

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(MATRIMONIAL)**

Claim No. BVIHMT2014/0031

BETWEEN:

LORN C. GREENE

Petitioner/Applicant

and

MARGARET V. GREENE nee JONES

Respondent

Appearances: Ms. Akilah Anderson, Counsel for the Petitioner/Applicant
Mr. Richard Rowe, Counsel for the Respondent

2020: 27th April

JUDGMENT

[1] **ELLIS J:** Following the grant of decree nisi in July, 2015 the husband ("the Applicant") then filed an application for ancillary relief on 18th November, 2015. He seeks the following relief:

- a) The interim order of court made on 29th January, 2015 be varied with respect to visitation of the children;
- b) The interim order be made a final order;
- c) A declaration be made with respect to the Applicant's 50% interest in the matrimonial home located at Cooten's Bay, Tortola known as Registration Section East Central Block 3139B Parcel 234 ("the Property");
- d) A declaration be made with respect to the value of the matrimonial home to be \$760,000.00;
- e) The Applicant transfers all his interest in the time share properties located at Florida, Westgate and Mystic Dune to the Respondent;

- f) A declaration that each party retains 100% interest respectively in the motor vehicles they currently drive;
- g) A declaration that each party retains 100% interest respectively, in the businesses that they each own in the case of the Applicant "Reliable Maintenance" and "Greenetech" in the case of the Respondent "Marley's Meals on Wheels";
- h) The Respondent pay the costs of the ancillary application;
- i) All costs be made payable into the chambers of SCA Creque;
- j) Further relief as the court sees fit.

[2] The interim order referred to in paragraph 1(a) above gave joint custody of the two (2) children of the marriage, Lornique and Lokoy Greene, to the parents with primary care and control being vested in the wife ("Respondent"). Reasonable access and visitation was also granted to the Applicant. The interim order also set maintenance for each child at \$300.00, per month. The Applicant maintains that this is adequate given their age and the fact that he is also responsible for half of their educational and uninsured medical expenses.

[3] By consent, the Parties agreed paragraph 1(e) to the extent that the Applicant makes no claim to either of the timeshare properties in Florida and so they are transferred to the Respondent¹. The Parties have also agreed that they will each retain their own motor vehicle and the Respondent has discontinued the claim to a motor vehicle purchased by the Applicant after their separation.

[4] Regarding their businesses, the Applicant has discontinued his claim in "Marleys Meals on Wheels" a food preparation and sale business which is co-owned by the Respondent, her brother and mother and the Respondent no longer maintains a claim in "Reliable Maintenance."

[5] On the other hand, the Respondent asks the Court to increase the monthly maintenance for the children of the family from \$300.00 per child per month, to \$1,000.00 per month for Lornique and

¹ The Respondent 'admits' in her evidence that a 'vacation home in Florida' was purchased from joint funds, but in fact essentially conceded too that the Applicant's monthly deposit of \$271 covered the loan for that purchase. The main point being that by her evidence, she has already received at least one matrimonial asset free of encumbrance. See D, 81

\$700.00 per month for Lokoy. She also seeks spousal maintenance in the amount of \$700.00 per month.

- [6] Therefore, at issue in these ancillary relief proceedings is the division of the matrimonial home, the claim for spousal support; and the claim for an increase in the maintenance currently payable for the two (2) children of the marriage. The Court will consider these in turn.

THE MATRIMONIAL HOME

- [7] The Parties were married in 1996. They married fresh out of university and both majored in Business Administration. In 1998, they had their first child and in that same year, the Respondent's uncle donated to her the land on which the matrimonial home now sits. The husband asserts that the land was held solely in the Respondent's name because he was not a BVI believer at the time and did not hold a non-believer's land holding licence. He asserts that in order to save time and costs they decided that the land would be held solely in the Respondent's name.
- [8] In 2000, the Parties obtained a joint mortgage from a local lending institution. The Applicant asserts that because he was the greater earner at that time, they agreed that he would give over half of his monthly earnings to the Respondent who would manage the payment of their monthly obligations, which included the mortgage. After 2 years had passed, he asserts that they agreed that he would pay the mortgage and the Respondent would pay the utilities and other household bills. In 2002, the Parties had their second child.
- [9] During the course of the marriage, both parties engaged in entrepreneurial activity. The Respondent took charge of all the money management decisions in the marriage. The Applicant is a car enthusiast and says that he developed a hobby of installing car radios and audio equipment. This hobby later resulted in the formation of the business, Greenetech, the trade licence for which was obtained in the joint names of the Parties in 1997. Together with the Respondent's brother, the Parties also jointly owned the landscaping business called Reliable Maintenance. The Respondent also says that she was involved in various family businesses apart from the joint ventures with her husband. Indeed, on her case, she admits to being a co-owner of Marley's

Meals on Wheels along with her brother and mother. During cross examination she also revealed that she is a shareholder in her father's business, Jones Woodwork.

- [10] The Applicant continued making the mortgage payments until 2013 when he was approved for a \$200,000.00 line of credit at Scotiabank. The Parties agreed to pay off the outstanding balance on the mortgage (\$174,000.00) using the credit line facility and used the matrimonial home as security for that new facility. It is not in dispute that the Applicant continued to service the credit facility, and thereby the payments for the matrimonial property.
- [11] The marriage began to break down and in February, 2014, the Applicant left the matrimonial home. However, he asserts that he continued to pay on the facility for the matrimonial home until November, 2017. He calculates that he has paid approximately \$310,538.00 towards the mortgage between 2002 and 2017. In his affidavit filed in support of his application he asks the Court to direct the Respondent to pay him his half of the matrimonial home within 90 days of the making of any order of the court. The home was valued at \$760,000.00 at the date of the application. The Applicant therefore asks for the sum of \$380,000.00 being half of that value. In the event that the Respondent is unable to finance this sum, the Applicant asks that the Property be sold and the proceeds equally distributed.
- [12] The Applicant's case was trenchantly defended by the Respondent. Contrary to what he contends, the Respondent submitted that the land was registered solely in her name not because of the Applicant's immigration status but because her uncle intended it as a reward for the fact that she was the first person in her family to graduate from high school. She stated that the Respondent was never registered as a co-owner even after he would no longer have required a non-belonger land holding licence because he was well aware that her uncle did not wish for the Property to be "lost" in the event that the marriage failed.
- [13] She stated further that the Applicant showed very little interest in the building or maintenance of the home. According to the Respondent, the Applicant was only interested in acquiring cars and spending his money on them. She, on the other hand, was the one who invested in their home and family. The Respondent asserts that at the onset of the marriage, she had accumulated savings in

excess of \$100,000.00. This entire sum was used to fund the initial construction of the home. According to the Respondent, she did this on the basis that she would eventually be refunded the total sum, as the Applicant has made no upfront financial contribution. In addition, the Respondent contends that her relatives made significant contributions by way of expertise, materials and labour which were intended to benefit herself and her children. She submits that this contribution was substantial and she has ascribed a total value of \$152,456.67 to the same.

