EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHMT 2014/0006
BETWEEN:

FITZGERALD GEORGE

Claimant

And

BURNETTE BARRY-GEORGE

Defendant

Appearances: Ms. Ruth-Ann Richards and Ms. Stacy Abel, Counsel for the Claimant
Ms. Anthea Smith, Counsel for the Defendant

2018: January 5

JUDGMENT

[1] **Ellis J.:** On 12th January 2015, the Petitioner/Applicant filed an Application for Ancillary Relief stemming from divorce proceedings which concluded on 19th September 2014 (The Application). The Applicant seeks:

i. A declaration/order that he has a legal and beneficial interest of 70% or greater in the Property located at Mount Sage and registered in the Land Registry as Block 2234B Parcel 266 (**the Mount Sage Property**).

ii. An order that he receive a portion of the proceeds of the income generated by the rented apartments erected on the Mount Sage Property.

iii. A declaration/order that the Property described a Lot 26 situate in New Enhams Village in the parish of Charlotte in the state of St. Vincent (**the St. Vincent Property**) be declared his sole property to be excluded from the matrimonial settlement.

iv. A declaration/order that he has a legal and beneficial interest of 60% or greater in the steel bending business "**B & G Construction**".

v. An order that the Respondent be compensated for her interest in the company, B & G Construction and that thereafter, the business be transferred totally to him.

vi. A declaration/order that he has a legal and beneficial interest of 50% in the motor vehicle bearing registration No. 1293 (**the Vehicle**).

vii. An order that he be compensated for his interest in the vehicle and thereafter that the vehicle he transferred to the Respondent.

viii. Costs

ix. Such further and other relief that the Court deems just.

[2] Although this Application is framed as an application for ancillary relief, it is by no means a straight forward one. During the course of the trial, it became clear that the major source of the contention between the Parties stemmed from the validity of an alleged agreement in which the Parties purported to deal with their interest in the matrimonial home. The Court is therefore compelled to first consider this issue as it may well be determinative of the claim made in respect of the Mount Sage Property.

The Mount Sage Property

[3] On 30th April 1985, the Respondent purchased two parcels of land situate at Mount Sage and registered in the Land Registry as Block 2234B Parcels 144 and 145. These parcels were later amalgamated to create a single Parcel 266.

[4] The Parties met in or about 1994. Prior to their marriage the Respondent obtained a loan of $35,000.00 from the Chase Manhattan Bank to construct the ground floor of the building on Parcel 266. She asserts that she paid the monthly installments on this loan solely, but she concedes that the Applicant contributed to the construction of the ground floor through his labour.

[5] After the ground floor was completed, the Parties took up occupation and lived together. They later married on 7th December 1996.

[6] In 1997, the Parties obtained a loan from the Chase Manhattan Bank in the sum of $110,000.00 in order to complete the second floor of the house. The Respondent contends that the loan proceeds

paid for all the materials and labour costs associated with the building. She asserts that with the assistance of the rents received from the leased apartments which were constructed, she solely paid the loan payments as well as the insurance and maintenance expenses associated with the house.

[7] The Respondent contends that as a result of leaks in the living room and bathroom of the house, she refinanced that loan to construct a third floor secured by a further charge over Parcel 266. The Parties jointly obtained a loan in the sum of $495,000.00. Again, the Respondent asserts that with the assistance of the rents received from the leased apartments which were constructed, she solely paid the loan payments. The third floor was completed in 2008.

[8] In 2009, the Respondent began to default on the loan payments. She contends that rental income was not being collected from the apartments and so she was not able to meet the loan payments. She states that she was forced to rely on her sister, Prudence Mathavious. The Respondent alleges that in 2009, Prudence loaned her $18,500.00 to assist with loan payments. In 2011, Prudence again loaned the Respondent a further sum of $28,162.56 to assist with loan payments and in 2012, she loaned the Respondent a further sum of $18, 530.72.

[9] The Respondent contends that the Applicant made no payments in relation to any of the loans and did nothing to assist in any effort to cure the default in the loan payments.

[10] The Respondent states that in 2012, she approached the Bank with a view to curing the default. However, the Bank refused to refinance the debt because of the previous poor payment record and because of her low earning capacity. According to the Respondent, the Bank suggested adding a new borrower, transferring the Mount Sage property into the name of that borrower and obtaining a waiver of the Applicant's interest in the property.

[11] In paragraphs 81 of her Affidavit, Respondent recounts the details of how this agreement was reached with the Applicant. The Respondent says that when she approached the Applicant with the Bank's proposal, the Applicant was very upset that Prudence was going to be involved. He told

them to give him $75,000.00 to buy him out so he could just go. According to the Respondent, the Applicant also indicated that he would seek the dissolution of the marriage.

[12] The Applicant contends that on the basis of this conversation, an oral agreement was formed in which *inter alia* the Applicant agreed to relinquish his interest in the Mount Sage Property and vacate the same in consideration of the sum of $75,000.00 (the Agreement). It was also agreed that the Applicant's name and obligations would be removed from the mortgage and the loan would be refinanced in favour of the Respondent and her sister, Prudence.

[13] In the wake of this purported agreement, the Respondent recounts that:

> *"When the Bank was ready to complete the refinancing they contacted me. This was early December 2012. The Bank instructed me that the Applicant had to go to the office of O'Neal and Webster to see a lawyers in relations to the Waiver documents that they required him to sign in relation to the refinancing. I told the Applicant that Prudence and I has gotten through with the refinancing and informed him of what the bank had told me and the documents he was required to sign. The Bank had instructed that we needed to go to the O'Neal and Webster law office. One day in early December 2012 on the day arranged by the Bank the Applicant and I made plans to handle his part of the process. At the time, the Applicant was working with Ed De Castro and he did leave work to go with me to O'Neal and Webster law office.*
>
> *We arrived at the office and waited to be dealt with. When they came and said they were ready for us, I got up to go in to the office with him and I was told that it was only him they wanted to see.*
>
> *The Applicant was not tricked. The Applicant knew of the refinancing between Prudence and I, as we had informed him. His only request was to be paid $75,000.00"*

[14] The Respondent asserts that the terms of the Agreement are later evidenced and confirmed by:

i. The fact that of the removal of the Applicant's name from the loan.
ii. The fact of the transfer of the loan into the names of the Respondent and Prudence.
iii. The demand by the Applicant for the payment of $75,000.00 in a letter from Farara Kerins (the then legal practitioners of the Applicant) to the Respondent on 1st November 2013.

