraph 72 that his monthly salary is \$10,200 net of deductions. However, at page 33 of the Exhibit to the Wife's First Affidavit which is an Appendix to his letter to MDM dated 17 August 2020 (**the Appendix**) he states his monthly income as being \$13,000 (\$2,000 from I Ltd and \$11,000 F Ltd). Under cross-examination, the Husband reverted to stating his income was only \$10,000 per month and could not show how his income was accounted for in the Businesses' accounts that he produced. In addition to this, we are told that he collects the rental income from the house that he and his brother inherited upon the death of their mother in the sum of \$2,000 per month although in his *viva voce* evidence he said that there is no tenant currently in the

unit that he, himself does not occupy. He also collects the rental income from the FMH in the sum of \$2,700. Based on this evidence it would appear that the Husband has been receiving at least \$14,700 per month since the death of his mother and prior to that a sum of \$12,700.

43. The Husband's Affidavit provided no evidence as to his monthly expenses. The only evidence as to his outgoings appears at the Appendix totaling \$12,300 per month. In cross examination he conceded that the amount set out as a personal debt owed to Sharon L Poe at \$3,000 per month was not in fact a personal loan owed by him to her. He also conceded that the sum due to Mr Tucker in relation to the purchase of his shares in I Ltd has been reduced to about \$20,000. By virtue of these admissions he conceded that the sums set out as a monthly payment to Sharon L Poe is not paid by him from his income and the sum of \$2,500 stated as being rent is not paid by him. His outgoings therefore amount to \$6,800 per month inclusive of his payment to Mr Tucker of \$1,000 per month on account of his share purchase in I Ltd.

44. In cross examination he indicated that he had other expenses not reflected in the Appendix and that the \$2,800 per month for child support is not reflective of his contributions to the two children he had outside of the marriage. He did not elaborate as to what those expenses were although it is clear that since in or about mid-2020 and leading up to the purchase of the Husband's girlfriend's property in the USA and thereafter, he has been making significant monthly payments to the girlfriend which he had not been making previously.

THE LAW

Division of Assets

45. I have a statutory obligation to have regard to all the checklist set out in Section 29 of the Matrimonial Causes Act 1974 (MCA) when determining an application for Ancillary Relief under Section 27 and/or Section 28 of the MCA. Section 29(1) sets out the particular factors which must be taken into consideration:

“29 (1) *It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to*

the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters -

- (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 of either of the parties to the marriage;*
- (f) *the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contributions by looking after the home or caring for the family;*

.....

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.
[Emphasis added]

46. Consideration must be had to the tailpiece of Section 29 (1) of the Act which requires the Court to place the parties insofar as it is possible and practicable to do so in the position that they would have been in if the marriage had not broken down and each party had discharged their respective financial obligations to the other. This tailpiece no longer exists in the UK legislation, but in determining what the aim of the court should be when exercising its discretion under Sections 27 and 28 of the Act, the House of Lords in the *White v White* [2001] AC 596 decision determined that the aim of the court is to come to a fair outcome as between the parties. This aim has been adopted in interpreting the tailpiece in our legislation. In the Bermuda case of *Green v Green*, in Justice Meerabux's judgment of 1 November 2001, he concluded that the tailpiece has the same meaning as the concept of fairness enunciated in *White v White*. A key feature of fairness is that there shall be no discrimination between husband and wife and their respective contributions during the marriage.

47. In considering what is fair, the court distinguishes between two types of assets, matrimonial assets on the one hand and non-matrimonial assets on the other. Matrimonial assets are those assets which have been created by the efforts of the parties or either one of them during the marriage. They arise out of the efforts of the parties during the marriage. Non-matrimonial assets are different in character as they originate from sources exterior to the marriage. They include the preowned assets of the parties, gifted assets and inherited assets.

48. In *White v White*, Lord Nicholls of Birkenhead said the following in relation to defining what is matrimonial and what is non-matrimonial:

“Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property...”

49. In relation to matrimonial assets, there is a presumption that these assets will be divided equally by the parties upon the breakdown of the marriage unless there is good reason to depart from equality. There is no such presumption in relation to non-matrimonial assets. However, where needs cannot be met from the pool of matrimonial assets the court will look to the non-matrimonial assets to the extent necessary to meet needs.

50. In the House of Lords decision in *Miller v Miller*; *McFarlane v McFarlane* [2006] 3 All ER 1, established the requirements of “fairness” as to the distribution of assets having three strands which must be considered: needs, compensation and sharing.

51. *Miller v Miller*; *McFarlane v McFarlane* further refined the distinction between matrimonial and non-matrimonial property. In that decision Lord Nicholls of Birkenhead said the following at paragraph [16]:

[16]This “equal sharing” principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership

of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observations that "husband and wife are not for all practical purposes equal partners in marriage.... This is now recognized widely, if not universally. The parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less. But I emphasize the qualifying phrase: "unless there is good reason to the contrary." The yardstick of equality is to be applied as an aid, not a rule." [Emphasis added]

52. Lord Nicholls goes further in paragraphs 21 and 22 to consider the concept of what constitutes matrimonial property as distinct from non-matrimonial property in the following terms as well as the matrimonial home being on different footing than other assets:

"[21] A complication rears its head at this point. I have referred to the financial fruits of the marriage partnership. In some countries the law draws a sharp distinction between assets acquired during a marriage and other assets. In Scotland, for instance, one of the statutorily prescribed principles is that the parties should share the value of the "matrimonial property" equally or in such proportions as special circumstances may justify. Matrimonial property means the matrimonial home plus property acquired during the marriage otherwise than by gift of inheritance... In England and Wales the 1973 Act draws not such distinction. By s. 25(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future.

[22] This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquit but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavor, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in the marriage. So it should normally be treated as matrimonial property for the purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been."

[Emphasis added]

53. In *JL v SL (No2)* [2015] 2 FLR, Mostyn J considered whether and to what extent a deviation from an equal division of matrimonial property, particularly the matrimonial

home may be justified. In that regard he quoted from his prior decision in *SS v AG (Financial Orders: Lottery Prize)* [2011] EWHC 2637(Fam) where he said:

“[8] While matrimonial property will normally be divided equally, this is not an invariable rule. The reason for this is that sometimes the matrimonial property in question will not be the product of the endeavors of the parties within the social-economic partnership that is marriage..... Sometimes one party brings assets in which become, “part of the economic life of [the] marriage.... Utilized, converted, sustained and enjoyed during the contribution period” ... This is the concept of mingling referred to by me in *N v F (Financial Orders: Pre-acquired Wealth at para [9]* (where I cited the remarks of Lord Nicholls in *Miller v Miller*; *McFarlane v McFarlane at paras [24] – [25]* and *Baroness Hale at para [148]*) and by *Wilson LJ in K v L (Non Matrimonial Property: Special Contribution at para [18]* (b). But even if there has been much mingling the original non-matrimonial source of the money often demands reflection in the award. Thus in *S v S (Non-Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam) *Burton J* divided the matrimonial property 60/40 to reflect this factor