- [14] The Respondent concedes that they obtained a mortgage in the sum of \$235,000.00 from Banco Popular de Puerto Rico. However she submitted that when her contribution of \$100,000.00 is added to the value of her family's contribution, it is clear that the construction of the matrimonial home was largely financed by the Respondent and her family who contributed a total sum of \$252,456.67. She therefore submitted that this is in excess of half of the value of the Property.
- [15] The Respondent does not deny that it was the Applicant's sole responsibility to service the mortgage payments. She does not dispute the Applicant's evidence that he made a monthly payment of \$1,400.00 towards the mortgage while she, as was agreed between them, would attend to the other bills which included utility bills, groceries, etc. However, she contends that this monthly payment of \$1,400.00 did not cover the total monthly requirements of the bank for interest payments, property taxes and insurance. She submitted that the mortgage was actually serviced by a required monthly payment of \$1,865.12. The additional sum of \$465.12, as well as the other expenses incurred by the family were solely borne by her.
- [16] The Respondent also noted the fact that after several years of servicing the mortgage, the principal owed on the mortgage at the time when the credit line was obtained from Scotiabank was \$170,875.03 which demonstrates a reduction of only \$29,124.97. She submitted that when the credit line was obtained, the Applicant kept the sum of \$24,071.00 in order to settle a personal loan. She submitted that the net effect of this is that over the several years the principal owed on the home had only been reduced by \$5,053.97.

- [17] She noted that because the cost of obtaining this line of credit was \$2,576.00, this would further reduce the contribution to the principal to only \$2,477.97. The Respondent therefore concluded that the significant lion's share of the previous mortgage payments went to settle a personal loan of the Applicant and that what accrued to both Parties was only \$2,576.00.
- [18] The Respondent contends that the Applicant subsequently renegotiated with the bank to make a monthly payment in the amount of \$585.00. This minimum payment was in fact less than the minimum (Interest of \$620.00) required on the ScotiaLine Credit line. This resulted in the monthly increase of the ScotiaLine, which automatically increased the ScotiaLine to \$186,497.23. The Respondent therefore submitted that the net contribution of the Applicant to the reduction of the principal mortgage of \$200,000.00 was actually - 24%.
- [19] The Respondent further submitted that the Applicant's lack of interest in Property is further reinforced by four particular actions. First, in reducing the payments on the credit line he effectively guaranteed that the principal owed would never be reduced. Second, he left the burden of the payment of the insurance on the premises and property taxes solely on the Respondent. Third, he failed to make any check on the property to secure same before the passage of hurricanes Irma and Maria and finally, he refused to apply the sum awarded by the insurance company for damage sustained by the Property in order to avert its further deterioration.

THE LAW

- [20] Assigning property rights to married couples once their relationships have broken down has historically been a difficult task. This is particularly so where there is an absence of legal joint ownership in the matrimonial or family home. In such cases, the only recourse is to establish equitable interest under property law, trust principles or equity assumptions.
- [21] In the case at bar, it is not disputed that the Property is registered in the sole name of the Respondent. It follows that the legal interest in the Property is vested solely in her. In **Stack v Dowden**,² the House of Lords stated:

² [2007] UKHL 17, per Baroness Hale of Richmond at paragraph. 56.

“Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.”

[22] Where legal title is in the sole name of one spouse, the other spouse will normally have no beneficial interest. However that spouse may be able to establish a share of the beneficial interest where he is able to prove that the legal owner of the land induced him to believe they would be entitled to a share in the ownership. He may prove this by demonstrating an (i) express agreement or (ii) contribution to the acquisition. In addition, that spouse must have acted to his detriment. If these requirements are demonstrated, the defendant will be considered to hold the property on a constructive trust for themselves and the claimant. The court will then calculate the respective shares in the property either by a ‘holistic’ examination of the whole course of dealing between the parties or, where no clear intention can be found, imputing what is fair in the context

[23] Happily, despite the fact that the property in question is currently registered solely in her name, the Respondent in this case takes no issue with the fact that it is in fact matrimonial property in which the Applicant has a beneficial interest. Instead, she contends that the Applicant’s equitable interest in the property should be determined in accordance with section 51 of the **Matrimonial Proceedings and Property Act 1995** (“the Act”) and in proportion to his actual financial contribution. Counsel for the Respondent helpfully provided the following table which illustrates her proposals:

Percentage valued owed to the Petitioner								
Contribution by Fam *1	\$45,088.00							
	\$100,000.00							
	\$235,000.00	\$607, 000.00	\$55,385.33	100%	9%	Divide by 2	5%	\$27,692.67
	\$19,070.00	\$551,614.67	\$607,000.00	\$1.00				
	\$152,456.67	\$55,385.33						
	\$551,614.67							

- [24] The Respondent further submits the Applicant's interest in the matrimonial home which is *de minimis* should be transferred to the children of the marriage where permitted by and should be determined in accordance with section 50 (6) of the Act.
- [25] Notwithstanding this unequivocal concession, a significant part of the Respondent's case concentrated on the fact that the land on which the matrimonial home is situated was donated to her by her uncle, Mr. Litwin Stevens. The Court had the benefit of evidence from the Respondent's uncle who made clear that he did not intend to make a joint gift to the Parties. Rather he stated that he gifted the land only to the Respondent on the basis that it would remain in her sole name.³ When he was cross examined under oath he explained that he did not want the Applicant to add her husband's name to the property because of his own experience with an unsuccessful marriage.
- [26] Not surprisingly, the Applicant disputes this. Counsel for the Applicant submitted that despite insisting it was a gift solely for the Respondent, her uncle clearly contemplated her marriage because the land was only transferred after she got married and when it was clear that she intended to start her own family. Given the Applicant's indication in her evidence that she had a happy marriage at that time, Counsel argued that it is obvious that she intended that this gift would be used for the benefit of her family.
- [27] The courts have long held that if a family member gives financial assistance to a newly married couple to acquire their matrimonial home, the usual inference is that it was intended as a gift to both of them rather than to one alone: see **McHardy and Sons (A Firm) v Warren [1994] 2 FLR 338, at 340**; **Midland Bank Plc v Cooke [1995] 4 ALL ER 562, at 570**. A party may provide proof to rebut such an inference. However, the matter does not end there.
- [28] In **Abbott v Abbott**⁴ the parties disputed the division of the family assets after a divorce. The family home was registered in the sole name of the husband. There being no provision for property adjustment, the court had to decide the division on the ordinary legal rules. In delivering the leading judgment of the Privy Council, Baroness Hale criticised the Eastern Caribbean Court of

³ Affidavit of Litwin Stevens

⁴ [2007] 2 ALL ER 432.

Appeal for attaching “undue significance” to Lord Bridge’s dictum as to what contributions would qualify in the inferred common intention category and approached the issues of establishing and quantifying the equitable interest in a more robust way. The husband agreed that the wife was entitled to an equitable interest in the family home, and the wife had also made a direct financial contribution to the property via, *inter alia*, half of a wedding gift given to the couple. However, rather than focusing on either of these, Baroness Hale’s judgment suggests a more flexible route to establishing a common intention constructive trust. This involves taking into account the parties’ whole course of conduct in relation to the property... in determining their shared intentions as to its ownership. In particular, Baroness Hale listed a number of factors (other than just financial contributions towards the initial purchase or subsequent mortgage) which would be relevant including, notably, how the parties had agreed to arrange their finances and discharge the outgoings and household expenses. Her Ladyship also referred specifically to the question of whether the parties had children for whom they both had responsibility to provide a home.

[29] In the case at bar, the land on which the matrimonial home was built was not an inherited asset, but a gift to the wife during the lifetime of her uncle. The Court had an opportunity to compare the evidence of the Parties and the Respondent’s uncle under cross examination and it is clear that their evidence as to the purpose and intention behind the gift was not consistent. When viewed objectively, the evidence discloses that the land was transferred to the Respondent in 1998, almost two years after the Parties were married and when it was clear that they were about to start their family.