[15] She complains that although the Applicant is aware that the sum of $75,000.00 has been available since January 2014, he now denies the existence of the Agreement and refuses to accept the payment or vacate the Property.

[16] Counsel for the Respondent submitted that the Court should reject the Applicant's claims for relief in respect of the Mount Sage Property and should instead order specific performance of the Agreement. She argued that the Agreement involves a disposition which once all the terms are satisfied confers an immediate and absolute interest in Parcel 266 in favour of the Respondent and her sister. She further submitted that under section 25 (1) (c) of the **Matrimonial Proceedings and Property Act** and pursuant to **Faiza ben Hashem v Abdulhadi Ali Shayif**[1], the agreement is not a settlement which can be varied by the Court.

[17] Counsel further argued that disregarding the agreement would affect the interest of a third party who, has as a result of the agreement, now incurred obligations on a substantial loan.

[18] Not surprisingly, the Applicant advanced a very different view of the facts. He contends that there is no subsisting or binding agreement between himself and the Respondent concerning the title to the Mount Sage Property.

[19] First, he asserts that from early on in their relationship, he made it known to the Respondent that he was functionally illiterate. Although he is able to sign his name, reading documents is a challenge and he requires assistance. According to the Applicant, he relied on and trusted the Respondent in relation to the preparation, reading and vetting all documentation. He asserts that by reason of the trust and confidence which he placed in the Respondent, he never had cause to question any instruction that she gave him concerning any document.

[20] In his written evidence, the Applicant stated that he was led to believe that the document which he signed was intended to refinance the loan which he and the Respondent had secured. It now turns out that the document was a Certificate of Independent Legal Advice, prepared in anticipation of executing a waiver.

[21] Counsel for the Applicant further submitted that the refinancing document which the Applicant was led to believe that he was signing was fundamentally different from what he was being invited to sign not just in respect to the purported effect of the document but the identity of the beneficiary. In

[1] [2008] EWHC 2380

the premises, she submitted that the Applicant could not be said to have acted negligently and so the certificate of independent legal advice is void.

[22] Alternatively, Counsel submitted that in any event the Applicant did not execute the waiver as per the Bank's indication. Counsel relied on the emailed correspondence from Harney's dated 7th November 2013 to Mr. Miller of Farara Kerins in which it is indicated that *"it appears that although Mr. George took advice in anticipation of executing the Waiver, he never actually signed the Waiver….the Bank is desirous of having Mr. George follow through and sign the Waiver in light of the fact that payment was made to O'Neal Webster for their services in advising Mr. George and his previously agreeing to sign the Waiver after having received such independent legal advice. I should be grateful therefore if you would take instructions from Mr. George as to whether or not he is prepared to sign the Waiver at this stage*."

[23] Counsel for the Applicant submitted that the Certificate of Independent Legal Advice which the Respondent executed in 2013 is void or voidable on the grounds of *non est factum* or in the alternative, on the basis of undue influence. By way of a further alternative argument, Counsel submitted that even if the Court should find that this signature is not void, it is clear that the Applicant never executed the Waiver. In the circumstances, she argued that the Applicant did not facilitate the procurement of the loan by the Respondent and her sister or the transfer of the property. The Applicant, instead relied on correspondence dated 22nd January 2014, written on his behalf by Farara Kerins which rejected the Respondent's offer of $75, 000.00. As a result, they say that there is no subsisting agreement concerning the title to the Mount Sage Property.

Is there a binding legal agreement in respect of the Mount Sage Property?

[24] Having heard evidence of the Parties and having reviewed their submissions, the Court has no reservation in concluding that the purported agreement had no legal effect in disposing of the Applicant's interest in the Mount Sage Property.

[25] Ultimately, the Respondent asks this Court to conclude that by oral contract, the Respondent agreed to dispose of or waive his interest in the Mount Sage Property, admittedly a matrimonial

asset, in consideration of the sum of $75,000.00 and in anticipation of the dissolution of the marriage. The Court is unable to draw this conclusion for a number of reasons. First, it is now clear that the laws of this Territory generally prescribe against the enforcement of any oral contract purporting to dispose of an interest in land. Section 4 of the **Conveyancing and Law of Property Act, Cap 220** of the Laws of the Virgin Islands provides that:

> "No action may be brought upon any contract for the sale or other disposition in land or any interest in land, unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing or signed by the party to be charged or by some other person thereunto by him lawfully authorized."

[26] The only written evidence provided to the Court in this case is a document which purports to be a **Certificate of Independent Legal Advice**. Written on the letterhead of the firm O'Neal and Webster, this documents evidences that the Applicant attended before his solicitor, Vanessa King, on 4th December 2012 to be advised on the effect of his executing a "waiver" in respect of the Mount Sage Property which the Respondent and Prudence had agreed to charge as security for a loan in the amount of US$540,000.00. However, it is apparent to the Court that the Applicant may not have personally retained this law firm or paid the legal costs associated with this advice.[2]

[27] The Certificate indicates that the nature of the documents was explained to the Applicant in the context of the loan and he was fully advised as to the liability that the Respondent and Prudence would incur by executing them. He also received advice about the manner in which the waiver could be enforced by the Bank. The Certificate indicates that following this, the Applicant indicated that he fully understood the effect of executing the waiver and he ascribed his signature verifying the truth of these statements.

[28] It is common ground between the Parties that in the wake of this consultation and legal advice, the Applicant choose not to execute the Waiver[3]. Based on the evidence presented by the Respondent, the Court has no reservation in concluding that the purported Waiver bears little resemblance to any agreement which may have been reached between the Parties in regard to the Mount Sage Property.

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[2] Emailed message from Janelle Archer to Menelek Miller dated 1st November 2013
[3] Emailed message from Janelle Archer to Menelek Miller dated 1st November 2013.

[29] The purported Waiver references the intended charge being secured by the Bank and it signifies the Applicant's agreement that the Banks rights and remedies under that charge will rank in priority to such rights and interests that he may have or to which he may become entitled in the Mount Sage Property and any buildings now or hereafter erected thereon or in the proceeds of any sale thereof. It also indicates that he releases and assigns all such rights and interests to the said Bank.