[9] In *Miller & McFarlane Lord Nicholls specified that the matrimonial home should always be designated matrimonial property whatever its source. He stated at para [22] that “the parties” matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in the marriage. So it should normally be treated as matrimonial property for this purpose.” This is reflected in the remarks of Wilson LJ in K v L at para [18] (c). But even the matrimonial home is not necessarily divided equally under the sharing principle; an unequal division may be justified if unequal contributions to its acquisition can be demonstrated. In *Vaughan v Vaughan [2—7]* EWCA Civ 1085 *Wilson LJ* stated at para [49]:*

“Such would be the award notwithstanding that the home had been owned by the husband, free of mortgage, since well before the marriage and that, putting to one side his misconduct in dissipating assets following the breakdown of the marriage (the effect of which is intended to be rectified by the calculation), the contributions of each party to the welfare of the family during the marriage were in effect agreed to have been equal in value albeit not in kind. Although in the words of Baroness Hale in *Miller*.... “the importance of source of the asset will diminish over time”, I consider that the husband’s prior ownership of the home carried somewhat greater significance than either the district or circuit judge appears to have ascribed to it.” [Emphasis added]

54. Mr Hill for the Husband, largely relied on *P v P [2004] EWHC 1364 (Fam)* to support the way which the Court should consider the application for a Property Adjustment Order as it relates to the FMH. *P v P* was a case where the husband and wife were both farmers and

were residing at and operating the farm which had been inherited through four generations of the husband's family. The question arose as to how the distribution of the assets (which included the farm) would be made when the farm had been passed to the husband through four of his family's generations; i.e. inherited property. Counsel for the husband in that case argued that any distribution of the farm to the wife would be unfair given its generational nature in the husband's family as inherited property stands on a different footing in accordance with *White v White*. Additionally, it was argued that the husband made a special contribution to the marital home and the farm given his inheritance of the property through many generations as well as it being his livelihood.

55. It should be noted that in *P v P* Justice Munby made numerous citations of *White v White*, *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139 as well as *Parra v Parra* [2002] EWCA Civ 1886, [2003] 1 FLR 942 which principles set out in these cases were relied on in Justice Munby's determination. All of these cases most notably precede *Miller v Miller*; *McFarlane v McFarlane* and the case of *Gray v Work* [2015] EWHC 834 (Fam) which I will refer to below.

56. *Gray v Work* involved parties who had a twenty-year marriage and were of a humble financial background. In the eighth year of marriage, the parties moved to Japan where over a period of time the husband created extremely substantial wealth of approximately \$450 million over a period of time. The husband in this case submitted the wife should only receive two percent of the marital assets; i.e. an unequal distribution; as it he said he made a special contribution to their wealth due to it be attained through his employment as the wife was a homemaker. Justice Holman reiterated that whilst there are some circumstances where special contributions do arise, such cases are rare. He stated the following at paragraphs 128 through 132:

“128. There is no doubt that the law recognizes that, in some cases, one party may have made (or may in the future make) what has been labeled a “special contribution” and that that may impact upon outcome. The House of Lords clearly said so in *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618, and the Court of Appeal said so in *Charman v Charman* (No. 4) [2007] EWCA (Civ) 503, [2007] 1 FLR 1246. I therefore unhesitatingly and unreservedly accept that there can be cases and situations in which a special contribution is identified which should and does impact on outcome.

129. There is also no doubt that, in practice, such cases have been rare. In Lambert v Lambert [2002] EWCA (Civ) 1685, [2003] 1 FLR 139, decided in November 2002, the Court of Appeal expressly and avowedly intended to close down what had been described as a Pandora's Box of special contribution claims in what Baroness Hale of Richmond later described in Miller as "the retreat from the concept of special contribution". In Lambert itself the Court of Appeal set aside a 63:37 percentage reduction to reflect special contribution and awarded to the wife 50 per cent.

130. Counsel have only been able to identify three reported cases in the 12 years since Lambert in which a court has, in fact, made a reduction or unequal award in order to reflect a special contribution, although I appreciate that there may be an unknown number of settled cases in which a special contribution was agreed or accepted to be a factor ...

132. The rarity of reported cases does not in any way at all detract from the existence of the concept of special contribution, which is undoubted, nor in any way diminish the claim which the husband makes in the present case. It does, however, tend to reinforce the exceptional (in the sense of rare) nature of successful such claims, and therefore the specialness which is required before such a claim can succeed." [Emphasis added]

57. Justice Holman summarized the principles which should be considered when determining whether there is a special contribution from one of the parties which would require the Court to make a departure from equality. At paragraph 140 states as follows:

"140. From the passages that I have quoted from Miller and Charman, I extract the following:

(i) The characteristics or circumstances which would result in a departure from equality have to be of a wholly exceptional nature such that it would very obviously be inconsistent with the objective of achieving fairness from them to be ignored; per Body J in Lambert but quoted with obvious approbation by Lord Nicholls of Birkenhead in Miller at paragraph 68.

(ii) Exceptional earnings are to be regarded as a factor pointing away from equality of division when, but only when, it would be inequitable to proceed otherwise (Lord Nicholls of Birkenhead in Miller at paragraph 68).

(iii) Only if there is such a disparity in their respective contributions to the welfare of the family that it would be inequitable to disregard it should this be taken into account

in determining their shares (Baroness Hale of Richmond, in *Miller* at paragraph 146).

- (iv) It is extremely important to avoid discrimination against the home-maker (the Court of Appeal in Charman at paragraphs 79 and 80).
- (v) A special contribution requires a contribution by one unmatched by the other (the Court of Appeal in Charman at paragraph 79).
- (vi) The amount of the wealth alone may be so extraordinary as to make it easy for the party who generated it to claim an exceptional and individual quality which deserves special treatment. Often, however, he or she will need independently to establish such a quality, whether by genius in business or some other field (the Court of Appeal in Charman at paragraph 80). A windfall is not enough.
- (vii) There is no identified threshold for such a claim to succeed (the Court of Appeal in Charman at paragraph 88)."
[Emphasis added]

58. The end result of *Gray v Work* was that Justice Holman equally distributed the assets as he was not of the view that the husband made an unmatched, special contribution that the legal principle requires. At paragraphs 152, 156 and 157 Justice Holman made the following findings:

"152. On considered reflection, however, I am not satisfied that the husband has established an unmatched special contribution of the kind and to the extent that the authorities require. I am not persuaded that his financial contribution was unmatched. For 20 years the wife was a good wife, a good home-maker and a good mother. It was only because of her willingness to move and live in Japan that the husband was able both to work there and amass the wealth, and also to enjoy a home and family life, and the procreation of his adored children.

...

156. Although the figures are large, I do not consider that the contributions of the husband in this case can be described as of a wholly exceptional nature, nor that it would be "very obviously" inconsistent with fairness for them to be ignored. Indeed, it would, in my view, be unjustifiably gender discriminatory to make an unequal award. This was a marriage of two strong and equal partners over 20 years. They each contributed a range of differing, but all of them important, ways to a marriage

and relationship which enriched them both, both financially and emotionally, as parents of their children and partners to each other.