[30] The Court has also had to consider the evidence of the Respondent’s father in this light. His evidence was advanced to support the Respondent’s contention that she should be awarded the greater interest in the Property. The Respondent’s father, David Jones swore an affidavit in which he indicated that he gave gratis assistance to his daughter in the construction of the matrimonial home. Nevertheless, he estimated his expertise to be valued at \$54,000.00 and further estimated the value of labour that he provided through his company, Jones Woodwork, to be \$98,456.67. In support, he exhibited a bill of quantities by Newton Construction Ltd. At paragraph 16 of his witness statement Mr. Jones makes this remarkable statement... “*while I acknowledge that I assisted my*

daughter in the construction of the home for her family, I would like to make it abundantly clear that the extent of the investments that I gave was to my daughter and for my grandchildren.”

[31] The Court did not find this evidence to be particularly persuasive. The following excerpt from Dillon LJ in **McHardy and Sons (a Firm) v Warren**⁵ sums up this Court view:

“To my mind it is irresistible conclusion that where a parent pays the deposit, either directly to the solicitors or to the bride and groom, it matters not which, on the purchase of their first matrimonial home, it is the intention of all three of them that the bride and groom should have equal interests in the matrimonial home, not interests measured by reference to the percentage half the deposit [bears] to the full price.”

[32] Moreover, much more important is the behaviour of both Parties throughout the marriage until it broke down. In **Abbott v Abbott**, Baroness Hale emphasised that:

"The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or impulse with respect to the property in light of their whole course of conduct in relation to it".

[33] Counsel for the Applicant appeared to agree with this dictum. Indeed, she submitted that the relatives' respective intentions were not specifically traversed by the Applicant because they are irrelevant. Rather, she submitted that it is the common intention of the Parties which is relevant.

[34] While there may be cases where the donor's intention at the time of making the gift may be relevant, where such intention is not made clear on the face of the deed, the Court must consider the surrounding circumstances of the gift including the timing and the nature of the gift. Neither Mr. Jones nor Mr. Stevens denied that the land was transferred, or the house built, until after the young couple had married and were expecting their first child. The Court has no doubt that they intended that the Property would be used to construct the family home in which they would house and raise their children. Thereafter, not only did the Parties utilise their combined savings, they also agreed to assume joint liability for the repayment of the mortgage loan and interest⁶ and they also divided the family financial burdens in such a way that both the mortgage and the family bills and expenses could be serviced.

⁵ [1994] 2 FLR 338

⁶ This has always been regarded as a significant factor: see *Hyett v Stanley* [2003] EWCA Civ 942, [2004] 1 FLR 394.

- [35] Having conceded that the Property is in fact matrimonial property in which both Parties have a proprietary interest, the Court is only concerned with quantifying their respective interests. Counsel for the Respondent has taken great pains to calculate the direct financial contributions made by each Party to the purchase and development of the Property. Presumably, she proposes that any order should take into account the Parties actual financial contributions in calculating what, if any, percentage proprietary interest should be ascribed.
- [36] The Respondent asked the Court to rely on the evidence of Mr. Maurice Lettsome a professional valuer, whose report appears to suggest that the Applicant has negative equity in the matrimonial home after 2014. The Court had an opportunity to read Mr. Lettsome's report and observe him under cross examination. Generally, the Court found his evidence to be equivocal, incomplete and inconsistent. He was not a particularly clear or persuasive witness and the Court was not convinced that his evidence was reliable.
- [37] First, it is important to note that although he had been touted as the Respondent's expert, at the beginning of his oral evidence the Respondent made it clear that she no longer wished to consider him an expert. Also of concern was the fact that during the course of his evidence, Mr. Lettsome asserted, then recanted his claims that supporting documents for the figures in his report were all attached to the report. When he was taxed, he could then only claim that he 'must have had a basis' for any figures that he could not explain. It soon became clear to the Court that Mr. Lettsome's report and affidavit were produced some 2 years before the husband attached his pay slips and a specific figure of his approximate total payments to the mortgage and Scotia Line loan. It also became clear that the figures applied to the wife's contribution were supplied by her and there were no proof of primary documents provided or attached which supported the material figures.
- [38] Counsel for the Applicant submitted that Mr. Lettsome's evidence was unhelpful in determining what the husband's actual contributions to the home were over the marriage and over any period at all. She noted that the report contained important disclaimers to the effect that it was limited to the quality of the information used to prepare it. Given the lack of independently obtained

documentation and the fact that he was an ordinary witness, Counsel submitted that his evidence should be accorded little or no weight. This Court finds much force in those submissions.

[39] In any event, the Court was not satisfied that the Respondent's mathematical approach to quantifying the Parties beneficial interest was the correct approach in the circumstances of this case. In **Midland Bank Plc v Cooke**⁷ the English House of Lords introduced the concept of applying the "*whole course of dealings*" approach to the quantification of the respective parties' proprietary share. In that case, the House of Lords held *inter alia* that it was not bound to ascertain the proportion of the second defendant's beneficial interest on the strict basis of the trust resulting from the cash contribution to the purchase price, but was free to attribute to the parties an intention to share the beneficial interest in different proportions and in determining what share the parties intended each to have, it was the duty of the judge where appropriate, to survey the whole course of dealings between the parties in relation to the subject property.

[40] This position was later confirmed and applied in relation to a sole owner case by the English Court of Appeal in **Oxley v Hiscock**.⁸ At paragraph 69 of the judgment, the court observed:

"...the second question to be answered in cases of this nature is "what is the extent of the parties' respective beneficial interests in the property?" Again, in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this Court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, "the whole course of dealing between them in relation to the property" includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

[41] The rationale for this pragmatic approach should be obvious but in the event that it is not, the dictum in **Oxley** is instructive. In that case, the Court of Appeal recognised that courts have not found it easy to reconcile such analysis with a traditional, property-based, approach. In fact, the

⁷ [1995] 4 ALL ER 562 CA.

⁸ [2004] EWCA Civ 546.

court noted that this approach was rejected, in unequivocal terms, by Lord Justice Dillon in **Springette v Defoe**⁹ when he said that:

"The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair".

- [42] The evidence which underpins the whole course of dealing has been said to include any advice or discussions at the time of transfer which cast light on the parties intentions; the purpose for which the property was acquired; the nature of the relationship between the parties; the personalities of the parties; how they arranged their finances; how they discharged outgoings on the property and their other household expenses and whether they had children for whom they both had responsibility for providing a home.
- [43] This Court is therefore satisfied that the proportion of the Parties' proprietary interest cannot be fixed solely by reference to the percentage of their direct and indirect contributions thus making all other conduct irrelevant. The Court much prefers the approach taken in **Drake v Whipp**¹⁰ where the English Court of Appeal held that once a constructive trust was proved, the court could adopt a broad brush approach when determining the parties' respective shares.
- [44] Applying the modern approach, the right question, in the circumstances of this case, would be "what would be a fair share for each party having regard to the whole course of dealing between them in relation to the property?" The Court is satisfied that this would be the proper basis for a property adjustment regime under the common intention trust.
- [45] The Respondent's unequivocal evidence is that there was a joint intention to acquire property together in order to construct their matrimonial home. The Respondent's true issue appears to be that fact that her investment of \$100,000.00 was never returned to her once they obtained the loan from the bank as was agreed. In the Court's judgment, such contribution would not without more vitiate the fact that there was a common intention that they would equally share the Property. The fact that the Respondent has taken no steps in their 17 years of marriage to enforce it as a loan simply reinforces this conclusion.