[30] The full text of the Waiver makes it clear that it is intended to protect the interests of the Bank. It states that the Applicant's legal or equitable interest in the Property will not override the Bank's interest. Even if it is conceded that the Applicant fully understood the nature of the document, it is clear that it does not in any way extinguish the legal or equitable interest which the Applicant may have in this Property.

[31] Second, while it could well be argued that the purported agreement was not a contract for sale but rather an verbal compromise agreement to which section 4 of the **Conveyancing and Law of Property Act** would have no application[4] even then the Respondent's case runs into a further road block. While it is always open to Parties to seek to enter into a pre-dissolution (postnuptial) settlement agreement, which will regulate the proprietary issues arising from their union, it is clear that in order to be legally binding, such an agreement must meet prescribed legal standards and will not in any event exclude the jurisdiction of the Court.

[32] Generally, under English common law such postnuptial agreements are not necessarily legally binding. However, recent case law now makes it clear that if such an agreement is entered into voluntarily by both parties, with the benefit of legal advice, full financial disclosure of both parties, and the terms in the agreement are fair and reasonable, then a court may be likely to uphold and enforce the terms. In **NA v MA**[5], Baron J outlined the current legal position in relation to contracts between spouses:

> "It is an accepted fact that an agreement entered into between Husband and Wife does not oust the jurisdiction of this Court. For many years, agreements between spouses were considered void for public policy reasons but this is no longer the case. In fact over the

[4] Nweze v Nwoko, Nweze v Nwoko, [2004] EWCA Civ 379
[5] [2007] 1 FLR 1760

years, pre-nuptial "contracts" have become increasingly common place and are, I accept, much more likely to be accepted by these Courts as governing what should occur between the parties when the prospective marriage comes to an end. That is, of course, subject to the discretion of the Court and the application of a test of fairness/manifest unfairness. **It may well be that Parliament will provide legislation but, until that occurs, current Authority makes it clear that the agreements are not enforceable per se although they can be persuasive (or definitive) depending upon the precise circumstances that lead to their completion.**

13) In ***Edgar v Edgar***[6], as Ormrod LJ, with whose judgment Oliver LJ agreed, said, at 1417C:

> **"To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue."" Emphasis mine**

[33] In **X v X (Y and Z intervening)**[7], Munby J held that an agreement between the parties (after the breakdown of the marriage) was a very important factor in considering what was a just and fair outcome. That case made is clear that a formal agreement, properly and fairly arrived at with independent, competent legal advice, would be upheld by the court unless there were good and substantial grounds for concluding that an injustice would be done by holding the parties to it. A court must, however, have regard to all the circumstances, in particular to the circumstances surrounding the making of the agreement, the extent to which the parties themselves attached importance to it and the extent to which the parties had acted upon it.

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[6] [1980] 1 WLR 1410
[7] [2002] 1 FLR 508

[34] One critical factor which a Court will also consider is the disparity of bargaining power. If this is unavoidable, then manifestly, there must be no exploitation of it by one over the other and certainly no pressure by one party on the other.[8]

[35] In the case at bar, the facts reveal that there was a complete lack of formality in arriving at or concluding this purported agreement. There is no indication that at time of formation, the Parties had reached any consensus on the termination of their marriage. There is also no evidence that the Parties fully disclosed their respective financial positions. It is also clear to the Court that while the Applicant may have been advised as to the legal implications of the proposed refinanced charge and the accompanying waiver, he would not have had the benefit of independent and competent legal advice regarding his interest in the matrimonial home or indeed any of the other matrimonial assets prior to entering into the purported Agreement.

[36] The Court has also taken into account the circumstances in which the purported agreement is said to have been reached. It is clear that the Applicant would have been confronted by the Respondent and her sister and presented with proposal which was not anticipated and which was upsetting to him. His impulsive response to the proposal, coupled with the indication or his intention to end his marriage is indicative of this. The discussion took place at a time when the Parties were living in the same household in an obviously unhappy union. There was no time for careful reflection.

[37] Moreover, the Court is also satisfied that the Applicant would have been well aware of his precarious bargaining position, given the fact that he had no registered interest in the Property which was solely registered in the Respondent's name. In addition, having heard and observed the Parties under oath, the Court has no doubt that this Applicant had limited literacy skills which made him somewhat dependent on the Respondent. In this regard the Respondent's oral testimony that she regularly completed documentation in preparation for the Applicant's signature is compelling.

[38] In arriving at these conclusions, the Court is guided by the reasoning in **NA v MA**. In that case Baron J considered the effect of a post-nuptial agreement drafted by the husband after he

[8] MacLeod v MacLeod [2008] UKPC 64, [2009] 1 All ER 851

discovered his wife had committed adultery with his best friend. He had not provided full disclosure of his assets, and had made clear that the wife must sign or the marriage was at an end. Attendance notes of her solicitors showed she was greatly distressed and signed against advice. The judge found that the wife had been placed under undue influence but held that even if the agreement were not overturned, the court must be satisfied that it was fair. The learned judge held the agreement was not premised on fairness, and it would not be fair even to use its terms as a starting point with which to assess the fairness of any award.

[39] Counsel for the Respondent has placed significant reliance on the letter dated 1st November 2013 from Farara Kerins acting on behalf of the Applicant. This correspondence, directed to the Respondent, demands payment of the sum of $75,000.00 on the basis of an oral contract concluded in 2012 in which he agreed to relinquish his interest in the property in which he was said to have a 50% interest. Counsel submitted that this letter evidences the terms of the agreement which the Respondent contends was reached between the Parties.

[40] While the Court found the Applicant's denials about the conversation between himself and his wife to be unconvincing, in the Court's judgment, this correspondence does little to advance the Applicant's case. First, for the reasons already indicated, the Court is satisfied that this agreement would not meet the legal standard for enforceability. In the Court's judgment, Farara Kerins would clearly have been operating on the basis of instructions provided by an ill-advised client who also incorrectly instructed them that in late 2012, he *"made the necessary arrangements with First Bank in order that the mortgage be transferred from his name to another*." The Court has not been provided with any documentation in which the Applicant legally purported to do so.