157. I thus do not reduce the amount which would otherwise be payable to the wife so as to reflect the claimed special contribution by the husband based upon his achievements at Lone Star and the wealth he amassed." [Emphasis added]

59. In the recent Privy Council decision of *Scatliffe v Scatliffe* [2017] 2 FLR, Lord Wilson JSC provided guidance on the way that courts should treat non-matrimonial property. Lord Wilson JSC said the following:

"[24]... But the bigger question is: irrespective of the extent or value of the husband's interest in the guest house, why was this asset ignored in both local courts? With respect to them, the board considers that the answer may betray a serious misunderstanding about the treatment of 'non-matrimonial property'; indeed possibly about the very meaning of the phrase, in the determination of applications for ancillary relief under the 1995 Act. At least the husband's ill-starred appeal enables the board to offer guidance in this respect, which it attempts to encapsulate in the 10 propositions which follow.

[25]

(i) Section 26(1)(a) of the 1995 Act obliges the court to have regard to the "property and other financial resources which each of the parties has or is likely to have in the foreseeable future".

(ii) Thus, when a court finds that an asset is not one in which either party has any interest (such as, in the present case, Parcel 174, beneficially owned by the son Derwin: see para 17 above), no account should be taken of it.

(iii) It is, however, confusing for such an asset to be described as "non-matrimonial property". [This is because these assets are not relevant to the analysis, such as apartment 1G.]

(iv) It was when introducing the "yardstick of equality of division" in the *White* case, cited above, at p 605, that Lord Nicholls proceeded, at p 610, to refer to "matrimonial property" and to distinguish it from "property owned by one spouse before the marriage, and inherited property, whenever acquired". In the *Miller* case, cited above, at paras 22 and 23, he described the latter as "non-matrimonial property"; and he explained his earlier reference to "matrimonial property" as meaning "property acquired during the marriage otherwise than by inheritance or gift".

(v) So the phrase "non-matrimonial property" refers to property owned by one or other of the parties, just as the phrase "matrimonial property" refers to property owned by one or other or both of the parties.

(vi) Accordingly, it is contrary to section 26(1)(a) of the 1995 Act for a court to fail to have regard to "non-matrimonial property". This raises the question: in what way should regard be had to it?

(vii) As was recognized in Charman v Charman (No 4) [2007] EWCA Civ 503, [2007] 1 FLR 1246, at paras 65 and 66, it was decided in the White and Miller cases that not only matrimonial property but also non-matrimonial property was subject to the sharing principle. In the Miller case, Lord Nicholls, however, suggested at para 24 that, following a short marriage, a sharing of non-matrimonial property might well not be fair and Lady Hale observed analogously at para 152 that the significance of its non-matrimonial character would diminish over time. Lord Nicholls had also stressed in the White case at p 610 that, irrespective of whether it fell to be shared, a spouse's non-matrimonial property might certainly be transferred in order to meet the other's needs.

(viii) In K v L [2011] EWCA Civ 550, [2012] 1 WLR 306, it was noted at para 22 that, notwithstanding the inclusion of non-matrimonial property within the sharing principle, there had not by then been a reported decision in which a party's non-matrimonial property had been transferred to the other party otherwise than by reference to the latter's need.

(ix) Indeed, four years later, in JL v SL (No 2) (Appeal: Non-Matrimonial Property) [2015] EWHC 360 (Fam), [2015] 2 FLR 1202, Mostyn J suggested at para 22 that the application to non-matrimonial property of the sharing principle (as opposed to the needs principle) remained as rare as a white leopard.

(x) So in an ordinary case the proper approach is to apply the sharing principle to the matrimonial property and then to ask whether, in the light of all the matters specified in section 26(1) and of its concluding words, the result of so doing represents an appropriate overall disposal. In particular it should ask whether the principles of need and/or of compensation, best explained in the speech of Lady Hale in the Miller case at paras 137 to 144, require additional adjustment in the form of transfer to one party of further property,

even of non-matrimonial property, held by the other.” [Emphasis added]

60. In summary, the principles to be applied in determining how to distribute, if at all, the matrimonial and non-matrimonial assets are as follows:

- (a) First, the court should determine what property is owned by one of other of the parties and exclude property that is not;
- (b) Next, the court should determine from the pool of assets owned by one of other of the parties, what is matrimonial property and what is non-matrimonial property;
- (c) Then, the court should divide the matrimonial assets equally between the parties and step back to see where that leaves them;
- (d) Thereafter, if needs require adjustment from an equal division then adjustment will be made first within the pool of matrimonial assets; and
- (e) Where needs remain unmet, the court may consider to what extent non-matrimonial assets should be accessed to meet the needs of the parties, but not for the purpose of sharing beyond what is required in meeting needs, although the sharing principle could be applied albeit “*rare as a white leopard*”.

Financial disclosure and adverse inferences

61. Both Counsel relied on *B v B (Matrimonial Proceedings: Discovery)* [1978] Fam. 181 in relation to the legal principles of financial disclosure in matrimonial proceedings. Justice Dunn summarized the test which must be met for discoverable documents at page 186, C as follows:

“If the wife cannot obtain the documents she requires on discovery, she may be able to apply under R.S.C., Ord. 38 for leave, since these proceedings are in chambers, to issue a subpoena duces tecum against the secretary or other officers of the company to produce relevant documents.

The person to be considered is therefore the husband, the party to the suit; and the next and vital question in the case is are these documents which were ordered to be produced documents which are or have been in the possession, custody or power of the husband? For this purpose "possession" means "the right to the possession of a document." "Custody" means "the actual, physical or corporeal holding of a document regardless of the right to its possession," for example, a holding of a document by a party as servant or agent of the true owner. "Power" means "as enforceable right to inspect the document or to obtain possession or control of the documents from the person who ordinarily has it in fact." The requirements of the Rules are disjunctive in their operation, so far as possession, custody and power are concerned. [Emphasis added]

62. Justice Dunn further summarized his conclusions as to the law of discovery at page 193, D as follows:

"... (1) A party to a suit must disclose all the documents in his possession, custody or power which are relevant to the matters in issue. The court has a discretion whether or not to order him to produce the documents for inspection by the other party or the court. (2) The documents of a company are in the legal possession of the company. If they are or have been in the actual physical possession of a director who is a party to litigation they must be disclosed by that director, if relevant to the litigation, even though he holds them as servant or agent of the company in his capacity as an officer of the company. (3) Whether or not documents of a company are in the power of a director who is a party to the litigation is a question of fact in each case. "Power" in this context means "the enforceable right to inspect or obtain possession or control of the document". If the company is the alter ego of such a director so that he has unfettered control of the company's affairs, he must disclose and produce all relevant documents in the possession of the company. (4) Where relevant documents in the possession of the company are disclosed by a director as being in his custody or power, the court has a discretion whether or not to order production of them. (5) The discretion is a judicial discretion, and in exercising it the court will have regard to all the circumstances. The court will balance the relevance and importance of the documents and the hardship likely to be caused to the wife by non-production against any prejudice to the husband and third parties likely to be caused by production. It has not hitherto been the practice of the court to order production of company documents to which the board of directors objects on affidavit, provided that the court is satisfied that the objection is not contrived for the purpose of frustrating the powers of the court." [Emphasis added]