⁹ [1992] 2 FLR 388, 393D-H.

¹⁰ [1996] 1 FLR 826.

[46] Having considered all of the evidence advanced in these proceedings, the Court is satisfied that the conduct of the husband and wife at the beginning and well into the marriage show a clear common intention of joint ownership of marital assets. In regard to the matrimonial or family home, it is common ground that they both have a beneficial interest in the same notwithstanding that the legal title is vested solely in the Respondent. It is not lost on this Court that this is only the family home in which they lived as a married couple and in which they raised their two children. Despite the Respondent's efforts to downplay the Applicant's role and contribution, it is clear that he was an equal breadwinner and partner and until the demise of the marriage, he did not shirk that role. Indeed, the Courts finds it incongruous that the Respondent would attempt to minimize his contribution while at the same time contending that his abrupt departure resulted in a reduced standard of living. The Court is satisfied that both parties made substantial contributions to the matrimonial home. The Court is however not persuaded that her family's contribution could be used to argue that the Respondent's contributions necessarily exceeded that of the Applicant.

[47] Their evidence indicates that they held joint accounts, pooled income and started and/or supported one another in their several business ventures. They jointly purchased several other properties during the marriage and they have managed to settle the division of those assets amicably. Indeed, in her viva voce evidence to the Court, the Respondent made clear that all of the household bills and expenses were evenly split between herself and the Applicant. The wife agreed that 'all bills' were paid from their joint chequing account. The Parties conducted their married life as equal partners and there was nothing said at trial to rebut this and further no reason why the matrimonial home should be removed from what was an established course of conduct suggesting an equal and joint enterprise.

[48] Indeed, notwithstanding her Counsel's submissions, the Respondent appears to have conceded this critical point at paragraph 31 of her affidavit filed on **20th September 2018** where she states:

"That I have agreed with no 1 set out by the Petitioner in the letter dated the 1st of September 2017 which sets out the following:

"In respect of the matrimonial home, our client shall sever the joint tenancy and substitute same with 50% holding each as tenants in common. Our client will then transfer his 50 % interest to both children.....with the exception that given the behavior of the Petitioner, before and after our separation in failing to meet his obligations and lack of communication that he not be the trustee, but this be

handed over to an independent person/body, until the children reach the age of majority.”

- [49] For the avoidance of doubt, the Court will further state that there is no evidence that the purported unilateral actions taken by the Respondent to repair and improve the Property following the Parties’ separation would have negated this common intention.
- [50] Having established the Parties’ respective proprietary interests in the Property, the Court must now consider what if any orders should be made to adjust such interests given the dissolution of the marriage. Thankfully in the Virgin Islands there is an established statutory mechanism or framework for property division upon the termination of a marriage. The applicable legislation is the **Matrimonial Proceedings and Property Act, 1995** (“the Act”). Section 25 of the Act gives the court power, *inter alia*, to make property adjustment orders for the benefit of a party to a marriage or a child of the family. In exercising this discretion, the Court’s objective is always to arrive at a fair and just outcome.¹¹
- [51] In deciding whether to exercise the powers given by section 25, the Court must have regard to all the circumstances of the case including the following matters stipulated in section 26 which are:- (a) the present or foreseeable future income, earning capacity, property and other financial resources of each party, (b) the present and foreseeable future financial needs, obligations and responsibilities of each party, (c) the standard of living enjoyed by the family before the breakdown of the marriage, (d) the age of each party and the duration of the marriage, (e) the physical or mental disability of either party, (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home, (g) any order made under section 49 (not applicable), and (h) the value to either party, of any benefit (for example, a pension) which, that party will lose as a result of the dissolution of the marriage.
- [52] Under section 26 of the Act the court is required 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

¹¹ Stonich v Stonich Civil Appeal No. 17 of 2002 Virgin Islands: “The wide discretion available permits the Court the ability to interpret fairness in light of prevailing societal standards.”

discharged his or her financial obligations and responsibilities towards the other. This duty should be carried out in a just and practicable way having regard to the conduct of the parties.

[53] In **Stonich v Stonich**, Saunders JA of the Eastern Caribbean Court of Appeal provide useful guidance on how this task should be approached:

“The Act 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.

[54] In **White v White**,¹² Lord Nicholls of Birkenhead who applied the principle of fairness in considering similar legislative provisions said:-

“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.”

[55] The Court will now consider the criteria set out in the Act. This analysis will also be relevant to the Respondent's claim for spousal support.

The income earning capacity, property and the other financial resources of each party both current and future

[56] The Parties enjoyed a comfortable standard of living. In addition to the matrimonial home valued at \$760,000.00 (\$655,117.00) the Parties also jointly owned time shares in Florida as well as various

¹² [2001] 1 ALL ER 1 at paragraph 25.

motor vehicles. By consent, the Applicant agreed to forgo all claims in respect to either of the timeshare properties in Florida and so they are transferred to the Respondent¹³. One of these properties was foreclosed however; full ownership of the Westgate Property is now vested in the Respondent. The Parties have also agreed that they will each retain their own motor vehicles and the Respondent has discontinued the claim to the motor vehicle purchased by the Applicant after their separation.

- [57] Regarding their businesses, the Applicant has discontinued his claim in “Marleys Meals on Wheels” a food preparation and sale business which is co-owned by the Respondent, her brother and mother and the Respondent wife no longer maintains a claim in “Reliable Maintenance.” The Respondent is the sole owner of two businesses Greenetech and Reliable Maintenance, both of which have and continue to have the potential to supplement his income although no projected calculations were provided to the Court. No doubt, the businesses would continue to generate income once they remain operational.
- [58] Both parties are employed in stable jobs and it is reasonable to assume that they will continue in gainful employment until retirement. No doubt, they will in time earn pension payments from their respective employment although the details of the same were not provided to the Court. The Applicant is employed by the Financial Services Commission and earns a gross annual income of \$85,800.00 (net \$70,265.28) The Respondent is a senior public servant who earns a gross annual salary of approximately \$63,275.76 (net \$57,985.44).
- [59] Counsel for the Respondent submitted that there is an obvious disparity in the Parties’ financial position. The evidence disclosed that the Applicant earns in excess of \$21,000 gross (net \$12,000) per annum more than the Respondent and she submitted that the Respondent is in need of financial support. She noted that the Respondent, (who claims a monthly deficit of about \$8000.00 per month) has had to take out loans to maintain her pre-separation standard of living and that she depends on the generosity of her immediate family, while the Applicant is able to support himself

¹³ The Respondent ‘admits’ in her evidence that a ‘vacation home in Florida’ was purchased from joint funds, but in fact essentially conceded too that the Applicant’s monthly deposit of \$271 covered the loan for that purchase. The main point being that by her evidence, she has already received at least one matrimonial asset free of encumbrance. See D, 81

and his new partner without her assistance, while at the same time financing the rebuilding of his mother's home.

The present and foreseeable future financial needs, obligations and responsibilities of each party

[60] Generally, financial needs include the provisions of accommodation and general living expenses. If there are children, the financial needs of the parent with whom the children live are likely to be greater than those of the other parent. However, when exercising its powers in ancillary proceedings, a court can take into account the fact that a party is living with a new partner as this would inevitably affect the financial resources and financial needs under section 26 (1) (b) of the Act.¹⁴ This is relevant in this case as the Applicant has now moved on to support a new family. He indicated that he receives no assistance from his new partner in that regard.