[41] Further, the letter makes it clear that the Applicant had been threatened with eviction and had been taunted by the Respondent with the phrase "*we tricked you, we tricked you*." Moreover, it is apparent that after he eventually sought relevant legal advice, the Applicant instructed his attorneys, to pursue his interests under the Matrimonial Proceedings and Property jurisdiction.[9]

[9] Exhibit "FG 13"- letter from Farara Kerins dated 23rd January 2014.

[42] What is clear is that following the consultation between O'Neal Webster and the Applicant in December 2012, and when it was clear that he had not to executed the waiver, the Respondent on 9th January 2013, executed a transfer of the Mount Sage Property, transferring her legal interest to herself and Prudence as joint proprietors in consideration of natural love and affection. This transfer is supported by an Affidavit sworn on 17th December 2007 in which avers that Burnette Barry (her maiden name) and Burnette Barry-George (her married name) are one and the same person.

[43] On 9th January 2013, First Bank wholly discharged the earlier change on the Property created by the Respondent and on the same date, Respondent and Prudence executed a new charge in the amount of $560,000.00. These combined actions evidence an intention on the part of the Respondent to unilaterally treat with property which was clearly a matrimonial asset. In pursuing this most unfortunate course, the Respondent may well have acted to the detriment of third parties but this fact alone would not militate against the Court's recognition of the Applicant's obvious interest in the Mount Sage Property.

[44] Subsequently, over one year later, on 19th January 2014, attorneys on behalf of the Respondent attempted to pay the Applicant the sum of $75,000.00. In a cover letter, the Respondent's attorneys also attached a draft release which was not provided to the Court and which was never executed by the Applicant.

[45] The Court therefore finds that there was no binding agreement regarding the Mount Sage Property. Consequently, in this case, this Court will apply the Law in accordance with the Matrimonial Proceedings and Property Act.

[46] For the avoidance of doubt, the Court finds that the judicial decision in **Faiza ben Hashem** did not assist the Respondent's case. In that case the court was asked to pierce the veil of incorporation of a company to make good the claim that the entire company and its assets are in reality part of the available pool of assets for financial provision. The Court was not required to pronounce on the validity of a post nuptial agreement. Instead, in arriving at his conclusions, the learned judge had to consider whether there was a settlement within the meaning of section 24 (1) (c) of the Matrimonial Causes Act. This required the Court to consider the import of an instrument made in

contemplation of marriage and settling property (including both income and capital) of which the parties to the marriage (or their children) are the beneficiaries. At paragraph 230 of that the **Faiza ben Hashem** case Justice Munby observed:

> "The starting point for any consideration today of section 24 (1) (c) must be the speech of Lord Nicholls of Birkenhead (with whom Lords Keith of Kinkel, Ackner, Lloyd of Berwick and Steyn all agreed) in *Brooks v Brooks*[10]. At page 391 Lord Nicholls said this:
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> > **"The section is concerned with a settlement "made on the parties to the marriage." So, broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children.** Conversely, a disposition which confers an immediate, absolute interest in an item of property does not constitute a settlement of that property. The statutory provision is concerned with an order varying the terms of a settlement. This would not be an altogether apt exercise in relation to property given out-and-out and belonging to one of the parties to the marriage as his or her own absolute property. The context does not require that outright gifts of this nature should fall within the scope of the variation provision. In such a case the appropriate order on the dissolution of the marriage, if an order is needed in respect of the property, is a property transfer or property settlement order.'" Emphasis mine

[47] In the Court's judgment the ratio in that case would have little application in the case at bar.

Division of Matrimonial Assets - Mount Sage Property

[48] In apportioning assets acquired over the course of a marriage, the Court is required to consider the provisions contained in sections 23–26 of the Matrimonial Proceedings and Property Act 1995 (the "Act") so as to produce a fair outcome. The Court is also obliged to take into account the ratios in **White v White**[11] and **Miller v Miler McFarlane v McFarlane**[12] which have clarified the manner in which the Court assesses a fair outcome. The Court is guided by the following observations of Lord Nicholls in **White v White:**

> "Self-evidently, fairness requires the court to take into account all the circumstances of the case. Indeed, the statute so provides. It is also self-evident that the circumstances in which the statutory powers have to be exercised vary widely. As Butler-Sloss LJ said in Dart v Dart[13], the statutory jurisdiction provides for all applications for ancillary financial

[10] [1996] 1 AC 375
[11] [2001] 1 AC 596
[12] [2006] 1 FLR 1186
[13] [1996] 2 FLR 286, 303

relief, from the poverty stricken to the multi-millionaire. But there is one principle of universal application which can be stated with confidence. In seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles. Typically, a husband and wife share the activities of earning money, running their home and caring for their children. Traditionally, the husband earned the money, and the wife looked after the home and the children. This traditional division of labour is no longer the order of the day. Frequently both parents work. Sometimes it is the wife who is the money-earner, and the husband runs the home and cares for the children during the day. But whatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering para (f), relating to the parties' contributions. This is implicit in the very language of para (f): '… the contribution which each has made or is likely … to make to the welfare of the family, including any contribution by looking after the home or caring for the family'. If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and the child-carer."

"A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination".

[49] Section 26 of the Act provides that the court must consider the following:-

i. 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;
ii. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future,
iii. the standard of living enjoyed by the family before the breakdown of the marriage,
iv. the age of each party to the marriage and the duration of the marriage,
v. the physical or mental disability of either of the parties to the marriage,
vi. contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home,
vii. any order made under section 49
viii. the value to either of the parties to the marriage, of any benefit (for example, a pension) which, by reason of the dissolution of the marriage, that party will lose the chance of acquiring.

[50] Further, the court is required to have regard to all the circumstances of the case to exercise its powers so as to place the parties, so far as 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 party had properly discharged his or her financial obligations and responsibilities towards the other.

The age of each party to the marriage and the duration of the marriage

[51] As at the date of her affidavit in 2016, the Respondent was 63 years. From her evidence the Applicant is five years her senior. They are therefore both senior citizens. The Parties were married on 7th December 1996 but it appears that they cohabited prior to that. The Parties obtained a decree of divorce on 19th September 2014. The Parties were therefore married for a relatively significant period of 18 years.

The physical or mental disability of either of the parties to the marriage

[52] There is no evidence that the Parties suffer from any physical or mental disability.