63. It is trite law that the failure of one party to provide full and frank financial disclosure in matrimonial cases, adverse inferences in respect of this non-disclosure can be drawn (see

THE WIFE'S POSITION

64. The Wife submitted there can be no doubt the FMH is matrimonial property and the Husband did not provide any special contribution to this asset which would result in her not obtaining an equal share in its value.
65. The Husband's evidence was clear that at the time of the marriage there was no equity in the property as its value was between \$600,000 and \$650,000 and the debt secured against it from HSBC was \$610,000.
66. The Wife's very significant contributions made during the marriage are continuing and will continue until the youngest child of the family, D, has completed her full-time education. The Wife contributed the bulk of her earnings throughout the marriage to the family in various manners, such as, by meeting the household and children's direct and indirect expenses and by undertaking the responsibility of being the Guarantor of a sizeable mortgage.
67. Mrs Marshall emphasized that all the equity in the FMH has been created during the marriage by the joint efforts of the parties in paying the mortgage and also in their respective contributions to the costs of renovations and improvements throughout the marriage. Mrs Marshall submitted that on these facts there is no basis upon which there should be any deviation from equality, notwithstanding the fact that the Wife in addition to her financial contributions to the FMH also took care of the domestic life of the family being the primary care giver of the children and the person who undertook the domestic tasks. The Wife also paid for almost all of the household expenses as well as the expenses relating to C and D with little if any contribution by the Husband.
68. Furthermore, the Wife's contributions are continuing in that after separation in 2018 she has continued to meet all of the expenses relating to the children of the family with no contribution by the Husband other than his agreement to pay fifty percent of D's school

fees for the current academic year part of which remained outstanding at the date of the hearing.

69. The evidence as to standard of living during the marriage can be gleaned generally from the evidence of the parties. They provided for their family, educated their children in private school and at the tertiary level; they improved their house and paid off their mortgage.

70. As it relates to the child maintenance for D, at paragraph 79 of the Husband's Affidavit, the Husband makes the following proposal in relation to his contribution towards the children's maintenance who are in full time education:

“79. *The parties shall share the education costs of the children still attending full time education and I shall contribute \$2,000 to the Petitioner by way of Maintenance.*”

Albeit \$2,000 per month is less than fifty percent of the cost of D's outgoings, the Wife is prepared to accept this sum as the husband's contribution towards D's direct, indirect and educational costs. She seeks a lump sum reflecting the backdating of the order with credit being given for the school fees that the Husband has paid for the current academic year as well as a lump sum reflecting his contribution towards D's maintenance until she has completed secondary school in June 2024. The lump sum payment is calculated as follows:

Date of Petition	19 March 2019
Date of Hearing	19 May 2022
<u>Total of 36 months at \$2,000 per month = \$72,000</u>	
Date of Hearing	19 May 2022
Date of Completion of High School	June 2024
<u>Total of 24 months at \$2,000 per month = \$50,000</u>	
TOTAL:	\$122,000

71. The Wife invited the court to look at the assets as follows:

Wife's Assets

Description	Net Equity
Wife's Property	NIL
Education Savings (For D's Tertiary Education)	NIL as not an asset for distribution
Wife's Pension	\$401,000
St David's Property	\$65,000
Total	\$466,000

Husband's Assets

Description	Net Equity
Inherited Property (Husband holds 50% interest)	NIL as not an asset for distribution for rather for consideration as to the Husband's resources
Pension	\$61,000
Businesses:	
a. FKB Net – 75% of \$322,203.00	\$241,652.00
b. ICS – 40% of \$390,000 <i>Less outstanding loan</i>	\$156,000.00 <i>(\$20,000)</i>
c. Artisan – 100%	Unknown
Total	\$438,652.00

72. Mrs Marshall submitted that as can be seen in the tables in paragraph 70 above, the net position of the parties, exclusive of D's university fund and the Husband's inheritance, is more or less equal.

73. The Wife's position is that her pension should not be considered for distribution or comparison to that of the Husband's pension as, instead of making the deduction from his income to contribute to his pension as required by law, he has opted to retain his income without that deduction and use it for current spending rather than put it aside for his retirement.

74. In relation to the true value of the Husband's Businesses, Mrs Marshall submitted that the reality is that we will never know what the value of the Husband's stake is in the Businesses and in the absence of evidence on that matter the court will need to draw appropriate inferences. The most favorable inferences that can be drawn for the Husband is that the value of the businesses is reflected in the Equity line of the Balance Sheet. Whilst that does not reflect the market value of them it is some indication of value that the Court should attribute unhesitatingly in assessing the value of the Husband's shares in the Businesses.

75. Mrs Marshall submitted the ultimate aim for the court is fairness. She submitted this is not a case of needs and the needs of the parties are already met, therefore the principle of sharing must be taken into consideration which is the third limb of "fairness"⁴. In this case, fairness cries out for an equal sharing of the FMH between the parties also based on the principle set out in *Miller v Miller*; *McFarlane v McFarlane* that the FMH is on different footing than any other asset. The Wife certainly does not accept the Husband has made any special contribution which has been unmatched by her during the marriage that would result in the Husband being granted a greater portion of the value of the FMH.

76. The net equity in the FMH amounts to \$1,290,000. On the principles set out above that should be divided between the parties on a fifty-fifty basis resulting in each receiving approximately \$650,000 of value. Assuming that the property sells for \$1,400,000 and each party receives fifty-percent of the net equity, it will allow the Wife to pay down a significant part of the mortgage on the Wife's Property. It would allow the Husband to buy out his brother's interest in the Inherited Property and to renovate same providing him with both a residential unit and a rental unit.

⁴ The three strands of "fairness" as defined in *Miller v Miller*; *McFarlane v McFarlane* as being (1) needs; (2) compensation and (3) sharing.

77. The Husband has given evidence that he is not able to raise a lump sum of half of the net equity of the FMH to the Wife. She is also not in a position to pay such a sum to the Husband. Additionally, the Wife is seeking an order which will facilitate that result being achieved without further obstacles by the Husband to frustrate the Wife's matrimonial claims as he had already done so with transferring the FMH into the Trust. Mrs Marshall strongly urged the Court that making a lump sum order in favour of the Wife whilst leaving the FMH in the sole ownership of the Husband will result in further proceedings and delay as it is clear that the Husband will not comply with any order not only given his non-compliance with orders to date, but based on his evidence that he cannot raise funds for the lump sum to be paid to the Wife which is equal to half the equity in the FMH.