[61] The Parties share two children. At the time of the application, Lornique was 20 years and Lokoy was 16 years. The children are in the primary care and control of the Respondent. The older child is currently pursuing tertiary education overseas while the younger attends high school in the BVI. Counsel for the Respondent submitted that the maintenance and support of these children is not likely to extend beyond the further eight years.

[62] With regard to obligations both Parties have provided evidence of their monthly expenses. Inclusive of the contributions by the Applicant ordered by the court, the Respondent asserts that she constantly runs a deficit.¹⁵ She was very thorough in detailing her liabilities and expenses (providing copious receipts and spreadsheets to bolster her claim of financial hardship) but save for her salary slip in her current post she provided scant information of her current financial position. Her evidence did not exhibit details of any of her bank accounts and so the Court is unaware of the current level of savings. The Court found this curious since she has demonstrated remarkable financial acumen in that she managed to amass a significant savings even while she was a student. The Court was also concerned that while she is an admitted investor in *Marley's Meals on*

¹⁴ Barnes v Barnes [1972] 1 WLR 1381 at 1384; Roberts v Roberts [1970] P. 1.

¹⁵This prior to the order of the court per month for the Petitioner to pay half the educational expenses of Lornique's university education

Wheels, she appears to receive no recent or consistent income from that business. During cross examination she also testified that she recently discovered that she has some shares in her father's business. She however provided no further details on this shareholding or the income if any derived therefrom.

The standard of living enjoyed by the family before the breakdown of the marriage

- [63] The demise of the marriage will inevitably mean that the standard of living of all parties is lower following the cessation of cohabitation unless there are substantial assets available for distribution. In general however, the wife and children should not be relegated to a significantly lower standard of living than what the husband enjoys nor should the wife's standard of living be put significantly higher than that of the husband.
- [64] The evidence in the case at bar reveals that the family had a comfortable standard of living which was based on their individual salaries as well as the income from their businesses. The Parties built a very comfortable home and yet still managed to have at least two vacation homes.
- [65] The Respondent and her children benefitted from a stable and structured family setting where the children were nurtured in an environment provided by both parents with the Applicant being the main breadwinner. The family enjoyed frequent travel annually as it was their tradition to work hard during work and school time and relax during the scheduled breaks of the Easter, summer and Christmas Holidays at the very least. No doubt, the Respondent and children of the marriage as a result of their extended travel, expect the continuation of this life style.
- [66] The Parties have provided no proof of any significant diminution in their respective standards of living.

The age of each party and the duration of the marriage/ the physical or mental disability of either party

- [67] Before the breakdown, the Parties had a marriage that lasted for over 17 years. This is a relatively long duration. The Respondent is 49 years old and the Applicant is 48 years old and so there is no significant difference in their ages. The evidence before the Court did not disclose that either of the parties to this marriage suffers from any mental or physical disability. They appeared to be able-bodied and in good health and are expected to continue to earn a living and eventually retire at the normal prescribed age.

Contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home

- [68] In considering this factor, the court is required to take into account both financial and non-financial contributions. In the case of non-financial contributions this included not only physical activities about the house but also the provision of support, love and affection that is necessary to maintain a happy family unit and an emotional environment of stability.¹⁶ It is also clear that financial and non-financial contributions are assigned equal weight.¹⁷
- [69] Prior to the demise of the marriage, the Parties equally bore the family's financial burdens and they structured their financial arrangements to accommodate this. However, after the breakdown of the marriage, it has been the sole responsibility of the Respondent to look after their home and the well-being of her children. The Court accepts that Respondent's evidence that the Applicant has taken a less active and involved role in child rearing and this along with the breakup of their family unit did in fact pose a challenge for the mental and emotional wellbeing of the children.
- [70] The Court has also taken into account the fact that since the separation in January 2014, the Respondent has unilaterally carried out improvements to the Property.

¹⁶ Cox v Cox Civil Appeal 19 of 2007 Barbados.

¹⁷ Fussee – Durham v Fussee – Durham Civil Appeal ECSC (SVG)

The value to either party, of any benefits which the party will lose as a result of the dissolution of the marriage

- [71] The benefits referenced here include pension, gratuity entitlements allowances and severance benefits payable under any statute or contract. The Parties advanced no evidence on these matters.

CONCLUSION

The Matrimonial Home

- [72] Upon the dissolution of marriage, a court is empowered to make property adjustment orders in accordance with the Act. The interpretation and application of these provisions in the BVI has been illustrated in **Ferdinand v Ferdinand**.¹⁸ In that case, the court considered a property adjustment order amongst parties of roughly equal economic standing, based on the conduct of the parties. The court granted equal portions having considered that it was the joint intention of the parties, in the happier days of their marriage, to have equal proportions of the family home. In coming to its decision, the court considered differing financial and non-financial contributions from members of the parties' extended family, including a deed of gift of the land on which the house was built, in the sole name of the petitioner.
- [73] **Hodge v Hodge**¹⁹ concerned a 15 year marriage in which both parties were substantial income earners who supplemented their salary with income from additional sources. Both worked in the government service, which the Court found to be a stable source of income subject to periodic review and capable of providing a reasonably good standard of living. Both contributed to household expenses and to the purchase of real property, although not in equal portions. The court accepted that non-monetary contributions were made by the wife through her contribution to the family's overall welfare.

¹⁸ Saint Vincent and the Grenadines Claim No. 101 of 2006

¹⁹ BVI Claim No. 2006/0012 Cecil Albato Hodge v Patricia Lartia Hodge at paragraphs 12 and 31.

- [74] The court found that in all the circumstances, fairness did not require an order for spousal support of the wife and declined to continue a previous order from the Magistrate Court which granted that to her. The court also granted a property adjustment order giving the wife one half of a parcel of land which was acquired during the currency of the marriage but to which she made no monetary contribution. The court declined an order in respect of the matrimonial home only because the land it was situated on was not vested in either of the parties at or after they built their home on it. In making the order, the learned judge also cited with approval the dicta in **White v White**²⁰ to the effect that a fair outcome is the ultimate objective in orders dividing matrimonial property and that engaging a 'yardstick of equality' was an acceptable guide. This has been widely accepted in case after case in the BVI.
- [75] The application before this Court seeks a declaration be made with respect to the Applicant's 50% interest in the matrimonial home located at Cooten's Bay, Tortola known as Registration Section East Central Block 3139B Parcel 234. The Applicant further asks that a declaration be made with respect to the value of the matrimonial home to be \$760,000.00 (\$655,117.00)²¹. However, in his affidavit in support, the Applicant not only seeks declaratory relief, he also seeks an order that the Respondent pay to him his half of the value of the Property failing which, it is to be sold and the proceeds divided once all expenses are paid.
- [76] The Respondent on the other hand submits that if the Applicant's equitable interest in the Property is determined in accordance with section 51 of the Act, it is clear that he has no equitable interest in the Property. However, in her affidavit of 20th September 2018, she seeks to have the Applicant's interest in the Property awarded to the children of the marriage to be held on trust by an independent person or body until the children reach the age of majority in the event that an order is made under section 50 (6) of the Act. The Court notes that one of the children of the marriage is already an adult and the other is not very far behind. Further, it has not been advanced that this proposal is intended as a more businesslike method of providing for the children's education and maintenance. The Court is therefore not satisfied that such order should be made in the circumstances of this case. The Court is satisfied that the children's needs could properly be

²⁰ [2001] 1 ALL ER 1 at paragraph 27 of Hodge.