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

[53] The Respondent's affidavit evidence discloses that she is employed as an incorporation clerk at AMS Financial Services where she earns a net monthly salary of $1683.51. She avers that this is the highest monthly salary she has ever been paid during her lifetime. She has been employed with this Company for the past 17 years. However it was only in oral testimony before this Court that the Respondent disclosed that at some point she was also employed in "side jobs" as a waitress (earning $300.00 per week) and office cleaner (earning ($200.00 per month).

[54] The matrimonial home consists of a number of rental units which generate a monthly rental income from the Property of no less than $2850.00 with a potential for $4350.00.

[55] As at the date of his evidence, the Applicant was 69 years old and still employed in the construction industry. In his affidavit evidence, he did not provide any firm details of his monthly earnings but in oral testimony before the Court, he testified that he is a mason by trade and that he also does a bit of steel work. He told the Court that he has worked at various places in the BVI earning on average $130 per day. According to the Applicant, he was scarcely out of work having been employed at Long Bay Hotel for a period of 2 years where he earned $130 - $140 per day and at the Administration Building on similar terms.

[56] In addition although he averred that he is in receipt of a monthly pension the exact amount of which is undisclosed.

[57] The Applicant also has legal title in the real property in St. Vincent and the Grenadines (the St. Vincent Property). This property is also potentially income generating but the Court was provided with no relevant details or estimates.

[58] The Parties jointly own B & G Construction, a once profitable steel bending and construction business which commenced operations in 2006. The Parties failed to disclose any financial statements relative to this jointly owned business. The contention is that this was a cash based operation with minimal record keeping. However, the Applicant made it clear that the business operated a bank account but the Court was not provided with the relevant bank records.

[59] The Parties lack of full and frank disclosure is of concern to the Court. Parties in ancillary relief proceedings are obliged to ensure that they place the Court in a position to properly exercise its discretion under section 25 of the Act. Where as in this case, a party has failed to do so, the Court is empowered to draw inferences which are adverse to him/her.

[60] In the case at bar, the Court was satisfied that neither Party had been entirely upfront with the Court but this was much more obvious in the case of the Applicant who failed to provide appropriate documentary evidence to support his financial standing.

The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future

[61] The Applicant contends that his monthly expenses include:

i. $300.00 in credit for his phone

ii. $200.00 for gas

iii. $140.00 per month for laundry

iv. Electricity bills for the Ground Floor of the matrimonial home and the steel bending business. The amount is undisclosed.

v. An undisclosed amount for food.

vi. Approximately $800.00 - $1000.00 in maintenance for the children in St. Vincent.

vii. Rental for the building which houses the steel bending business. This sum is undisclosed.

[62] The Court notes that no supporting evidence was presented to prove these expenses.

[63] With regard to the Respondent, her monthly expenses include the mortgage loan payments in the amount of $3668.01; life insurance premium - $547.49; telephone - $60.00; food - $450.00; and personal grooming - $250.00. She also claimed that she paid the annual taxes on the Property.

The standard of living enjoyed by the family before the breakdown of the marriage and contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home

[64] According to the Respondent, for several years and up to the present time, she has relied on her family to make ends meet because from very early in the marriage, the Applicant contributed very little to the household expenses. This situation became dire when the rental income generated by the Mount Sage Property was significantly reduced after 2009. This assertion was corroborated by the unchallenged evidence of her sister, Prudence Mathavious.

[65] She avers that all of her life savings were consumed in maintaining the mortgage payments. She further stated that save for the electricity and gas bill, the Applicant made no contribution to the household expenses. She stated that while he has contributed about $200.00 to the Christmas shopping, he has not contributed to the weekly food bill.

[66] The Respondent asserts that as a result of his non-contribution to the household and mortgage expenses, the Applicant was able to develop the property in St. Vincent as well as purchase motor vehicles.

[67] Mysteriously, the Applicant does not recall similar financial hardship. In stark contrast, the Applicant's evidence is that he and the Respondent enjoyed a comfortable lifestyle. He states that he was in a position to travel to St. Vincent on a regular basis while the Respondent travelled overseas as well. He went on to state that by reason of their financial security, he was able to send $10,000.00 in cash to his son in St. Vincent for the purchase of a vehicle.

[68] Having observed the witnesses under oath, the Court satisfied that at some point in the marriage, the Parties financial stability shifted. They were clearly unable to meet their obligations under the mortgage because the anticipated rental income did not materialize. The Court had no doubt that the Respondent's sister assisted them in avoiding forfeiture on more than one occasion.

[69] The Parties provided no evidence which addresses the factors mentioned in 26 (1) (g) and (h) of the matrimonial Proceedings and Property Act.

Valuations and Ruling

[70] The Mount Sage Property is described as a multifamily residence with five 2-bedroom apartment units. The Parties currently occupy on the apartments making the others available for rental. As at January 2016, BVI Development Consultants valued the Mount Sage Property at $800,000.00. The balance of the mortgage was said to be $528,530.12.

[71] The Applicant's valuer, BCQS put the market value at February 2015 as $1,050,000.00. In light of this disparity, Counsel for the Applicant invited the Court to apply the median valuation of

$925,000.00. However, the Court notes at paragraph 3.9 of the BCQS valuation report, the proviso that the valuer has "undertaken only a limited inspection for valuation purposes". Although he observed that the residence generally appeared to be in a good state of repair, the valuer makes it clear that they have not undertaken a structural survey or tested any of the services.

[72] Counsel for the Respondent compellingly submitted that such a limited inspection would affect the true valuation because the report should take into consideration the condition of the property which is in need of substantial repair. Counsel for the Respondent also asserted that the BVI Development Consultants Report should be preferred by the Court because their appraisals have repeatedly been relied on and accepted by the Banks. Relying on the BVI Development valuation, Counsel for the Respondent submitted that the value of the Property (less the balance due on the mortgage) would be $271,469.88.

[73] The Parties do not dispute that the Mount Sage Property is matrimonial property. In her oral testimony before the Court, the Respondent clearly conceded that the Applicant has an interest in the Property. This is confirmed in the written submissions advanced on her behalf by her attorney who submitted that at best the Applicant is entitled to a 50 % interest[14]. The Applicant also does not deny that the Respondent contributed to the development of the Mount Sage Property. He acknowledges that that she brought the undeveloped land into the union and pooled her resources to develop the Ground Floor. He also acknowledges that they jointly secured loan facilities to develop the other parts of the Property.