78. Therefore, in all of the circumstances the Wife seeks a Property Adjustment Order in her favor of the FMH, inclusive of an Order that the Registrar of the Supreme Court be empowered to sign the Deed of Conveyance in the Husband's stead and with the cost of the conveyance to be met from the sale proceeds of the said property. It was argued that the Wife will then be able to market the property for sale obtaining the best price that is available on the market after which she proposes that the net proceeds of sale be divided equally between the parties with the following being deducted from the Husband's share, namely maintenance for D from the date of the Petition to the present and also from now to the completion of her high school education by way of lump sum which will total \$122,000.

79. The Wife is also seeking that those costs which have not already been granted in relation to Interlocutory Application, that all remaining costs as it relates to the Substantive Application, be granted costs on indemnity basis.

THE HUSBAND'S POSITION

80. Mr Hill relied heavily on *P v P* to assert that the FMH is not a matrimonial asset as it was brought into the marriage by the Husband and the Husband's intent was for it to be

inherited by his children. Furthermore, he asserted that the Husband is “*being deprived of asset which he built with his own hands would be unfair*”.

81. The principle argued in *P v P* which Mr Hill submitted should be taken into consideration, is the intent in that case of the husband’s family that the farm would remain in the family and any distribution of this generational asset would be unfair to the husband. Mr Hill submitted this principle can be applied to the FMH in this case as the Husband’s evidence is that it had been his intent, not just going back to when he purchased the FMH, but also upon his divorce from his first wife that the FMH would be left to his children. It should be noted this was also one of the main arguments Mr Hill presented in relation to the Section 41 Application for the FMH to remain in the Trust.
82. Mr Hill also raised that the FMH was always intended to be an income generating asset which paid for itself during the course of the marriage. This was presented on the basis the rent derived from one unit would allow for the mortgage payment for the entire property to be met. When the Parties moved into the FMH the parties occupied the smaller lower apartment. The rental payment from the upper apartment was able to cover the entirety of the secured borrowing.
83. The Husband accepts the Wife made a contribution to the borrowing against the FMH nevertheless, which reflected the fact that a portion of the borrowings secured against the FMH were used to pay off the St David’s Property. The Husband does not accept the identical sum of \$40,000 was secured for the purpose of making a lump sum payment in accordance with the Consent Order to the First Wife. Mr Hill stressed that it remains the case that borrowings that were secured against the property were used to meet obligations of the parties that had first been undertaken prior to the marriage. This fact, whatever the purpose for the payment to the First Wife, Mr Hill submitted does not alter the quite extraordinary contribution that this Husband made to the FMH.
84. It was further submitted that the FMH has been brought into the marriage by the Husband in circumstances that impose an obligation to consider whether, in light of the other circumstances of the case, it should be treated as being *sui generis*. The contribution and the actual attachment of the Husband would form the basis for a deviation from an equal

distribution and the crafting of an order that saw the Husband with the asset he built and which his lifelong dream had been to make available to his children, including the biological children of the Wife.

85. Mr Hill accepted that where the parties have accumulated assets beyond the pure capital needs of the parties, the Court will be confronted with the question of sharing the remaining assets between the parties. The assets in the present case can be viewed, at least in one sense, in exceeding the strict capital needs of the parties. However, the source of those assets is not determinative and a determination will be required to take an informed decision about whether fairness requires that an order of some complexity be sought that will reduce fairness.

86. Mr Hill in his closing submissions attempted to submit that the Businesses' accounts couldn't be relied on as they were hearsay; however, he quickly conceded that he had at no point raised this issue when the Husband was being extensively being cross-examined on the accounts. Mr Hill also suggested that the Wife should have obtained valuations of the Businesses and that without any such valuations their value can only be accepted as \$75,000 which is the total value of all of the Husband's shares.

87. At paragraphs 77 through 79 of the Husband's Affidavit, he set out what he thought would be a fair resolution of the Wife's Section 41 Application as well as the Wife's Substantive Application which can be summarized as follows:

- (i) The FMH remain in the Trust with a declaration that the Trust is valid and binding;
- (ii) The parties retain all assets in their respective names absolutely free from any claim from the other, inclusive of their respective pensions;
- (iii) The claims for a lump sum provision, a Property Adjustment Order or a variation of settlement be dismissed.

(iv) The Wife continue to live in the FMH for two years or until such time as construction is completed at the St David's Property (whichever is the soonest) and during this time she will pay \$2,500 per month in rent to the trustees of the Trust.

(v) The parties will share the education costs of the children and the Husband will pay the Wife \$2,000 per month in child maintenance.

88. However, during Mr Hill's final submissions, he stated that a fair outcome would be for the Husband to pay the Wife a lump sum of \$350,000. Mr Hill purported that this lump sum allows Wife's needs to be met and takes into account the special contribution the Husband has put into the value of the FMH. He based this calculation by dividing the difference between the parties' assets in two which he set out as follows:

<u>Husband</u>	
FMH	\$1,296,388 ⁵
Pension	\$61,000
Businesses	<u>\$75,000</u>
<i>Total:</i>	\$1,432,000

<u>Wife</u>	
St David's Property	\$65,000
Education Savings	\$170,000 ⁶
Pension	\$400,000
Personal Savings	<u>\$15,000</u>
<i>Total:</i>	\$650,000

Difference in parties' value of assets:	\$782,388
Divided by 2 =	<u>\$391,194</u>

⁵ Whilst Mr Hill used \$1,400,000 as the value for his calculations presented in the hearing, I have put the net value which represents its true market value.

⁶ Mr Hill incorrectly stated this figure to be \$200,000 during his submissions, so I have corrected this figure in accordance with the evidence.

89. The above calculation does not support the \$350,000 lump sum payment proposed to be payable to the Wife, but I am unclear based on Mr Hill's submissions as to why there would be a difference.

APPLYING THE FACTS TO THE LAW

Discovery and adverse inferences

90. During the course of the substantive hearing, Mr Hill attempted to argue that some documents which had been ordered to be disclosed in relation to the Businesses were not discoverable and the Court had no jurisdiction to require the Husband to produce the documents. In my Ruling of 13 May 2022 (**Ruling**)⁷ in relation to the Husband's Recusal Application, I set out a detailed chronology of the procedural history of this Application, particularly as it relates to requests made of the Husband for financial disclosure under Rule 77 (4) of the MCR and his non-compliance of the same. The said chronology can be found in paragraphs 16 to 32; however, I draw particular attention to paragraphs 23 to 26:

“23. As it related to the mention to address outstanding matters regarding Rule 77(4) requests and responses, I heard further from both Mrs Marshall and Mr Hill. Mrs Marshall confirmed that the Respondent had yet to comply with providing his Rule 77(4) Responses in accordance with the June 2021 Consent Order. When Mr Hill was asked why the Respondent had not complied he said, “I am not sure and would have to look into it” and proposed for the responses to be provided by end of week. Given the insufficient explanation for the Respondent's noncompliance provided by Mr Hill, he was asked again to provide the same. Mr Hill's responses were: “I will look into where they went”; “I don't know the answer, but they have been drawn up”. Therefore, I ordered for them to be produced by close of business on 29 June 2021 (**the June 2021 Order**).