²¹ Value set out in the June 6, 2018 BCQS report.

provided for in an order for periodical payments rather than an out and out transfer of the Applicant's interest in the matrimonial home.

[77] As Lord Nicholls stated, in **Miller v Miller**²²

"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.' 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."

[78] In this case, I find that fairness dictates equality. At this juncture the Property is registered in the sole name of the Respondent but the Court has found that the Applicant has a 50% equitable interest in the same.

[79] Section 50 of the Act allows the Court to direct a sale of the home or to order one party to transfer his or her share of the home to the other party with or without the other party making any compensating payment where the Court is satisfied that both parties to the marriage have made a substantial contribution to the home (whether in the form of money payments, or services, or prudent management or, otherwise howsoever). Although the Applicant sought this relief in paragraphs 18 – 20 of his affidavit in support, these claims were not reflected on the face of his notice of application for ancillary relief. Nevertheless, the Court has considered the property adjustment order sought and in doing so the Court notes that both Parties failed to adequately address the myriad of factors which a court is obliged to weigh in such applications including the parties and the children's housing needs, alternative accommodation options, the respondent's ability to generate the capital necessary to purchase the applicant's interest etc.

[80] The English case of **Wachtel v Wachtel**,²³ highlights the standard of the evidence which would be required in such cases:

"No order should be made for a lump sum unless the husband has capital assets out of which to pay it without crippling his earning capacity...When the husband has available capital assets sufficient for the purpose, the court should not hesitate to order a lump sum...the wife should be compensated for the loss of her share by being awarded a lump

²² [2006] UKHL 24.

²³ [1973] EWCA Civ. 10

sum. It should be a sum sufficient to enable her to get settled in a place of her own, such as putting down a deposit on a flat or house.”

[81] In maintaining that the Applicant has no equitable interest in the Property, the Respondent did not address her ability to rehouse herself and the children and other than a cursory reference in his legal submissions, the Applicant has also not addressed the matter save to say that he is willing to give the Respondent 9 months to raise the necessary funds. Having regard to evidence which addresses the factors listed in section 26 of the Act, the Court is satisfied that the Respondent should be given a period of 12 months from the date of this judgment to secure the necessary financing to compensate the Applicant for his 50% share of the Property. Upon receipt of such payment both the legal and equitable title to the Property will be vested solely in the Respondent.

[82] The Court is satisfied having regard to all of the evidence before it, that the Property in question is the family home and remains the place of residence for their children, one of whom is still a minor. The Applicant has managed to obtain alternative accommodation elsewhere which he now occupies with his new companion; however, there is no evidence before the Court that the Parties own any other residence in the Virgin Islands. This Property therefore provides a home and accommodation for the children of the family.

[83] In **M v B**²⁴ Thorpe LJ held:

“It is one of the paramount considerations, in applying the criteria in s 25 of the 1973 Act, to endeavour to stretch what is available to cover the need of each party for a home, particularly where young children are involved. The primary carer needs whatever is available to make the main home for the children, but it is also important (albeit to a lesser extent) that the other parent have a home of his own where the children can enjoy contact. The possibility (where there are enough funds by stretching and a degree of risk-taking) of so dividing the funds available that both parties can rehouse themselves is an exceptionally important consideration and one which will almost invariably have a decisive impact on the outcome.”

[84] The Court is well aware that the aim of the law and procedure governing ancillary relief is to determine cases in such a way as to effect a clean break between the parties where possible. No doubt this is intended to encourage the parties to put the past behind them and to begin a new life

²⁴ [1998] 1 FLR 53.

which would not be overshadowed by the relationship which has broken down.²⁵ However, a court's duty to consider whether to effect a clean break is subject to the overarching objective of fairness. On the limited evidence available at this time, the Court is not satisfied that an immediate order for sale would be appropriate given that the Respondent currently resides in the Property along with the children (one of which is a minor) who have struggled emotionally with the breakdown of the family unit.

[85] The laws governing ancillary relief make it clear that the court's powers must be exercised in such a way as to place the children of the marriage so far as it is practicable having regard to the prescribed factors in the financial position in which they would have been if the marriage had not broken down and each of the parties had properly discharged his or her financial obligations and responsibilities towards that child. From all accounts this is their only place of residence in the BVI. The Parties are obliged to provide the children of the marriage with adequate accommodation until the age of majority or until they have completed tertiary education. The Court has also considered that the Property sustained significant damage during the 2017 hurricanes which required significant repairs. Further, the Property remains encumbered in favour of Scotiabank and it is likely that this will continue given the Parties' mutual obligations to educate their children.

[86] For these reasons, the Court will make the declaration of interest sought. In the interest of achieving a clean break, the Court will also order that Respondent pay to the Applicant the sum representing the fair value of the Applicant's one half share of the Property to be paid within twelve (12) months of the date of this judgment. In the event that Respondent is unable to comply with this Order, the Property is to be sold and the proceeds equally divided once all charges against the Property are satisfied. However, such sale will be deferred until the youngest child, Lokoy, attains the age of 18 years. It is not lost on this Court that this deferred order for sale will keep the Applicant out of his share of the property for a number of years, however, the Court has weighed the interest of the minor child as well as the fact the Respondent may well be left in a position when she is compelled to rehouse herself as an independent person, after having discharged her responsibility as primary carer to the children. In the Court's judgment in the event

²⁵ Minton v Minton [1979] AC 593.

that she is unable to buy out the Applicant interest in the Property, this is the only fair and just outcome.

SPOUSAL SUPPORT

- [87] The Respondent's application for spousal support in the sum of \$1,000.00 per month has been buttressed by, first the outline of her monthly expenses and secondly by the fact that she alone bears the brunt of child rearing following the cessation of cohabitation. The Respondent provided evidence of her expenses which was scrutinised and critiqued by the Applicant. He suggested a number of deductions from the expenses ascribed for vehicle, ground and building maintenance. He also suggested that the legal fees of \$300.00 per month should also be deducted as well as half of Lornique's college fees. Counsel for the Respondent submitted that the sum of the reductions would be \$1,904.66. Even when this sum is deducted, she submitted that there is still a significant shortfall.
- [88] Counsel for the Respondent submitted that the clear inference to be drawn is that the expenses incurred were reasonable. Counsel further submitted that the grant of spousal maintenance and increased maintenance for the children would bring closer equality because as the Applicant presently earns in excess of \$21,000.00 gross more than the Respondent and owns businesses which are likely to earn significant income. Counsel for the Respondent concluded that this would allow the children and the Respondent to maintain the standard of living enjoyed by the family before the breakdown of the marriage, which is placing the Respondent deeper and deeper into debt.
- [89] The Applicant was quite critical of the timing of the Respondent claim for spousal support. He noted that no leave was sought for the late claim for spousal support and he submitted that this application should be refused on this basis. Alternatively, the Respondent argued that the evidence does not demonstrate that such an order is necessary or appropriate. Both are educated professionals who obviously enjoyed a fairly good standard of living throughout the marriage, both engaging in entrepreneurial activity, owning 2 timeshares at one point and various motor vehicles, some said by the wife to be bought by her. Given the Respondent's evidence that she was the

initiator of their financial decisions aimed at becoming debt free at relatively young ages, Counsel argued that there is a clear disconnect between her early affidavit evidence representing herself as the financial mastermind of the family, both nuclear and extended, and her later about turn and insistence at trial that she was surviving on unspecified personal loans and assistance.