[74] However, Counsel for the Applicant submitted that the Respondent's contribution must be compared to that of the Applicant who utilized his own financial resources and physical labour and who also inveigled friends to provide their skills and labour to develop the Property. She noted that he also took responsibility for some of the household bills and he worked together with the Respondent to develop a business venture which was somewhat successful. On this basis, she submitted that the Applicant's contribution is greater than that of the Respondent and displaces the presumption of equality. Counsel invited the Court to award a 70% interest in the Mount Sage Property to the Applicant.

[14] Paragraph 64 of the Respondent's Closing Submissions

[75] The Court is guided by the following dictum of Lord Nicholls in **Miller & McFarlane:**

> "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 any marriage. So it should normally be treated as matrimonial property for this 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."

[76] Having considered the written and oral evidence in this case, as well as all of the factors in section 26 of the Act, in the Court's judgment, the Mount Sage Property is matrimonial property under the Matrimonial Proceedings and Property Act. The Court is also satisfied that there is no basis for the Court to divert from equality principle referenced in the following dictum from **Stonich v Stonich:**[15]

> "[27] In assessing the respective contributions of husband and wife, there was a time when one regarded the fruits of the money-earner to be more valuable, more important that the childrearing and homemaking responsibilities of a wife and 10 mother. If the man was reasonably successful at his job and the family fortunes were vastly improved, his contribution was almost automatically treated as being greater than that of the wife who remained at home. Ironically, if the man's business failed, whether through bad luck or ineptitude, the wife invariably shared equally the couple's hard times.
>
> [30] The MPPA does not rank in any order of preference any of the factors to which Courts are obliged to have regard. It is for the Court to consider all of them. In one case, the facts and circumstances may call for a particular factor to be given special importance. In another case another factor may assume most significance. The point is that there is no basis in law for Courts to regard always as decisive or of special importance the financial contribution made by a party to the welfare of the family. In the normal course of things any such contribution should be weighed in the same scales as a contribution of a different nature. Spouses may choose to perform different roles in a marriage. If the husband's skill, initiative, hard work and drive yield handsome financial rewards, it is entirely unfair to regard those rewards as being any greater in value than those of the wife who might have employed equal skill, initiative and dedication at home bringing up the children and keeping a stable household. In such a case I see no reason why the assets acquired during the marriage ought not to be equally divided. As Lord Nicholls states, each in their different spheres contributed equally to the family and, as a general guide, equality in the distribution of matrimonial assets should be departed from only if, and to the extent that, there is good reason for it."

[77] The evidence in the case at bar discloses that that the Parties lived together as man and wife for a period of 18 years. During this time, they worked together to develop the raw land which the

[15] BVI Civil Appeal No.17 of 2002

Applicant brought to the marriage. The Court has no doubt that in doing so they combined not only their financial resources but also their skills, initiative and hard work. These qualities no doubt also motivated them to start a business venture, which from all indications was once successful and profitable. In the Court's judgment, they each in their different spheres contributed equally to the family. Further, no evidence has been presented which would lead the Court to conclude that one party's earning capacity has been advantaged at the expense of the other party.

[78] It appears that along the way, their financial situation became precarious and with the marriage souring, the Court has no doubt that the Applicant disconnected socially, emotionally and financially. It is also not lost on the Court that the financial strain suffered by the Parties which lead to the arrears in the mortgage on the Mount Sage Property coincided with the development of the St. Vincent property in 2010. The financial assistance which Prudence had to render when the mortgage stood in arrears is indisputable but it does not negate the Applicant's interest in the Property.

[79] The Respondent states that although they both started B&G Construction, she never received any income from the business. The Court finds her evidence that the Applicant took all of the profits of the business to be implausible. The Court is satisfied that the profits were applied for their mutual benefit and that her role in the business meant that she had access to the accounts.

[80] On a whole, the Court is not satisfied that either Party has been completely forthcoming with their evidence. The evidence before the Court discloses that neither Party was solely or mainly capable of servicing their mortgage obligations as well as maintaining their living and business expenses. It is clear to the Court that it would take creative accounting for them to sustain their standard of living on their individual earnings. Looking at their declared income and expenses, the Court can only conclude that their standard of living and the assets accumulated over the course of the marriage was the result of their combined resources, skills and effort.[16]

[81] The Court therefore finds that the Parties are each entitled to a 50% interest in the value of this Property.

[16] Ramsaroop v Ramsaroop unreported 17th February 1997 HC Trinidad and Tobago 4211/1995

Apportionment of Rental Income

[82] The Applicant invited the Court to make consequential orders in respect of the rents generated by the Mount Sage Property. However, the untraversed evidence before the Court is that the rental income was used to satisfy the monthly mortgage payments of ($3,293.25) which were due on Property. It is not disputed that the mortgage payments were often in arrears because the apartments were vacant for extended periods. In fact, the Respondent's evidence is that only in 2010 were rents collected in excess of the mortgage payments and by this time the loan payments were already in arrears. Counsel for the Respondent therefore submitted that there was no surplus income generated from the apartments to be divided between the Parties.

[83] The Court found the Respondent evidence in this regard to be persuasive. While there can be no doubt that the Parties should share equally in any rental income generated from the property, where such income is used to satisfy the mortgage payments or is reinvested into the Property, the Court is satisfied that this claim for relief cannot be maintained.

The St. Vincent (New Enhams Village) Property

[84] The St. Vincent Property is essentially a 2800 square foot house lot with a three-storey concrete structure constructed thereon. The land in question was the subject of a donation or gift recorded in an indenture dated 11th April 2003, from Granville Samuel, (the Applicant's friend) to the Applicant in consideration of his "*natural love and affection and for divers good causes and considerations*". The Respondent disputes the nature of this conveyance. Instead, she alleges that the Applicant's brother purchased the land with funds supplied by the Applicant with the intent of circumventing a vendor who was determined to sell only to Granville Samuel.

[85] The Applicant asserts that this Property should be exempt from the marriage settlement because the land was a gift to him and because the residence was intended to benefit his mother. He also asserts that since his mother's death, the St. Vincent Property has been treated as "family land". The Respondent categorically denies this and asserts that the Property was never occupied by the Respondent's mother and is not "family land". The Respondent contends that this Property falls

within the matrimonial estate and that she has an interest in the Property for which she is entitled to be compensated. The Respondent's evidence is that she sent monies to St. Vincent at the Applicant's request to assist with the construction of the home. She also sent furniture for use in the home.