24. Counsel next appeared before me on 27 July 2021 (**the July 2021 Order**) at which time Mrs Dismont (holding for Mrs Marshall) advised the Respondent had still not provided his Rule 77(4) Request responses and also had failed to produce the original of the Declaration of Trust and Reconveyance in accordance with the June 2021 Order. As a direct result of the Respondent's continual noncompliance of the orders to provide his responses to the Petitioner's Rule 77(4) Requests, Mrs

⁷ S v S [2022] SC (Bda) 31 Div (5 May 2022)

Dismont submitted the best course of action was to list a preliminary hearing with the Respondent to attend for cross examination. Mr Hill confirmed he had no objection.

25. Additionally, at this appearance, Mr Hill alleged that he had actually provided the Respondent's Rule 77(4) Request Responses via hard copy to Marshall Diel & Myers Limited (**MDM**) on two occasions by his administrator. I asked Mr Hill if he had any correspondence or likewise to support this, but he was not able to do so. Mr Hill further contended that the original of Declaration of Trust and Reconveyance was with the Land Registry and not the Respondent which is why it had not been produced. I reminded Mr Hill that the evidence provided by Ms Dill in her examination on 29 June 2021 was clear that she had provided the original of the Declaration of Trust and Reconveyance to the Respondent. Mrs Dismont also confirmed that other documents requested of the Respondent had not been provided (as set out in MDM's letter of 4 June 2021, a copy of which was provided to the Court and Mr Hill at this appearance). Mr Hill's response was "I didn't know there were other documents". Mrs Dismont proposed that such documents be provided three days prior to the preliminary hearing. Mr Hill made no objection to this provision and when asked if there was anything further to address no objection was provided by Mr Hill.

26. Paragraphs 1 and 3 of the July 2021 Order (**the July 2021 Order**) are as follows:

"1. This matter shall be listed for a preliminary hearing before the Registrar to deal with the Respondent's financial disclosure pursuant to Rule 77(4) of the Matrimonial Causes Rules 1974 ("the Preliminary Hearing"). The estimated length of the hearing is one day and the Respondent shall be in attendance to be cross-examined.

...

3. The Respondent shall produce the documents requested by Marshall Diel & Myers Limited in their letter dated 4 June 2021, a copy of which is annexed hereto and marked "Exhibit A". Such documents shall be served upon counsel for the Petitioner, copying in the Supreme Court Registry, 3 days prior to the Preliminary Hearing."

91. Exhibit A of the July 2021 Order set out all of the financial disclosure being requested by the Wife. As it relates to the Businesses, the following was ordered to be produced by the Husband:

"7. Please have your client provide financial statements for the last three years 2018, 2019 and 2020 for [F Ltd] together with a copy of the Government contracts which [F Ltd] has.

8. *As noted in our client's 2nd Affidavit, it is her understanding that your client owns a company known to her only as [A Ltd], which is a holding company that owns the following companies:-*
- i. *Perform to Learn Nursery;*
 - ii. *License for telecommunication;*
 - iii. *Livenet;*
 - iv. *[N Ltd]; and*
 - v. *It may also hold [I Ltd]. ICS may however be owned by your client personally with Dion Tucker. We understand that Dion purchased the company upfront and your client was to pay him back his share which was evidenced by a Promissory Note. Please have your client produce a copy of any Promissory Note entered into with Dion Tuckers together with details in relation to this company and what his interest is therein.*
10. *Please also have your client provide disclosure in relation to the above companies including but not limited to the following:*
- i. *Incorporation documents;*
 - ii. *details of his shareholdings therein;*
 - iii. *a schedule of the companies' assets and the financial statements for the companies for the last three years; and*
 - iv. *documentary proof of all income/dividends and other emoluments received by the Respondent from these companies over the last three years."*
92. The relevant chronology continued in the Ruling from paragraphs 27 through 32 as follows:

"27. On 5 November 2021, a Notice of Hearing was issued listing the preliminary hearing for 23 November 2021 at 9:30 a.m. (the Preliminary Hearing). On 23 November 2021, Counsel for the parties appeared; however, the Respondent failed to attend despite his requirement to attend with in accordance with the July 2021 Order. On this occasion, Mr Hill submitted he had not been able to contact the Respondent so he did not have notice of the hearing. Mrs Marshall strongly opposed this position, not only because as attorney of record service upon Mr Hill is deemed to have been served on the Respondent, but also as she submitted it was unbelievable the Respondent, given his profession as an IT specialist, was unable to be contacted via email, text or telephone by Mr Hill. Given the Respondent's non-appearance, the Court was left with little choice by to adjourn the matter to 30 November 2021.

28. Due to my unexpected availability on 30 November 2021, the Preliminary Hearing had to be administratively delisted. Relisting dates were canvassed for 9 or 10 December 2022; however, Mr Hill was unavailable. The matter was listed by the Acting Registrar, Mrs Cratonia Thompson, based on Counsel's availability on 13 January 2022 at 9:30 a.m. This listing date was communicated to Counsel via email correspondence from the Acting Registrar on 10 December 2021 at 11:16 a.m. Mr Hill subsequently sent emails to the court on both 30 December 2021 and 4 January 2022 wherein it appeared he was making an adjournment request in relation to the Preliminary Hearing listed for 13 January 2022. The Acting Registrar responded on 7 January 2022 at 9:53 a.m. as follows:

"Good day Mr Hill,

We write in reference to your correspondence below.

Please note that in the absence of an agreement from the opposing party to adjourn, you are required to make the necessary adjournment application (i.e. by summons with supporting affidavit).

Kindly note the attached Circular.⁸"

29. On 11 January 2022 at 3:24 p.m., Mr Hill wrote to the court "with an update on my Covid status and that of my client". The correspondence ended with:

"I am not making a formal application for an adjournment I am merely writing to inform the Court of the position and in particular seek guidance on my own personal status and my potential position as a persona non grata or as the Germans might put it *Wiedereintritt Verboten*. They have such a way in telling you what you can't do.

I await further guidance." [Emphasis added]

30. It is unclear what "guidance" Mr Hill was seeking and in my view, there was no need for any response to be provided to Mr Hill other than what he had already been advised of by the Acting Registrar on 7 January 2022.

31. It is accepted that there was some confusion on 13 January 2022 as to whether the hearing would be held remotely or in person at the Commercial Courts; however, Mr Hill was provided with the required Zoom details to participate in the said hearing, yet he failed to appear. Mr Hill suggested in the hearing of the Recusal Application that he was sitting in this "very court" (Court #1 of the Civil/Commercial Courts) and was waiting for the matter to proceed, but no one

⁸ Circular No. 7 of 2007 setting out the practice directions for adjournments was the Circular attached to this correspondence.

showed up. This is quite frankly beyond belief. I hosted the remote hearing via Zoom from my Chambers located in the Civil/Commercial Courts in the Government Administration Building. At no point was I advised Mr Hill attended Court in person and at no time did Mr Hill write to the Court after being provided with the remote hearing details that he had mistakenly appeared in person. Zero correspondence was sent by Mr Hill either by email or otherwise on 13 January 2022 or thereafter.