[90] In responding to this application, the Applicant averred that although, his salary was higher than that of the Respondent's early in their marriage the extent of the disparity was never actually quantified. He submitted that even excluding their income from their entrepreneurial activities, the difference was not significant. By 2005, she was earning the sum of \$32,000.00 to the Applicant's \$43,000.00 per annum.

[91] Counsel also took issue with the Respondent's lack of candour. She referenced her attention to detail when producing records in support of her largely dismissed claim for retroactive maintenance for the period 2014 – 2018 and she submitted that the absence of crucial financial information in this application was remarkable. Counsel took issue with the fact that the Respondent did not provide any evidence of her level of savings – not one bank account. She also did not provide any financial records whatsoever of her involvement in the business "Marley's Meals on Wheels" despite admitting under cross examination that she is a co-owner and that she has received some limited return on her investment. Instead, she claimed that the business had no financial records despite her own written evidence that she was relied upon by various family members for her financial acumen. Further, it was only under cross examination that the Respondent admitted that she 'recently' discovered she had 'some shares' in her father's business, Jones Woodwork. No details of the value of that shareholding or the income (if any) to be derived therefrom were provided.

[92] Counsel for the Applicant also noted that although the Respondent complains that she has been solely footing all of the children's education and medical expenses since his departure thus creating a deficit of over \$8,000.00 monthly, there is no clear evidence as to how this deficit has been serviced since the Parties separated some 4 years ago. Counsel noted that the Respondent provided no proof of any cost cutting measures that she was forced to implement in order to sustain her lifestyle and that of the children whom she claimed she was left to raise on her own.

Instead, in 2016 she sent the Applicant a spreadsheet for a holiday trip with the children costing over US\$7,000.00, including trips to theme parks. Despite his refusal to contribute, she went on the trip anyway and gave only a general statement to the effect that the children did not 'get all that they wanted' on that trip.

[93] The spreadsheets and figures provided by the Respondent have been described by the Applicant as inflated and misleading or unsupported. Having had a chance to observe the Respondent under cross examination, the Court is satisfied that the criticism is somewhat warranted. For example, in claiming for Lornique's increased maintenance, the sum of \$500.00 for her monthly rent was included when it appears that Lornique resides with a close family member and so it is doubtful whether actual or consistent payments were actually paid. In another instance, the sum of \$200/300 per month was claimed for landscaping, yet in the viva voce evidence the Respondent admitted that these services were provided by her uncle and were not provided during the time period in which the spreadsheet was 'updated' and presented to the court.

[94] When challenged about the spreadsheet showing a large deficit in her monthly income and expenditure, Mrs. Greene did not venture to proffer an amended figure based on her knowledge of her current reality, offering to the court instead that the spreadsheet was old and there was an error in updating it. There was no evidence either of a decreased standard of living, despite the insistence that she suffered financial distress after the separation: the wife continued to take trips with the children and to put her daughter into an overseas institute for a second associate degree whilst maintaining that the husband was not contributing at all or in a timely manner. She did not under cross examination refute, her husband's viva voce evidence in chief, that she offered to essentially 'take over' the Scotia loan that was secured by the matrimonial home by requesting her own credit line, a request that would have added to her monthly liabilities.

[95] Finally, the Applicant observed that the Respondent entered the government service early in the marriage and remained there, steadily rising the ranks. He submitted that it can be inferred that she would be entitled to pension and other benefits the magnitude of which were undisclosed. Counsel for the Applicant therefore concluded that the Respondent has not complied with her duty of full

and frank disclosure of her overall financial circumstances and the court is entitled to draw an adverse inference from such failure.

CONCLUSION

- [96] Despite the fact that these ancillary proceedings were commenced in 2015, the Respondent's claim for spousal support was only advanced in 2018. In support of her application, the Respondent relied on evidence of her financial position which obtained as at 2016 when the Parties were engaged in contentious divorce proceedings and it was clear that the Respondent had withdrawn his financial support from the family.
- [97] The overriding aim guiding the court in making an order for spousal maintenance is the need to achieve a fair and just result. The Act makes it clear that in arriving at a fair and just outcome, the factors to be taken into account are the same as those applicable to applications for a property adjustment order. In exercising its discretion, a court must apply the factors under section 26 of the Act, so as to place the parties so far as practicable and having regard to their conduct 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 each other.
- [98] Both Parties have a duty to make full and frank disclosure of their assets and relevant up to date information concerning their financial position because without this the court will be unable to exercise its discretion properly and justly. In circumstances where a party seeks an order for spousal support, without providing a complete and current picture of their financial position, the Court is entitled to draw appropriate adverse inferences from such failure. For the reasons already set out, the Court is not satisfied that either side has been completely forthcoming in these proceedings.
- [99] The Court has taken into account the Respondent's evidence as to the purported short fall which she says prevents her from meeting her expenses, It is clear to the Court that this marriage broke down in a mire of acrimony and bitterness. The Court has no doubt that the Applicant abruptly and wrongfully withdrew his financial support from his children after he left the matrimonial home.

Indeed, the history of this case discloses that it was only under compulsion of the Court that he resumed and kept up this financial support of the children of the marriage. In the Court's judgment, this initial neglect of duty is the principle cause of the financial hardship experienced by the Respondent in 2016. Having reviewed the totality of her claim, the Court is satisfied that any legitimate short fall could adequately be resolved by appropriate maintenance orders in respect of the children of the marriage.

- [100] The Court has also taken into account the Parties standard to living before the breakdown of the marriage and the Applicant's own needs and his ability to pay the monthly sum of \$1000.00 claimed. In that regard, the Court has taken into account the fact that he no longer contributes to the mortgage on the Property. However, when the Court takes into account that he no longer has the enjoyment of that Property in which he has a vested interest, and the fact that he has relinquished his interest in the time share property without compensation and finally, that as a non-primary carer he also is entitled to reasonable accommodation where his children can enjoy contact and visitation, the Court is satisfied that in all the circumstances of this case, the Respondent has not made out her case for spousal maintenance.

INCREASE IN MAINTENANCE OF CHILDREN

- [101] Financial provision for children on the dissolution of a marriage is governed by sections 24 and 25 of the Act. Section 26 of the Act provides that it is the duty of the Court in deciding whether to exercise its powers under sections 24 and 25 in relation to the child of the family, a court must consider all the circumstances and pay particular attention to the factors set out in section 26(2).
- [102] These include: (a) the financial needs of the child; (b) the income, earning capacity (if any), property and other financial resources of the child (c) any physical or mental disability of the child, (d) the standard of living enjoyed by the family before the breakdown of the marriage; and (e) the manner in which he/she was being and in which the parties to the marriage expected him/her to be educated or trained.

[103] And Section 26(2) mandates the court to:

“...so exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1) (a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards the child.”

[104] These provisions are without prejudice to 26(3) which provides that:

“In deciding whether to exercise its powers under sections 24 and 25 against a party to a marriage in favour of a child of the family who is not a child of that party and, if so, in what manner, the Court shall (considering the circumstances of the case) have regard:

- (1) To whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed the responsibility and to the length of time for which that party discharged that responsibility;
- (2) To whether in assuming and discharging that responsibility that party did so knowing that the child was not his or her own;
- (3) To the liability of any other person of any other person to maintain the child.”