[86] The Respondent also asserted that in bearing all of the expenses associated with the Mount Sage Property, and in receiving no income from the B & G Construction, she allowed the Applicant to have the full use of his income to develop the St. Vincent Property. She therefore contends that she is entitled to at least a 40% interest in that Property which would amount to EC$209, 600.00. However, the Respondent stated that she is prepared to relinquish any interest in respect of the St. Vincent Property, if the Applicant completes the agreement in respect of the Mount Sage Property.

[87] It is common ground between the Parties that the Property was developed during the course of the marriage. According to the Applicant, construction of the building on the Property commenced in 2005 and was completed in 2011. The clear and cogent evidence before the Court is that construction was facilitated through an original building loan facility of EC$140,000.00 and a further loan of EC$40,000.00 both secured in the sole name of the Applicant. The monthly loan payments are EC$3,631.45.

[88] Thereafter, the Applicant's case becomes decidedly less cogent and plausible.

[89] During the course of these proceedings, the Applicant repeatedly asserted that the Respondent has no interest in the St. Vincent Property because it was never treated as a matrimonial asset and because she has made no monetary contribution to the same. He later told the Court that his family collaborated to develop the St. Vincent Property and that his brother, Joel made the mortgage payments from his earnings at his tyre shop and construction business. However, the Applicant failed to provide any proof of such payments or indeed the status of this mortgage. Instead, in his Third Affidavit he concedes his role in financing the construction:

> "I *agree that I sent money to Joel: he was doing the labour. I was helping to finance it. I rely on my* first affidavit."

Before the Court, he also testified that the house was constructed with a building loan and money which came from his salary.

[90] The Applicant's evidence was further complicated by his evolving and conflicting testimony before the Court. Adding to the confusion, the Applicant testified that the property is registered in his sole name but that his family members all have title to it. He further testified that the house is not occupied by any of the family members but is normally rented. He told the Court that this rental income is shared amongst the family members. However, he provided no evidence to support these contentions.

[91] The Applicant's evidence posed a great difficulty for this Court. His vacillating testimony convinced the Court that he was less than truthful and essentially fashioning a story which would support his narrative. The Court accepts the Respondent's evidence that she supplied furnishings for the St. Vincent Property and that at least on one occasion she sent funds to assist with constriction costs.

[92] Even if the Court were persuaded that the land in question was a subject of a gift to the Applicant and that the Respondent's actual pecuniary contribution to its development was negligible, these factors would not be determinative. Matrimonial assets include all property acquired during a marriage otherwise than by inheritance or gift and is the financial product of the parties common endeavour. In **Miller v Miller** and **McFarlane v McFarlane**[17] Lord Nicholls described the Court's role in this way:

> "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 acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, 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 any marriage. So it should normally be treated as matrimonial property for this 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.

[17] [2006] 2 AC 618 at paragraph 22

The matter stands differently regarding property ('non-matrimonial property') the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the *White* case[18]:

> 'Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property.

In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

With longer marriages the position is not so straightforward. **Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the *White* case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs."' Emphasis mine**

[93] Having reviewed the totality of the written evidence and having had an opportunity of observe the witness give oral evidence and having considered all of the circumstances of the case, this Court is satisfied that the St. Vincent falls to be considered as part of the matrimonial estate.

[94] At the time of the divorce decree they had been married for approximately 18 years. This is by no means a short marriage. The documentary evidence reveals that in 2003, the subject land acquired by the Applicant by way of gift well into their marriage. Thereafter, the land was developed and a three storied residential structure was constructed thereon.

[18] [2001] 1 AC 596, 610

[95] The Applicant contends that this asset was intended to constitute family lands. However, this contention was wholly unsupported and uncorroborated. The uncontroverted fact is that the property remains registered in the sole name of the Applicant. It was developed with a loan facility secured solely by the Applicant and from direct financial contributions. The Property is clearly income generating and the Court is not satisfied that it in any way operates as family property. While it may well have provided a respite for his mother at one time, it is now common ground that she never resided there.

[96] In the Court's judgment the Applicant's evidence at paragraph 62 of that his third affidavit provides an apt description of his family's role. Here, the Applicant states that:

> "Joel lives in the same village and keeps an eye on things. In or around May, 1 2016 he called me to tell me that the girl living on the second floor moved out leaving the house empty."

[97] The Court is also satisfied that although the Respondent could prove only minimal direct financial contribution, the Applicant's own written evidence leads the Court to conclude that Property was developed partly with proceeds of the jointly owned **B & G Construction,** whose proceeds were used for their mutual benefit.[19] The Court is also satisfied that there was an indirect non pecuniary contribution because it is clear to the Court that because of the Respondent's role in managing the business as well as the household, the Applicant was able to dedicate his available earnings to develop the St. Vincent Property. This is the way in which the Parties have chosen to organize their financial affairs.

Valuation and Ruling

[98] There is no evidence of the balance owed on a mortgage loan and so the Court has no indication of whether there are any other incumbrances attached to the Property. The Respondent's appraiser, Mr. Chris Browne valued the St. Vincent Property (assuming vacant possession) at EC$524,000.00.

[19] See: paragraphs 76 and 83 of the Applicant's Third Affidavit

[99] On the other hand, the Applicant's valuer, Arthur Guy, valued the Property at EC$401,338.00. Counsel for the Respondent submitted that the Mr. Guy's valuation should be rejected because he has reduced the value of the house (constructed between 2010 and 2012) on the basis of a 25% depreciation totaling $126,312.50 with no apparent justification. The difficulty which this poses is further compounded when the Court had regard to the 2011 valuation carried out in respect of the Property in which Mr. Guy did not factor in depreciation and ascribed a value of EC$464, 000.00.

[100] Counsel for the Applicant invited the Court to accept this valuation as the true and correct valuation because Mr. Guy had valued the property on two occasions and because the depreciation was assessed by a professional. She speculated that the depreciation percentage may have been ascribed due to disrepair. These submissions did not persuade the Court that the Applicant's valuation should be accepted or that a median valuation should be applied. In the Court's view, experts ought not to attempt to assess value based solely on experience and professional judgment and then invite a Court to wholly rely such opinions. Where an individual seeks to persuade a court to rely on his professional assessment he must reflect the methodology employed and provide appropriate data to support his conclusions.