32. Having accepted both Mr Hill and the Respondent (who was served personally with the Notice of Motion which had been re-dated and was returnable on 13 January 2022 at 9:30 a.m. as evidenced by the Affidavit of Service of Evernell Davis filed on 6 January 2022) had notice of the Preliminary Hearing, I proceeded in their absence. On this occasion it should be noted that I was sitting as an Assistant Justice and not the Registrar as the Notice of Motion had also been listed this day.”

93. Paragraphs 36 and 37 of the Ruling addressed further points where Mr Hill attempted to submit he had challenged the disclosure of the Businesses documents:

“36. Furthermore, it was alleged that as the Registrar, I “made three important decision concerning the disclosure of documents” which the Respondent did not believe he can disclose. In the Respondent’s Second Affidavit at paragraphs 8 and 9 as well as in the submissions made by Mr Hill, it is being alleged that Mr Hill raised the issue of the Court’s jurisdiction to disclose certain documents (the original Declaration of Trust and Reconveyance, the Respondent’s deceased’s mother’s Will, and business accounts) and that in the capacity as Registrar I made findings regarding this jurisdictional point. Paragraphs 8 and 9 state as follows:

“8. To be clear the Petitioner has sought disclosure of the three documents or classes of document referred to above in separate application. Upon the making of the application my Counsel has indicated that he objects to disclosure. He has attempted to make good that submission only to be interrupted and to have the order made against me without proper consideration on the true legal position.

9. Since the making of the order I have elected not to disclose the documents that are the object of the Registrar’s Orders. Accordingly, the Petitioner has served two separate applications for contempt of court and as a result of my failure to attend the contempt of court motions has sought and been granted leave to have me committed. The judge sitting and that granted such leave was the Registrar of the Supreme Court who made the disclosure orders complained of.

Those two applications are to be heard simultaneous with the substantive applications by the same judge.”

37. *During Mr Hill’s continued to strenuously aver that when he appeared before me sitting as Registrar, that he made objections and arguments as to why certain documents should not be disclosed. I advised Mr Hill that I was very clear of my recollection of the appearances before me and that on those occasions Mr Hill appeared, no such objections were made. This was not accepted by Mr Hill which necessitated excruciatingly arduous task of detailing the history of the appearances before me sitting as the Registrar.”*

94. Relevant findings in the Ruling:

- “51. Moreover, I asked Mr Hill to take me to the specific orders where he says I made the determinations regarding the disclosure of documents and he was unable to do so. He ultimately said the application was in relation to all orders I made as the Registrar. I reiterated when Mr Hill’s raised this point in his submissions, that at no time during any of the preliminary appearances before me as the Registrar did he ask me to make a determination as to ability of the Court to order that the Respondent disclose those documents. Having completed the arduous task of thoroughly reviewing all of my hearing notes as well as listening to excerpts of the CourtSmart recordings, I was even more confident that my recollection was in fact correct. I particularly refer to paragraphs 23, 24 and 25 above which need no further explanation; as is the case with the entirety of my detailed chronologies. I made no determination that Mr Hill relies on that I should now be reviewing in my capacity as an Assistant Justice.

52. *A matter of great significance, is that at no time has the Respondent filed an appeal against any of my decisions sitting as the Registrar. I reject any proposition that a Judge has the authority to go behind the order of the Registrar on the hearing of a substantive application where no appeals have ever been made at any point (even outside of the statutory timeframe). I reiterate that Mr Hill was specifically asked to provide authorities which he says support his position, but was unable to do so. Mr Hill’s response was merely there are “hundreds of authorities” and he could not produce one at that time as he did not believe he would have to address this point.*

53. *When I exercised my judicial capacity given to me as the Registrar under the Rules, on occasions where neither the Respondent nor Mr Hill appeared, I satisfied myself that they had notice of the same. The Section 41 Application and Substantive Application cannot be used as a conduit to effectively appeal orders which have been made many months and up to almost twelve months ago. This is not an opportunity for Mr Hill to litigate issues which are res judicata.”*

95. Despite my findings in the Ruling that Mr Hill at no time during the Rule 77(4) investigation leading up to the listing of this matter contested the Court’s jurisdiction to provide the Business’ documents in Mrs Marshall’s letter of 4 June 2021, I emphasized when Mr Hill made these submissions, and I do so again, that even if Mr Hill had challenged this point previously, I would not and do not find in the Husband’s favour.
96. Mrs Marshall’s cross-examination of the Husband was deliberate and discernible in having the Husband confirm that for all of the Businesses he is a shareholder that the Businesses held AGMs and at the AGMs company accounts were produced which the Husband accepted he obtained being a shareholder of each company. The Husband went even further in his *viva voce* evidence confirming he could simply return to his offices to obtain the accounting documents are were ordered to be produced. At no time when the Husband was giving this *viva voce* evidence regarding him having the documents of the Businesses being in his “custody, power and/or possession” did Mr Hill raise any objections regarding the admissibility of this evidence. Moreover, the Husband confirmed his ability to produce them swiftly by attending his office during an adjournment and bringing them back to the Court at the recommencement of the hearing.
97. There was no dispute between Counsel regarding the law requiring that disclosure is only applicable where a document is in the individual’s custody, possession or power as defined in *B v B* at set out in paragraph 62 above.
98. Nonetheless, Mr Hill was unrelenting in his submissions relying on the definitions set out in *B v B* at paragraph D of page 186 (cited above) which he attempted to contend that the legal principles of disclosure not being applicable to this case as *B v B* related to a director of the company and the Husband in this matter is not a director of the Businesses.
99. I rejected Mr Hill’s submissions as I accepted the documents which were ordered to be produced by the Husband in relation to the Businesses were documents which were/are in his possession, custody and power.

Findings Regarding Income, Expenses and Assets

100. Where the Husband's evidence conflicted with the Wife, I preferred that of the Wife's. The demeanor of the Husband throughout these proceedings, particularly as it related to the supposed inaccuracies of his sworn Affidavit evidence as well as his continual deflection and evasiveness of the answering of questions throughout his cross-examination made his evidence ambiguous and unreliable. On numerous occasions, without the interjection of his Counsel, the Husband stated "*I do not see how that is relevant*" and had to be directed that it was not a matter for him to determine the relevancy of a question unless an objection was raised by his Counsel. The Husband had to continually be directed to answer Mrs Marshall's questions. In comparison, whilst the Wife was giving evidence, she was composed, frank and unequivocal in her answers which were supported by the evidence presented in her affidavit evidence.
101. Moreover, the Husband's failure to comply with numerous orders for financial disclosure and production of documents (some of which to date he has yet to file with the court), cannot be overlooked. His non-compliance which continued throughout the hearing only heightened my skepticism of the truthfulness of his evidence. Therefore, where the Husband's and Wife's evidence is at odds, I prefer that of the Wife's.
102. As it relates to the FMH, I have absolutely no doubt it can be defined as nothing other than matrimonial property. The case law relied on by the Husband's attorneys of *P v P* was simply outdated with the current principles regarding the division of matrimonial assets and overall was not a case where any comparisons can be drawn. Whilst the Husband may have emotional attachment to the FMH, this is not enough to deny the Wife's entitlement to a claim against it.
103. I also reject the Husband's assertion that he made a special contribution towards the FMH which would result in him obtaining a greater share of that asset compared to the Wife. The principles set out in *Gray v Work* in order to determine the Husband made a special contribution, it must be shown that the contribution is wholly exceptional in nature and that the contribution is unmet by the other party. I accept the FMH had little to no value at the time the parties refinanced the FMH and as such all of the equity in the FMH was

created during the marriage. I find both parties contributed to development of the FMH. The Wife by her financial contributions to the renovations of almost \$250,000, by the general upkeep of the FMH and caring for the children of the family as well as being the main contributor towards the household expenses (and the sole contributor for the private education fees for C and D). Not only were the parties' contributions matched as it relates to the FMH, it could be argued the Wife's contributions were greater based not only on her financial contributions but also due to her contributions in the caring of the household and the children of the family. I find no reason to divert from an equitable distribution in the value of the FMH.

104. The Wife has a far greater pension than the Husband; however, the Husband made an active choice to not contribute to his pension as it is required by law and the Wife should not be penalized for this.

105. The fund that the parties established during the marriage for the education of D was liquidated by the Wife in order for her to purchase a property post-separation which amount to \$170,000. I do not accept that these are savings which are available to the Wife. It was clear that the intent during the marriage was to set up the fund in order to be prepared to pay for D's tertiary education and now that it is simply been put into a different form, does not remove this intent. Whilst these funds are a matrimonial asset, they are to remain earmarked to pay for D's tertiary education and as such should not be considered in the distribution between the parties.

106. The Wife's Property is not a matrimonial asset and will not be taken into consideration for distribution as it was purchased following the divorce and no funds were used which were derived from or created during the marriage.

107. As it relation to the Husband's Property, I accept this is also not a matrimonial asset which should be considered for distribution; however, it should be considered a financial resource of the Husband.

108. The value of the Businesses I accept as they have been presented by the Wife as being \$377,652 (see paragraph 71 above). As previously stated, given the Husband's

evasiveness in producing these documents over the period of almost one year and his attorney making arguments which were not put to the parties in cross-examination during the hearing particularly regarding their value, it would be tremendously unfair to accept the Husband purported value as being \$75,000. Given the evidence the Husband produced during cross-examination and his continues refusal to provide full and frank financial disclosure I must draw adverse inferences. I am certain that the value of the Businesses far exceeds \$75,000 and are at the very minimum \$377,652. Similarly, it was impossible for the Husband to produce reliable evidence of his income even after producing the accounts for the Businesses. Therefore, it is difficult to accept what he says is his monthly income.

109. As it relates to the Husband's expenses, there were many inconsistencies. Expenses which were improperly on his monthly expense list were conceded during his cross-examination. Moreover, when the Husband was questioned regarding how much he was sending to his girlfriend in relation to the payments for the children he had outside of the marriage, he was unable to given a definitive answer. His bank statements showed several payments to the girlfriend over and above \$2,800 per month. The Husband's bank statements also showed at least two occasions where he paid thousands of dollars in which he very reluctantly admitted were payments to lawyers in Arizona. He refused to be fully transparent regarding what the nature of his business with the lawyers was, but admitted approximately \$4,500 was to pay for legal fees for his girlfriend and another approximate \$7,500 was used for business advise in Arizona. It is difficult to accept the Husband's position that he has no savings due to his apparent financial investment in the FMH when he is able to make significant payments such as these.

110. I have no reason to doubt the evidence produced by the Wife as it relates to her income. Additionally, the Wife was not challenged as to her expenses and I accept these are accurate and reasonable.

CONCLUSION

111. I have taken into consideration all of the factors which are set out in Section 29 of the MCA as well as the principles set out in the case law and applied those principles to my findings set out above.
112. I accept the needs of the parties have been met by the assets they hold in their sole names as set out in paragraph 71 above as well as it relates to my findings regarding their respective income and expenses. As such, the only asset for distribution is the FMH based on the sharing principle. I grant the Property Adjustment sought by the Wife in relation to the FMH. The cost of the conveyance shall be borne equally between the parties. In the event the Husband refuses to sign the conveyance within seven days of being asked to do so, the Registrar of the Supreme Court shall have the power to sign the said conveyance in his stead.
113. The parties shall each be entitled to an equal portion of the net value of the FMH, the lump sum of \$122,000 being deducted from the Husband's portion which represents the agreed payment of \$2,000 in child maintenance for D until she completes her high school education. Any orders for costs made in favour of the Wife shall also be deducted from his share of the net value of the FMH.
114. The \$170,000 fund held by the Wife for D's tertiary education shall be utilized for this purpose only. In the event that D does not pursue tertiary education, the sum of \$170,000 shall be divided equally between the parties. Any contributions the Wife continues to make on a monthly basis to increase these funds shall not be considered for division.
115. All other assets held in the parties' names shall remain his and hers absolutely without any claim from the other.
116. In relation to costs, the Husband's cross-examination was painstakingly protracted as a direct result of the Husband failing to comply with the numerous Court orders to provide financial disclosure. For example, the Husband was asked specific questions in MDM's

letter of 4 June 2021 regarding some of the deposits and withdrawals evidenced in bank statements which he exhibited to his Affidavit. These questions spanned over four pages in MDM's letter and the Husband had to be taken through these which required follow-up questions based on the answers provided.

117. Furthermore, as none of the Businesses' documents ordered to be disclosed had been provided prior to the hearing, further orders and directions were given for the Husband to produce these during the midst of his cross-examination. Even then, despite clear direction from the Court to produce financial documents, the documents were provided piece-meal which required cross-examination to be suspended in relation to a specific issue until such time as the documents were produced.

118. Given the Husband's continual changing of his position as it related to the location of the original deeds to the FMH, the original Reconveyance and Declaration of Trust as well as his bank statements, the Wife's attorneys were forced issue a Writ of Subpoena *Ducus Tecum* for a representative from HSBC to attend the hearing. This resulted in the Husband having to be cross-examined on the newly produced bank statements as it was the first time they had been provided to the Wife despite numerous orders for the production of these documents.

119. The continual submissions from Mr Hill regarding inaccuracies of findings I made in the case management hearings such as those relating to the disclosure of documents is yet another reason the hearing of this matter was unnecessarily and unreasonably drawn-out.

120. Mr Hill argued that costs in relating to this Application should be no order as to costs. He submitted that there was no prejudice caused by the failure of the Husband to provide adequate financial disclosure, "if that's what happened". He further submitted that the Husband "has done nothing wrong in this substantive application" as all the delays were dealt with in the costs orders against the Husband in the Section 41 Application as well as all other interlocutory applications.

121. In all of the circumstances, I will award costs to the Wife on an indemnity basis.

23 December 2022



ALEXANDRA DOMINGUES

ASSISTANT JUSTICE OF THE SUPREME COURT