[105] I have considered the factors mandated by the Act. I note that neither Party has averred that either of the children suffers from any disability.

[106] Regarding the income and/or earning capacity of the children, Lokoy attends school in the BVI full time while Lornique is 19 years old and has in the past held a part time job while completing her associate degree in the BVI. She is a US citizen and is currently pursuing further tertiary studies there. The Court notes that when the Respondent was asked whether Lornique could work in the US to help to support herself while pursuing this further course of study her response was equivocal. Nevertheless, it appears that Lornique is not gainfully employed. Neither Party has asserted that the children own any property and other financial resources which would be relevant.

[107] The interim order which was made in January of 2015 mandated maintenance for each child in the sum of \$300.00, per month. The Respondent seeks an increase of maintenance for in the sum of \$700.00 for Lokoy and \$1,000.00 for Lornique. She contends that this is entirely reasonable given the fact that she is already solely bearing the burden of caregiver.

- [108] From all accounts, the children enjoyed a –comfortable standard of living before the dissolution of the marriage. They were well provided for with all basic necessities comfortably covered. They were well entertained and travelled frequently and enjoyed overseas vacations on multiple occasions. Counsel for the Applicant has submitted that there is no reason for maintenance of either child of the family to be increased and certainly not the extent suggested by the Respondent. She argued that for all intents and purposes, the standard of living of the family has not diminished since the departure of dissolution of the marriage. Counsel further submitted that the children are adequately maintained given their respective ages (one an adult, the other on the cusp of adulthood).
- [109] In respect of Lornique, Counsel noted that the figures suggested for her care in the US, have not been substantiated in any way. Counsel noted that Lornique, who is an adult, has not expressed any need. In fact, Counsel noted that she inexplicably failed to cash a cheque that he gave to her for the sum of \$1,000.00. He submitted that this suggests a lack of financial urgency on the part of this young adult or her mother. Given that he jointly remains responsible for underwriting her educational and uninsured medical expenses, the Applicant submitted that there is no compelling evidence to suggest that Lornique or Lokoy are in need of increased maintenance payments.
- [110] The evidence adduced by the Respondent however, reflects her efforts to maintain their standard of living. What is clear to this Court is that prior to the interim order being made, the Respondent bore the brunt of the children's day to day expenses which include but are not limited to food, clothing, transportation and accommodation. The Court notes that the Applicant levied only a few areas of challenge to the figures presented by the Respondent. The Court agrees that child maintenance payments are designed to cover the costs of a child's living expenses such as accommodation, food and clothes etc., not educational or medical expenses.²⁶ These are normally addressed in separate orders. Three years have lapsed since the interim order was granted and the Court must assume that the Parties are better able to assess the actual costs of maintaining their children. In her affidavit filed on 11th November 2016, the Respondent sought an increase to \$500.00 per month per child. In her 23rd June 2016 affidavit, she indicated that the actual monthly expenses for the children (excluding medical and educational expenses) totaled \$2,281.40 per

²⁶ MR v (1) Secretary of State (2) CR (CSM) (Child Support: Other (2014) UK v T 198 (AAC) (30th April 2014).

month. However, in her affidavit of 20th September 2018, she claimed an increase to \$700.00 in respect of Lokoy and \$1,000.00 in respect of Lornique as she is currently attending college in Miami. This is exclusive of the education and medical expenses incurred in respect of each child.

[111] Despite the moving goal post, what is clear, is that the Respondent as consistently contended that \$300.00 per month in periodical maintenance payments was not adequate to see to the needs of the children and to keep them in the financial position in which they would have been if the marriage had not broken down and each of the Parties had properly discharged their financial obligations and responsibilities to the children.

[112] The Court has had an opportunity to observe both the Parties in the witness stand. The Court has also, reviewed all of the written evidence including the monthly income and expenses of the Parties and it is clear that the Applicant does in fact earn significantly more than the Respondent. The Court has also taken into account that the Applicant also has a potential source of income from his business interests. Even with his new household to support and notwithstanding the Respondent's lack of candour, the Court is satisfied that the Applicant is in a better financial position than the Respondent. The Court has however kept in mind the principle that payment of maintenance should not put either party in a penurious position.

[113] Finally, the Court has considered the Respondent's evidence of the actual cost of maintaining the children on a monthly basis and the minor objections raised by the Applicant. Looking at the matter in the round, the Court is satisfied that there is sufficient evidence to demonstrate that a case has been made out for an increase in monthly support for the children. The Court will order that the Applicant now pay the sum of \$500.00 per month per child until each child reaches the age of 18 years or until 22 if the child is engaged in a course of education or training. The Parties will continue to equally bear the cost of all educational and medical expenses incurred by the children over the same period.

COSTS

[114] Counsel for the Applicant has urged the Court to have regard to the conduct of parties throughout these divorce proceedings. In the course of this matter, the Respondent has delayed the completion of the matter on largely unsupported bases. She noted the following;

- a) an unsuccessful appeal to the grant of the decree nisi;
- b) the deliberate revelation of without prejudice correspondence which shows an offer for settlement by the husband as far back as September, 2017, on terms in line with the law and authorities;
- c) the pursuit in 2018 of a judgment summons for over \$50,000.00, over \$40,000.00 of which was dismissed by the court as being unsupported by the law and also for being brought out of time with no attempt to seek leave to do so;
- d) maintaining, against the grain of the law, that in a long marriage between equally educated parties who shared expenses, that the husband was entitled to nominal share only of the matrimonial home;
- e) allowing the trial to be delayed to produce a report that she required (Greenetech) that was not addressed at all because it failed to support her case;
- f) bringing after 4 years, a spurious and unsupported claim for spousal support which was not pursued at trial

[115] In all the circumstances, Counsel asks that the Respondent pay the Applicant's costs on this application to be assessed if not agreed within thirty (30) days.

[116] Costs lie in the court's discretion and the Court is entitled to take into account the Parties conduct in the litigation. In this matter, the Court is satisfied that only conduct relative to the ancillary proceedings should be considered. In that regard, the Court is reluctant to penalize a party simply on the basis that they have chosen to defend ancillary relief proceedings. Having regard to the financial position of the Parties and the orders made, the Court is of the view that the Parties should bear their own costs.

[117] In conclusion, having regard to all the circumstances of the case the Court will make the following declaration and orders:-

- i. **The Applicant is entitled to 50% interest in the Property registered in the land registry as Block 3139B Parcel 234 East Central registration section.**
- ii. **The Respondent shall pay to the Applicant the sum representing the fair value of the Applicant's one half share of the Property within twelve (12) months of the date of this judgment. Upon receipt of such payment both the legal and equitable title to the Property will be vested solely in the Respondent.**
- iii. **In the event that the Respondent is unable to comply with paragraph 2 of this Order, the Property is to be sold and the proceeds equally divided once all charges against the Property are satisfied. However, such sale will be deferred until the youngest child, Lokoy Greene, attains the age of 18 years.**
- iv. **The Applicant is to pay \$500.00 per month as maintenance for each child of the marriage until they attain the age of 18 or until the age of 22 if the child is engaged in a course of education or training.**
- v. **The Parties will continue to equally bear the cost of all educational and medical expenses incurred by the children until they attain the age of 18 or until the age of 22 if the child is engaged in a course of education or training.**
- vi. **Each party is to bear their own costs.**
- vii. **Liberty to apply.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Ag. Dep. Registrar