[101] Counsel for the Applicant submitted that in the event that the Court finds that the St. Vincent property is part of the matrimonial estate, then the Respondent's interest would be minimal, not exceeding 15%. The Respondent on the other hand, submitted that she has no less than a 40% interest in the Property.

[102] It is clear to the Court that the Respondent was less actively involved in the development of the St. Vincent Property. However, there is evidence that she remitted monies to the Applicant to assist with the construction on his request and that she sent items of furniture to be used in the residence. The Court is also satisfied that her indirect contributions enabled the Applicant to develop this Property. She was clearly the homemaker in the BVI but at the same time she was gainfully employed throughout the marriage and an active co-owner of their B&G Construction. The Court has no doubt that she assumed the lion share of the household expenses, no doubt underwritten with the income generated from that business and the assistance of her sister. The

Court is also satisfied that the failure to properly service the Mount Sage mortgage is directly attributable to the concurrent development of the St. Vincent Property.

[103] Ultimately in determining applications for ancillary relief, a court must attempt to achieve the sometimes elusive concept of fairness.[20] Lord Nicholls described this concept in the following way:

> "This element of fairness reflects the fact that to greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money-earner, home-maker and child-carer. Mutual dependence begets mutual obligations of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family's standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."
>
> A practical consideration follows from this. Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so."

[104] The Court has considered whether the Applicant earnings or contribution to the welfare of the family were so exceptional as to warrant a departure from the equality of division. In that regard the Court cannot ignore the fact that the Applicant has failed to fully and frankly disclose his income or provide any cogent evidence of the source of funds used to defray the St. Vincent payments or to otherwise fund construction of the residence.

[105] In **Miller & McFarlane,** Lord Nicholls stated the position in the following way:

> "The answer is that 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. The wholly exceptional nature of the earnings must be, to borrow a phrase more familiar in a different context, obvious and gross. Bodey J encapsulated this neatly when sitting as a judge in the Court of Appeal in *Lambert v Lambert*[21]. He described the characteristics or circumstances which would bring about a departure from equality:

[20] Miller v Miller at paragraph
[21] [2003] Fam 103, 127, para 70

> '.. those characteristics or circumstances clearly have to be of a wholly exceptional nature, such that it would very obviously be inconsistent with the objective of achieving fairness (i.e. it would create an unfair outcome) for them to be ignored.''

[106] In line with the modern authorities of **White v White** and **Lambert v Lambert**[22]**,** the Court finds that there is no basis to depart from equality principle and will order that the Parties are each entitled to a 50% interest in the St. Vincent Property.

B & G Construction- the Steel-Bending Business

[107] The Applicant readily concedes that in and around 2006 the Parties obtained a trade licence to operate a steel bending and tying business which they called **B & G Construction.** He states that together they obtained a loan of $30,000.00 to get the business started. They both carried out the role of managers although in his oral testimony he conceded that the Respondent has an active role in managing the financial accounts and clerical work.

[108] The Applicant's evidence is that, they "grew the business…we expanded and it grew bigger and bigger". However, the Applicant also stated that the business is no longer a going concern. From all accounts, all that remains is the two steel shops, the three electrical steel benders, a cutter machine, a generator and an inoperable Toyota Dyna. Importantly, the Respondent does not dispute the Applicant's evidence as to the current state of the business. This was also confirmed by the valuer, Kreston CCT Accountancy Services who provided a report from dated 14th October 2016. The author indicated that there were no proper accounting records maintained in respect of the business and no concrete indication of the income generated from the business which was not operated on any regular basis. It is apparent that this is a cash business with very little assets. The valuer confirmed that all of the equipment was either old or damaged and he indicated a provisional estimate of the fixed assets (equipment) in the sum of $1625.00. He made it clear that given the state of the business, the cost and effort of undertaking a detailed verification exercise was unjustified.

[22] (2002) EWCA Civ. 1685

[109] In his Application, the Applicant conceded that the Respondent is entitled to a 40% interest in the business. However, during his oral testimony the Applicant asserted that he wanted no part of the business because it has ceased to be a going concern since 2011. The Court has some difficulty in accepting this evidence given his indication that he continues to visit the business site and pay the rental in respect thereof.

[110] The Respondent is equally skeptical. She contends that she is entitled to a 40% interest in the business which she is willing to abandon provided that the Applicant completes the agreement in respect of the Mount Sage Property.

[111] In light of the Court's findings regarding the Mount Sage Property and notwithstanding the dearth of cogent evidence regarding this business the Court has taken into account the unchallenged evidence of the Respondent and will award her 40% interest in the value of the business. As the Applicant is interested in retaining sole ownership of the business he will pay the Respondent her 40% share of the assessed value within 30 days of today's date.

The Vehicle

[112] The Respondent asserts that she was solely responsible for obtaining the loan which purchased the Vehicle and that she made all the loan payments associated with that loan. Notwithstanding this she says that she said that the vehicle was solely utilized by the Applicant and she has no use of the same. However, she indicated that she is not interested in the Vehicle and is prepared to waive all interest in the same.

[113] Remarkably, when he was cross-examined, the Applicant stated that he was no longer in pursuing any relief in respect of the motor vehicle. He told the Court that the vehicle is inoperable and has been for some time.

[114] In light of the Parties declared positions, the Court is not required to dispose of this claim for relief.

Costs

[115] Counsel for the Respondent submitted that regardless of the outcome of these proceedings, the Applicant should pay the Respondent her costs. She submitted that the Applicant's dishonest conduct, his failure to make full and proper disclosure of his financial resources to the Court and his eleventh hour concessions demands that the Applicant pay the Respondent's costs incurred in pursuing this ancillary relief claim.

[116] While the Court has some concerns about the way in which the Parties chose to purse their claims for ancillary relief, the Court also cannot ignore outcome of the litigation which saw partial success on both sides. The Court is therefore satisfied that each Party should bear their own costs.

[117] In the premises and for the reasons outlined it is hereby declared and ordered that:

i. The Applicant has a 50% legal and beneficial interest in the Mount Sage Property.

ii. The Respondent has a 50% legal and beneficial interest in the St. Vincent Property.

iii. The Applicant will pay the Respondent her 40% share of the assessed value of B&G Construction within 30 days of today's date.

iv. Each Party will bear their own costs.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar