

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN
3 FAMILY DIVISION
4

5 CAUSE NO: FAM 0009/2010

6 BETWEEN:

7 DIANA MARIE ESCALANTE-SCOTT
8 Petitioner

9 AND:

10 ANDREW THOMAS SCOTT
11 Respondent

12 AND:
13

14 Appearances:

15 Mr Delroy Murray of Murray &
16 Westerborg for the Petitioner

17 Mr David McGrath of Samson & McGrath
18 for the Respondent
19

20
21 Before:

Hon. Mr. Justice Richard Williams

22
23 Heard:

3rd, 4th and 5th September 2012

24
25 Date of Written Closing Submissions:

20th September 2012

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27 Date of Circulation of Draft Judgment:

10th January 2013

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29 Date of Judgment:

21st January 2013



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32 JUDGMENT

- 33
- 34 1. This is an application for financial provision made by Diana Marie Escalante-Scott,
35 against her husband, Andrew Thomas Scott. She did not file a summons for
36 ancillary relief, but at paragraph (b) of the prayer in her petition for divorce she
37 invited the court to *"make such Orders pursuant to Section 19,20 and 21 of the*
38 *Matrimonial Causes Law (2005 Revision) as may be agreed between the parties or*
39 *otherwise as may be just."*
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1 appears that in the years following PSM's inception it had established a healthy
2 client base.

3 10. The husband contends that his involvement in PSM was brought to a close by the
4 wife, so he then started up a new security company called Scott Security Ltd with
5 Mr Neil Williams. The Company was registered on the 18th February 2010 and
6 granted a licence to operate the following month. The husband now runs Scott
7 Security in which he holds a 40% shareholding and Mr Williams, being the person
8 who funded the setting up of the Company, holding 60%.

9 11. At paragraph 17 of his affidavit sworn on the 10th August 2010 the husband stated
10 that he had been taking a salary of only \$3000 per month from Scott Security to
11 cover his own living expenses and payment of his liabilities. However, at paragraph
12 56 of his affidavit sworn on the 17th June 2011, and in his evidence in chief, he
13 quoted a larger amount, namely that since March 2010 he had been transferring
14 C\$5000 per month into his personal account from which he would pay all of his
15 liabilities (for example First Caribbean credit card debt, Ocean Club mortgage
16 payments and utilities). I will take the higher and most recent figure as being the
17 husband's income from that source.

18 *WIFE AND HER EMPLOYMENT*

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20 12. The wife was born in March 1965 and is aged 46. She is from Belize but, having
21 lived in Cayman since the age of 17, has acquired Caymanian status. Her career
22 background is in hairdressing, having established her first hair salon, 'Studio 7', in
23 1993. Around the same time that PSM was set up, shortly after the marriage, she
24 changed the salon's name to 'Cut Above.' The location of the salon was moved so



1 that the two new businesses could operate from the same building in the Caymanian
2 Village Shopping Plaza.

3 13. The husband contends that around two hundred thousand dollars (CIS200,000) was
4 utilised from the PSM accounts towards the setting up and running of 'Cut Above.'
5 This figure is not agreed by the wife who put the building and refurbishing costs at
6 twenty-five thousand dollars (CIS25,000), with an additional CIS80,671 at Elite
7 Systems for Paul Mitchell hair products.

8 14. The wife states that she closed Cut Above on 29th June 2010 due to financial
9 constraints, brought on by a marked reduction in business, rental arrears and her
10 being unable to dedicate sufficient time to the salon due to her newly acquired
11 commitments to PSM.

12 15. The wife stated that her sister, Anna Harper, did not buy Cut Above, but she
13 relocated her salon to Cut Above's premises and purchased some of the equipment
14 for only ten thousand dollars (CIS10,000). The wife states that the CIS10,000 was
15 paid by her sister directly to the landlord towards the CIS14,317.43 arrears in rent
16 for the premises, which had been occupied by both Cut Above and PSM. The wife
17 states in her June 2011 affidavit that she then worked in her sister's salon.

18 16. In February 2012 her sister closed her salon. The wife is now hairdressing at
19 another salon on a commission basis. The wife continues to run the distributorship
20 for Paul Mitchell hair products in the Cayman Islands.

21 17. Unfortunately, the wife gives no definitive figures for her current or foreseeable
income – simply saying that what she earns helps *"to cover some expenses albeit
barely enough to survive."* When she ran her salon, despite the content of her



1 affidavit evidence, she said that she had on average between \$3,000 to \$7,000
2 receivables per month. At paragraph 4 of her affidavit sworn on the 2nd December
3 2011 she stated that between 4th January 2010 and 16th November 2011 her monthly
4 income was C\$1,495.72. She said in her evidence in chief that the Paul Mitchell
5 distributorship may realise \$2,000 to \$3,000 per month. However, in her earlier
6 affidavit evidence she said that the Paul Mitchell income had reduced and was less
7 than \$2000 to \$3000.

8 *DIANA ESCALANTE T/A BELFOR (CAYMAN)*



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10 18. To address the needs of various local businesses to rescue/restore documentation
11 damaged by Hurricane Ivan, the parties, in collaboration with Belfor Canada,
12 established a document restoration security services business called Diana
13 Escalante T/A Belfor (Cayman). The Trade and Business Licence was dated 9
14 November 2004. The business ceased operation around January 2007. The service
15 provided, backed up with overseas expertise, was in great demand from businesses
16 on Island. It was profitable and some of the sums earned were used to purchase the
17 Venetia property and to set up PSM.

18 19. A great deal of evidence was presented and time spent by the parties during the
19 hearing dealing with the issue of who was primarily responsible for setting up and
20 running the Belfor business. I am satisfied that the wife, although not to the degree
21 she contends, 'rolled up her sleeves' and on occasion got involved in some of the
22 work required on site, including sometimes marshalling parts of the labour force.²
23 However, I also accept that it was the husband who, possessing the necessary

² Affidavit of Carmen Swaby, sworn on the 10th October 2010

1 security experience acquired whilst a police officer, was in reality the figurehead
2 for the business. The husband was the person who Belfor Canada, the Canadian
3 parent company, perceived to be its point man in Cayman and with whom business
4 relations were forged. He was Belfor Canada's original agent in the Cayman Islands
5 and the wife was later added by the parent company as an agent. It appears that the
6 invoices were received from "Andy Scott, Belfor agent." Although I accept (not in
7 affidavit form and thus requiring caution when relying upon it), the contents of the
8 email from Marshal Oliver, the Director of Belfor Canada, dated 15 September
9 2010³ are consistent with the husband's contentions and I am content that they
10 reflect the true position. There were practical reasons why Belfor (Cayman) was
11 established in the wife's name due to her Caymanian status.

12 20. Having regard to my findings, I see no reason to stray from the husband's
13 submission that the profits from Belfor need not be proportioned and that no special
14 account is required as to the parties' contributions from the profits, some of which
15 was used to purchase the former matrimonial home.

16 21. That is the essential background to the application before me. So far as the evidence
17 is concerned, there has been a mass of written evidence contained in at least five
18 extremely large lever files. Despite the volume of written evidence, Counsel and
19 those giving oral evidence, on the whole, made only passing reference to large parts
of it, primarily in summaries. During the hearing, neither the witnesses nor I were
taken through considerable parts of the copious documentation in the analytical way
I would have expected if the contents were being heavily relied upon. Therefore,
although post hearing I have had to spend quite some time carefully reading all of



³ Husband's affidavit sworn on the 17th June 2011 - Exhibit AS1- Tab 10

1 the material, a significant part of the unexplained material was not that helpful and
2 the relevance and desired weight to be placed on it, unclear.

3 22. In addition to the written evidence, I have received an opening skeleton argument,
4 opening submissions and closing submissions from the attorneys on both sides and
5 I am extremely grateful to them for their assistance by those written documents.
6 Over the two-day hearing I have heard oral evidence at some length, both from the
7 husband and the wife.

8 *ISSUES*



9
10 23. In closing for the wife, Mr Murray contended that the issues that require
11 consideration by the court are: (i) what is (are) the matrimonial property(ies) of the
12 marriage; (ii) the disposal of the outstanding pension payments due from PSM; (iii)
13 how to approach the debt owed to PSM; (iv) the relevance of the conduct of the
14 parties; (iv) whether the Petitioner is entitled to an order providing the periodic
15 payments: (v) pension equalisation: and (vi) costs.

16 24. Mr McGrath for the husband raises for determination, albeit expressed differently,
17 issues which are on the whole similar to those suggested by the wife, namely: (i)
18 how should the court deal with PSM and any assets and in particular liabilities
19 which result from the operation of PSM? (ii) what are the matrimonial assets and
20 liabilities and how should they be apportioned? (iii) is the Ocean Club apartment a
21 matrimonial asset? If so, to what extent and what value should be attributed to it?
22 (iv) what account should be given to the husband's payment of/reduction of the
23 credit card debts? (v) is the wife entitled to spousal maintenance?

24 *WIFE'S POSITION*

1 25. The wife contends that both the Venetia property and the Ocean Club property
2 should be treated as matrimonial assets. The wife submits that she should be
3 awarded a half of the equity in the Venetia property, which she states amounts to
4 two hundred and fifty five thousand dollars (CIS255,000).

5 26. I have found some difficulty ascertaining precisely what orders the wife seeks due
6 to uncertainty caused by the unexplained inconsistent position taken by Mr Murray
7 in his written skeleton argument dated 31 August 2012 when compared to his
8 closing written submissions dated 18 September 2012. The inconsistency may have
9 come about because they were possibly drafted by different persons, as, looking at
10 the corner markers, one bears the name of Mr Murray and the other of Ms
11 Thompson, and they are in different typecast.

12 27. A claim for one-half of the equity in the Ocean Club property is set out in the
13 skeleton argument whereas, in the closing written submissions, it is stated that the
14 wife seeks at least a third of the equity in the Ocean Club property, which she puts
15 at twenty five thousand three hundred and thirty three dollars (CIS25,333). The
16 wife accepts that this was an asset acquired by the husband before the marriage, but
17 claims that it was one she has contributed to. It is suggested that the fact that the
18 husband was able to reside and work in the Islands due to her status amounts to a
19 contribution, as do payments towards the mortgage made from PSM accounts.

20 28. Another example of an inconsistency between the written skeleton argument and
21 the written submissions concerns PSM's pension liability. Paragraph 9 in the
skeleton argument clearly states that the wife's position is that the PSM's
outstanding pension liability should be borne equally by the parties. This seems
consistent with paragraph 4 (27) of the wife's affidavit sworn on 16 June 2011. This





3 is also consistent with the wife's Schedule of Assets and liabilities which sets out
4 that each party has a \$62,500 liability in relation to the mortgage. However, at
5 paragraph 44 of the closing submissions, and in the absence of any previously
6 unknown evidence coming to light subsequent to the filing of the skeleton
7 argument, an entirely different position was taken on behalf of the wife. In the
8 closing argument, it was submitted that the PSM pension liabilities should be borne
9 solely by the husband due to his alleged mismanagement of the Company. It is
10 contended that his conduct in relation to the management of PSM, of matrimonial
11 assets and of the Company's liabilities generally, has been such that it should not be
12 disregarded. One would have expected the closing position to be echoed in the
13 opening skeleton on this important and central issue. The husband, in the absence of
14 any new evidence, should be entitled to approach and present his case to meet the
15 claim as put by the wife in the opening skeleton argument.

14 29. The wife contends that she has no pension entitlement, whereas the husband has a
15 police pension from the United Kingdom of approximately \$40,408 and one from
16 the Cayman Islands of C\$28,459. The only pension accrued during the marriage
17 was for the short period between October 2004 and June 2005 – a time when the
18 husband was still a member of the RCIPS. The wife seeks an award of no less than
19 50% in respect of the commuted value of the husband's pensions. Although this
20 claim is set out in the brief paragraphs 58 to 61 in the closing written closing
21 submissions, it was again not specifically raised in the opening skeleton argument
22 nor argued strongly before me.

23 30. I am satisfied that the Court has jurisdiction to make such orders although
24 regrettably, I was not referred to any case law in support of this contention and to

1 the suitability of making such an order in the circumstances that prevail in the case
2 before me. Despite this, the Court may have regard to the pension disparity when
3 considering factors relating to fairness between the parties, but at the same time
4 recognising that the pension rights were almost totally gained pre-marriage, and
5 that this was a short marriage to separation.

6 31. Having regard to this being a short marriage, with a very short period of pension
7 accrual during marriage, this is not a case suitable for pension division. It is not an
8 application that appears seriously pursued by the wife as evidenced by the manner
9 in which it was raised and pursued during the hearing.

10 32. In the opening skeleton argument the court was told that the wife was claiming 60%
11 of the net value of all contracts entered into between former clients of PSM and
12 Scott Security. This claim does not seem to have been pursued and was not set out
13 in the written closing submissions. This may well be because it was recognised that
14 any claim, if there was merit in one, concerning conduct of Scott Security to the
15 detriment of PSM would be an issue between the companies to be resolved in a
16 different court setting. In addition, it may be concluded that, due to the wife's lack
17 of relevant security experience, PSM's clients would naturally follow the husband
18 to Scott Security. However, the wife submits that the husband's actions be
19 considered as relevant conduct when considering the division of matrimonial assets.

20 33. The wife submits that due to her age, limited income capacity as a self-employed
21 hairdresser and the loss of her business and client base, when compared with the
potentially lucrative Scott Security business, this is a case for spousal periodical
payments. It is contended that, if the court feels that this is a matter in which there



1 should be a clean break order, the wife should be given an uplift in the proportion
2 of capital assets.

3 34. Although accepting that a number of its clients are former PSM clients, I am
4 satisfied that the relevance of Scott Security to these proceedings is limited. I have
5 regard to the fact that it is potentially a lucrative business and that the husband can
6 earn a living and support himself from it. It is relevant when considering the
7 husband's needs.

8 35. However, Scott Security should not be regarded as being a matrimonial asset.
9 Although I accept that the husband may have been earlier exploring all of his
10 options – including the possibility of setting up a fresh company, Scott Security was
11 incorporated after the parties' separation and after the hearing before Henderson J
12 in March 2010. It is a new company with the financial backing to fund its setting up
13 coming from a third party. The husband was entitled to take this step, especially as
14 it was clear that he no longer had any authority to make decisions in relation to the
15 operation of PSM, which had been the source of his livelihood. It is understandable
16 that the clients and staff chose to leave PSM due to the uncertainty surrounding the
17 future of PSM which was brewing at the end of 2009 and early 2010.

18 36. The wife initially sought an order for costs, including for the costs incurred by her
19 prior to the granting of legal aid. The court was informed that her costs amount to
20 C\$23,096.25. However, in the Closing Written Submissions she appears to be
21 arguing that each party bear their own costs, contending that costs should only be
22 awarded if the assets involved were substantial.

23 *HUSBAND'S POSITION*



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37. The husband seeks an order in the following terms:
- (i) The matrimonial home at Venetia be placed on the market forthwith with an agreed realtor and sold for the best price reasonably obtainable.
 - (ii) The net proceeds of sale of the property be paid into escrow and the following liabilities be paid there from: (a) the debt owed by the parties in relation to outstanding pension contributions, plus interest and penalties; (b) C\$69,950 to be paid to the husband in respect of credit card debts he says were incurred during the marriage. The husband would be liable for payment of the credit card debts to Scotiabank and First Caribbean international bank; (c) the parties' legal costs to the respective attorneys in these proceedings, including any figure required to be repaid to the legal aid fund.
 - (iii) Any surplus from the net proceeds of sale of the property to be apportioned equally between the parties.
 - (iv) PSM should be liquidated.
 - (v) No order as to costs.
38. The husband contends that the Ocean Club property should not be viewed as a matrimonial asset and he should retain it. He argues that if there is any issue as to the period between August 2007 – August 2009 when the mortgage was paid from PSM accounts, then the maximum value of the wife's claim against the property is one half of the value by which the mortgage balance was reduced during that period (C\$9,360). The monthly mortgage payments for the relevant two year period were around C\$780.

1 39. It is contended that the wife should not be entitled to even a share of that amount, as
2 it should be set off against occupational rent for her use (which included other
3 members of her family) of the former matrimonial home to his exclusion. The
4 husband argues that the wife's refusal, in particular since his suggestion in late
5 October 2011 to allow this family-sized property to be rented out which, even after
6 deducting a sum for the wife's costs of renting a smaller property for just herself,
7 would have allowed substantial in-roads to have been made into the outstanding
8 stamp duty liability. He contends that this could also be off-set against any claim
9 she may have in relation to the Ocean Club property.

10 40. The husband highlights that this was a short marriage, being less than five years in
11 length to the date of separation. The wife puts the length of marriage at 4 years and
12 10 months and in cross examination she accepted this constitutes a short marriage.
13 The husband indicates that the wife has an income earning capacity as a hairdresser
14 as well as from her Paul Mitchell hairdressing supplies distributorship. He contends
15 that she has suffered no economic disadvantage arising from the marriage, as when
16 they met she had a salon and when they separated she still did so. He submits that
17 both parties leave the marriage with precisely the same skill and earning potential
18 which they had when they entered it.

19 41. The wife accepted during cross examination that she came to the marriage with no
20 property of her own. She accepts that she came into the marriage with her skills and
21 reputation as a hairdresser and that she still has that same skill set. The wife did
22 state that she no longer owns a salon, so contends that her position is now, albeit
23 post separation, worse than it was at the time of the marriage.





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Although I find that the wife dedicated some time working on PSM matters after August 2009, I am not convinced that this was to such an extent that it was a primary reason for her closing down the salon. It does appear that the salon had been run in such a way that it was over-reliant upon profits of PSM and funds coming out of the PSM accounts (as well as some payments from the credit cards) which were greater than the business' payments into those accounts. The wife was solely responsible for running the salon and after a reasonable period of time post set up, she should have been able to structure it as an independent business, not dependent on PSM financing. When the funds from the PSM income were no longer forthcoming this must have contributed to the reason she faced difficulties running the salon.

12 43. If the wife is right when she says that her gross monthly income for the three year
13 period ending 31st December 2009 (a period of time before she took on any
14 responsibility for PSM) averaged only CI\$584.90⁴ one must question how seriously
15 she approached the business and how many hours she was putting in at the salon.
16 The affidavit is ambiguous and I have taken it to be referring to her income. If I am
17 wrong, and she is referring to the salon's gross income, my concerns increase. The
18 wife has owned hair salons in Grand Cayman for almost twenty years and one
19 would have expected her, over those years, to have retained a loyal client base if the
20 business was being run efficiently. As already highlighted she puts her income from
21 the salon between 4 January 2010 until 16 November 2011 as being CI\$17,948.65,
22 an average of CI\$1,495.72 per month. No explanation has been offered in relation
23 to the different income for the two periods of time. I note that between February
24 2010 and April 2011 CI\$34,433.66 was debited from the Cut Above account. I have

⁴ Para 4(iii)(c) Wife's affidavit sworn on the 25th June 2010

1 reviewed the bank statements and documentation exhibited at “DMES 13” of the
2 wife’s affidavit sworn on 25 June 2010, but no accounts for the salon, which was
3 primarily a cash business, have been produced to the Court. The evidence tends to
4 show that she, as well as the husband, was enjoying a lifestyle that did not
5 necessarily revolve around prioritisation of the needs of the work place.

6 44. The brief nature and substance of the evidence set out at paragraphs 9 and 10 of the
7 wife’s affidavit sworn and 16th June 2011 concerning the sale of the salon’s
8 contents and equipment to the wife’s sister, and the informal looking bill of sale
9 dated 1st August 2010 exhibited at “DMES20”, give credence to the husband’s
10 concerns set out at paragraphs 20 and 21 of his affidavit sworn on the 10th August
11 2010 as to whether a reasonable market price was obtained. The bill of sale post
12 dates the payment of C\$10,000 to CP Development by Derrick Harper.

13 45. Cut Above, similar to PSM, could be regarded as being a Matrimonial asset.
14 However, the business now has no value.

15 46. It does appear that both the husband and the wife failed to efficiently manage the
16 businesses for which they had primary responsibility. Particularly in the latter years
17 of the marriage PSM, to its own detriment, was funding from company assets a
18 grand lifestyle for both parties which was disproportionate to their means.

19 47. In the written submissions filed by Mr McGrath on behalf of the husband dated 31
20 August 2012, it was rather unattractively contended that, due to the wife’s approach
to pursuing the Fourth Quarter debt, she should “*take sole responsibility for the
pension arrears.*” However, in his closing written submissions this contention is
not re-stated. Therein it is rightly argued that this should be regarded as a



1 matrimonial debt and any balance left after recovered PSM account receivables
2 have been applied should come from the proceeds of the sale of the former
3 matrimonial home. This is similar to the submission contained in Mr Murray's
4 skeleton argument filed on behalf of the wife. I am satisfied that is the correct
5 approach to take in this matter.⁵

6 48. The husband contends that it is a "*paradigm case*" for a clean break and therefore
7 no order for spousal periodical payments should be made.

8 49. The husband submits that the wife is not entitled to a proportion of the husband's
9 pension which was almost entirely acquired from his employment prior to their
10 marriage.

11 *THE LAW*



12 50. The Law pertaining to the making of periodical payment orders and to the division
13 of matrimonial assets is governed by s.19 of the Matrimonial Causes Law, which
14 reads as follows:
15

16 *"In dealing with all ancillary matters arising under this Law the court should*
17 *have regard first of all to the best interests of any children of the marriage and*
18 *thereafter to the responsibilities and financial and other resources, actual and*
19 *potential earning power and deserts of the parties."*
20

21 51. It must be read in conjunction with s.21 of the Law, of which the relevant parts for
22 my consideration in this matter provide as follows:
23

24 *"at the time of pronouncing a decree under this law, the court shall, as*
25 *appropriate, make order for:*
26 *(a) ...*
27 *(b) the disposition of matrimonial property, including the matrimonial home;*
28 *(c) ...*

⁵ See paragraph 28 above

1 (d)
2 (e) making financial provision from the property of either spouse for the
3 other spouse;
4 (f) providing for periodical payments to be made by either spouse for the
5 other spouse; and
6 (g) costs.”

7
8 52. As highlighted by Sir John Chadwick P. at para. [32] in *McTaggart v McTaggart*
9 CICA 14 of 2010 (“*McTaggart*”), the court when exercising those powers could
10 make an order for the disposition of matrimonial property; could make an order for
11 financial provision out of the property for one of the parties for the benefit of the
12 other; and could make an order that periodic payments be made by one party for
13 the benefit of the other.

14 53. In deciding whether to make an order under s.21 (b), and from where any such
15 order should be made, I am required to consider and decide which of the parties’
16 assets is matrimonial property. In the combined House of Lords appeals of *Miller v*
17 *Miller* and *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2AC 618, 634
18 (“*Miller*”) Lord Nicholls of Birkenhead described matrimonial property as
19 “*property acquired during the marriage otherwise than by inheritance or gift.*” Its
20 distinguishing feature is that it is “*the financial product of the parties’ common*
21 *endeavour.*”



24 **PRINCIPLES TO BE APPLIED**

25 54. Section 19 and s.21 of the Law give the court a wide discretion when it comes to
26 financial provision and any awards made to the parties.

1 55. The courts in the Cayman Islands, in deciding whether to exercise its powers under
2 s.21 and, if so, in what manner has, when considering what is fair in all the
3 circumstances of the case, traditionally had regard not only to the matters set out in
4 s.19, but also the relevant factors raised in s.25 (1) of the Matrimonial Causes Act
5 1973, and now s.3 of the Matrimonial and Family Proceedings Act 1984 in England
6 and Wales.⁶ The factors to be considered include:

- 7 (i) The income earning capacity, property and other financial resources
8 which each of the parties has or is likely to have in the foreseeable
9 future;
- 10 (ii) The financial needs, obligations and responsibilities which each of the
11 parties to the marriage has or is likely to have in the foreseeable future;
- 12 (iii) The standard of living enjoyed by the family before the breakdown of
13 the marriage;
- 14 (iv) The age of each party to the marriage and the duration of the marriage;
- 15 (v) Any physical or mental disability of either of the parties to the
16 marriage;
- 17 (vi) The deserts of the parties, including contributions made by each of the
18 parties to the welfare of the family (to include contributions made by
19 each of the parties to the accumulation of matrimonial assets as well as
20 non matrimonial property) and any contribution made by looking after
21 the home caring for the family;⁷

⁶ *Doak v Doak and Riley* [2002] CILR 224, [17], [21], [22], *Wight v Wight* CICA 6 of 2006 [62] (“*Wight*”), *Wood v Wood* [2009] CILR 255, [12] and *McTaggart v MacTaggart* (supra) [39]

⁷ *Deborah M. Wight v Ian A.N. Wight*, CICA 6 of 2006 Zacca P at para 33



- 1 (vii) The value to either of the parties to the marriage of any benefit (for
- 2 example, a pension) which, by reason of the dissolution of the
- 3 marriage, that party will lose the chance of acquiring;
- 4 (viii) The conduct of each of the parties. If that conduct is such that it would
- 5 in the opinion of the court be inequitable to disregard.

6

7 56. Lord Nicholls of Birkenhead in *White v White* [2001] 1 AC 596 ("*White*") held

8 that

9 *"The purpose of these powers is to enable the court to make their financial*

10 *arrangements on or after divorce in the absence of agreement between the*

11 *former spouses."*

12

13 57. Lord Nicholls dealing with the concept of fairness stated that:

14 *"Divorce creates many problems. One question always arises. It concerns*

15 *how the property of the husband and wife should be divided the*

16 *outcome ought to be fair in all the circumstances...."*

17



18 58. Lord Nicholls when dealing with fairness at page 605 stated that:

19 *"As a general guide, equality should be departed from only if, and to the extent*

20 *that, there is good reason for doing so. The need to consider and articulate*

21 *reasons for departing from equality would help the parties and the court to*

22 *focus on the need to ensure the absence of discrimination. This is not to*

23 *introduce a presumption of equal division under another guise. Generally*

24 *accepted standards of fairness in a field such as this change and develop,*

25 *sometimes quite radically, over comparatively short periods of time. The*

26 *discretionary powers, conferred by Parliament 30 years ago, enable the courts*

27 *to recognise and respond to developments of this sort. These wide powers*

28 *enable the courts to make financial provision orders in tune with current*

29 *perceptions of fairness. Today there is a greater awareness of the value of none*

30 *financial contributions to the welfare of the family"*

31

1 59. When identifying the principles to be applied following *White* and *Miller* I
2 respectfully adopt the approach taken to the case law emanating from England and
3 Wales by Sir John Chadwick. P. in *McTaggart*.⁸ I am conscious that there has been
4 recent case law in which the courts in England and Wales have tried to understand
5 the limitations of and apply the principles set out in *Miller*, unfortunately none of
6 which has been placed before me in this matter.

7 60. In *Miller*, Lord Nicholls identified three strands of principles for the purpose of
8 achieving fairness between the parties, namely, financial needs, compensation and
9 sharing. I now concentrate on these elements, for there is no child of the marriage
10 whose best interests I would otherwise have had to consider first.

11 61. Baroness Hale at para [144] in *Miller* commented on the principles highlighted by
12 Lord Nicholls as follows:

13 *"Thus far, in common with my noble and learned friend, Lord Nicholls of*
14 *Birkenhead, I have identified three principles which might guide the court in*
15 *making an award: need (generously interpreted), compensation, and sharing. I*
16 *agree that there cannot be a hard and fast rule about whether one starts with*
17 *equal sharing and departs, if need or compensation supply a reason to do so, or*
18 *whether one starts with need and compensation and shares the balance. Much*
19 *will depend upon how far future income is to be shared, as well as current*
20 *assets. In general, it can be assumed that the marital partnership does not stay*
21 *alive for the purpose of sharing future resources unless this is justified by need*
22 *or compensation. The ultimate objective is to give each party an equal start on*
23 *the road to independent living."*
24



25 62. I need not say a great deal about the first strand of fairness, namely needs. I note
26 that Lord Nicholls pointed out that in most cases, the search for fairness would

⁸ See also Forte J in *Wight* (supra) para, 62 and Sir John Chadwick P in *W v W* [2009] CILR 255 at para.12

1 largely begin and end upon consideration of financial needs because the available
2 assets would be insufficient to provide adequately for the needs of two homes.

3 63. Baroness Hale stated at para. [138] in *Miller* that:

4 *"In the great majority of cases, the court is trying to ensure that each party and*
5 *their children have enough to supply their needs, set at a level as close as*
6 *possible to the standard of living which they enjoyed during the marriage."*

7

8 64. The principle of need will require consideration of the factors (i) to (v) set out in
9 paragraph 64 above. There is an obligation to be fair but where there is a need for a
10 departure from equality there must be good reason for doing so. The Court must
11 consider the needs of both parties before doing so.

12 65. The second strand of fairness is namely what Baroness Hale termed "*relationship-*
13 *generated disadvantage compensation.*"

14 66. Sir John Chadwick, P in *McTaggart* referred to the following extracts from *Miller*
15 in which Lord Nicholls and Baroness Hale explained the concept. At para. [13] to
16 [15] Lord Nicholls stated:

17 *"[13.] Another strand, recognised more explicitly now than formally, is*
18 *compensation. This is aimed at redressing a significant prospective economic*
19 *disparity between the parties, arising from the way they conducted their*
20 *marriage. For instance, the parties may have arranged their affairs in a way*
21 *which has greatly advantaged the husband in terms of his earning capacity, but*
22 *left the wife severely handicapped so far as her own earning capacity is*
23 *concerned. Then the wife suffers a double loss: diminution in her earning*
24 *capacity and the loss of a share in her husband's enhanced income. This is*
25 *often the case. Although less marked than in the past, women may still suffer a*
26 *disproportionate financial loss on the breakdown of the marriage because of*
27 *their traditional role of home-maker and child-carer.*

28
29 *[14.] When this is so, fairness requires that this feature should be taken into*
30 *account by the court when exercising its statutory powers. The Court of Appeal*



1 *decision in SRJ v DWJ (Financial Provision) [1999] 2 FLR 176, 182 is an*
2 *example where this was recognised expressly.*

3
4 *[15.] Compensation and financial needs often overlap in practice, so double-*
5 *counting has to be avoided. But they are distinct concepts, and they are far*
6 *from co-terminous. A claimant wife may be able to earn her own living, but she*
7 *may still be entitled to a measure of compensation."*

8
9 67. Baroness Hale said at para [140]:

10 *"a second rationale, which is closely related to need is compensation for*
11 *relationship – generated disadvantage. Indeed, some consider that provision*
12 *for need is compensation for relationship – generated disadvantage. But the*
13 *economic disadvantage generated by the relationship may go beyond need,*
14 *however, generously interpreted. The best example is a wife, like Mrs*
15 *McFarlane, who is given up what would very probably have been a lucrative*
16 *and successful career. If the other party, who has been the beneficiary of the*
17 *choices made during the marriage, is a high earner with a substantial surplus*
18 *over what is required to meet both parties needs, then a premium above needs*
19 *can reflect that relationship – generated disadvantage."*
20



21 68. The principle of compensation relates to, amongst others, (i) the perspective
22 financial disadvantage which upon divorce some parties face as a result of decisions
23 which they took for the benefit of family during marriage; (ii) in a short marriage
24 the financial disadvantage a party suffered, if any, on entering into the marriage;
25 and (iii) any loss of possible pension rights.

26 69. This "*relationship-generated disadvantage compensation*", would apply where
27 there is a surplus of assets and income over needs. This is not the case in the matter
28 before me.

29 70. The third strand of the principles for the purpose of achieving fairness between the
30 parties is that of sharing. Lord Nicholls explained as a marriage is a partnership of
31 equals and that when a partnership ends each is entitled to an equal share of the

1 assets of the partnership, unless there is a good reason to the contrary. Lord
2 Nicholls said at para. [16]:

3 *"This "equal sharing" principle derives from the basic concept of equality*
4 *permeating marriage as understood today. Marriage, it is often said, is a*
5 *partnership of equals. In 1972, Lord Keith of Kinkel approved Lord Emslie's*
6 *observation that 'husband and wife are now for all practical purposes equal*
7 *partners in marriage': R v R [1992] 1 AC 599, 617. This is now recognised*
8 *widely, if not universally. The parties commit themselves to sharing their lives.*
9 *They live and work together. When their partnership ends each is entitled to an*
10 *equal share of the assets of the partnership, unless there is a good reason to the*
11 *contrary. Fairness requires no less. But I emphasise the qualifying phrase:'*
12 *unless there is good reason to the contrary'. The yardstick of equality is to be*
13 *applied as an aid, not a rule."*
14



15 71. The relevant factors for the principle of sharing are: (i) the contributions of the
16 party to the welfare of the family, (ii) the duration of the marriage: and (iii) conduct
17 of the parties, which would be inequitable to disregard.

18 72. The principle of fairness may apply to all properties of the parties both
19 'matrimonial' and non-matrimonial. However, the courts must consider a number
20 of factors which may vary depending on the source of these assets. In relation to
21 non- matrimonial property, by this I mean property which a party may have brought
22 with them into the marriage or acquired by inheritance or gift during the marriage,
23 then the court should consider the duration of the marriage. The fact that it is a short
24 marriage, depending on the source of the asset, may justify a reason for departing
25 from equality. In such a case, fairness may require that a party may not be entitled
26 to a share of the non-matrimonial property which the other party brought into the
27 marriage. Lord Nicholls at para [24.] in *Miller* said that this reflected:

28 *"The instinctive feeling the parties will generally have less call upon each other*
29 *on the breakdown of a short marriage."*

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73. Most helpfully, Sir John Chadwick, P. at para [42] to [43] of *McTaggart* set out the following considerations that this court must have, when he stated:



"[42] in this jurisdiction. A court will need to consider whether – having proper regard to the section 19 factors – an order under paragraph (b) of section 21 of the law for the disposition of the matrimonial property will make appropriate provision for the relevant party in respect of the three strands: need, compensation and sharing. If not, then the court will need to go on to consider whether to make an additional order under paragraph (e) of section 21: that is to say, an order making financial provision for that party out of the property of the other party."

*"[43] It seems to me reasonably clear (and I would so hold) that, if satisfied that an order under paragraph (b) of section 21 of the law (or the combination of orders under paragraphs (b) and (e) of that section) would make appropriate provision for the relevant party in respect of the three strands (need, compensation and sharing), the court should not (without good reason) make an order for periodical payments under paragraph (f) of that section. To make an order for periodical payments – in circumstances where such an order is necessary because appropriate provision can be made by the disposition of matrimonial property (under paragraph (b)) or by a capital adjustment from the separate property of the other party (under paragraph (e)) – would be inconsistent with the principle of "clean break" to which Lord Scarman referred in *Minton v Minton* [1979] AC 593, 608."*

74. The President highlighted that there was no provision in the Matrimonial Causes Law similar to the clean break provision, s.25A (1) of the Matrimonial Causes Act 1973 in England and Wales. However, it is clear from his approach at para. [45] that he felt it commendable for the courts in Cayman to recognise the undesirability of continuing ties after divorce and to do this by adopting the modern approach of, where appropriate, seeking to make orders enabling a clean break. I wholeheartedly adopt Sir John Chadwick P's approach set out in the abovementioned paragraphs.

1 75. So when I now move on to consider the issues, the parties' evidence and any further
2 law I have regard to the above principles which establish that overall, the court is
3 charged with dividing the assets in a fair and equitable manner, whilst trying to see
4 if there can be a clean break.

5 *POTENTIAL ASSETS*

6 *FORMER MATRIMONIAL HOME - 5 VENETIA, SOUTH SOUND*



7 76. In this case there is no doubt that the property at 5 Venetia, South Sound is a
8 matrimonial asset. There is no dispute between the parties as to that. This property
9 has a value in the region of five hundred and fifty-five thousand dollars (CI
10 \$555,000) and is unencumbered save for the requirement to pay outstanding stamp
11 duty in the sum of C\$48,279.⁹ The husband estimates that upon sale and discharge
12 of the stamp duty and deducting ancillary costs of sale that the equity left over
13 would be four hundred and seventy two thousand dollars (C\$472,000). The wife
14 claims a 50% interest in the equity of this property which she submits would be in
15 the region of two hundred and fifty five thousand dollars (C\$255,000), and the
16 husband states would be around two hundred and thirty six thousand dollars
17 (C\$236,000). The husband's figure includes the incidental costs of sale and is the
18 one which I find to be more accurate. I therefore find that the former matrimonial
19 home has equity of four hundred and seventy two thousand dollars (C\$472,000).

20 77. The husband submits that the property be sold and the stamp duty liability
21 discharged. It has not been submitted on behalf of the wife that the property be sold.
22 Although I have considered whether the wife could remain in the property with a
23 charge in favour of the husband, I conclude that this would not do justice to the

⁹ Para 5 husband's affidavit sworn on the 17th June 2011

1 husband. Apart from both parties' liability and the PSM pension liability, he has
2 other large debts that he would be unable to discharge without a sale. Accordingly,
3 as the most significant matrimonial asset, the former matrimonial home must be
4 sold.

5 78. There is an issue as to how all the proceeds of sale are to be utilised before the
6 parties receive any of the equity. As already mentioned, the husband by the end of
7 the hearing contended that the first draw on the proceeds of sale after payment of
8 the stamp duty should be to pay off the PSM pension debt. Despite initially sharing
9 the husband's approach to the repayment of the pension debt, by the closing
10 submissions it was unattractively suggested that he should also be solely
11 responsible for discharging that debt. It appears that the wife's position is that both
12 parties bear their own costs and that these then be paid from any sums received by
13 the respective party. I endorse the husband's suggestion which was set out in
14 closing.

15 79. The PSM pension liability is in the region of C\$121,745.67. The amount left for
16 each party if there were a 50/50 split after payment of only the stamp duty
17 discharge of the PSM pension would be in the region of \$171,127. I will have to
18 consider whether any other deductions should be made to meet additional liabilities
19 before the parties receive a share and whether there should be an equal or other
20 percentage split of the net proceeds.

21 80. The husband goes on to say that, thereafter, the proceeds of sale should be used to
22 pay the credit card debts incurred during the currency of the marriage, totalling
23 C\$69,950.27 (increasing) and then both parties' personal legal costs. The wife



1 contends that the husband should be solely responsible for the credit card debts. I
2 will deal with this a little later herein.



3 *206 OCEAN CLUB CONDOMINIUMS*

4
5 81. The position in relation to the apartment at 206 Ocean Club Condominiums is
6 disputed. The wife contends that it is a matrimonial asset and the husband argues
7 that it is not. The husband initially rented and then later purchased the property,
8 residing there from 1996 until it was severely damaged by Hurricane Ivan in
9 September 2004. The parties lived together in the property for only three months
10 when the parties cohabited between May 2004 and the middle of September 2004.
11 In August 2007, after the property was rebuilt, it was rented to the wife's brother
12 for CI\$1500 per month. The husband contends that the brother owes a sum of
13 CI\$17,444.50 for outstanding rent and utilities. The husband currently resides in the
14 property to which he returned in around July 2009 when he says he was excluded
15 from the former matrimonial home.

16 82. The property is registered in the husband's sole name. The husband purchased the
17 property in 2001 for one hundred and forty three thousand dollars (CI\$143,000) –
18 three years prior to the date of the marriage. The wife, in her affidavit of 16 June
19 2011 does not accept that purchase price, but this was not explored by Mr Murray
20 in cross-examination. For the purpose of this hearing, the purchase price has little
21 significance.

22 83. The husband purchased the property with the assistance of a mortgage from Scotia
23 Bank which, as at the 15th June 2011, had a remaining balance of CI\$84,325.40.
24 The husband states that he also borrowed GBP 35,000 (CI\$43,000) from his parents

1 towards the deposit and legal fees. The husband contends that this was not a gift
2 and he has still to repay them.¹⁰ The Court record reflects that during the hearing,
3 when asked whether there was an issue about this being a loan or gift, Mr Murray
4 conceded that there was nothing to contradict that it was a loan. This concession
5 was made by Mr Murray despite the contents of paragraph 7 (8) of the wife's
6 affidavit sworn on 16 June 2011. Having regard to the evidence and Mr Murray's
7 concession, I find that it is a loan and not a gift.

8 84. The property was valued in June 2011 at C\$160,000 and the husband rightly
9 contends that after costs of sale, and discharging of liabilities, the equity realised
10 will be in the region of C\$22,630. The wife wrongly stated that the equity is
11 C\$76,000, although that figure does not take into account the loan from the
12 husband's parents or the costs of sale.

13 85. The husband contends that the wife has made no contribution towards the property.
14 The wife contends that she did make contributions to the property prior to the
15 marriage as she was purchasing items such as food, furnishings and remodelling the
16 apartment at that time. She contends that had it not been for Hurricane Ivan, the
17 intention was that they would reside at the property and it would have become the
18 matrimonial home. The wife contends that funds to repair the apartment and pay the
outstanding mortgage came from PSM accounts. However, I accept the husband's
submission that the vast majority of the repair work was covered by payments from
the strata's insurers.

22 86. The husband accepts that there was a short period of time when the mortgage was
23 paid from PSM funds, namely between August 2007 to August 2009. Between



¹⁰ See letter Jane Scott dated the 12th June 2011

1 September 2004 and August 2007 there was a mortgage moratorium as a
2 consequence of Hurricane Ivan, so no loans were then repaid. The husband states
3 that for a part of the time the rental income from the property was being paid into
4 PSM and that mortgage payments were made out of the PSM account to the
5 mortgagee. In other words PSM was not paying the bulk of the mortgage, the
6 payments came from the rental income from the husband's tenants.

7 87. The husband contends that, because of the way the parties structured their
8 expenditure, he was unable to pay salary monies into a personal account and he had
9 to use the PSM account to pay for all of his bills. On inspection, it is evident that
10 the accounts were used for the PSM business, the wife's Cut Above business as
11 well as the parties' personal expenditure throughout.

12 88. The husband contends that if the wife does have a claim against the Ocean Club
13 property it would only be one half of the value by which the mortgage balance was
14 reduced during the two-year period between 2007 and 2009. It is contended that if
15 the court found that to be so, then it should be set off by the fact that the wife has
16 had exclusive use of the former matrimonial home for more than two years post
17 separation, it should be viewed as occupational rent. The husband contends that
18 from July 2010 he sought that the wife vacate the home so that it could be rented
19 out, but when the application came before Quin J. on 11 August 2010 he only
20 ordered that the ancillaries be set down for hearing.

21 89. Although I should take into account the property at Ocean Club when seeking
22 fairness between the parties, it is up to me to determine the approach to be taken in
23 regard to the property in all the circumstances of the case. I accept the husband's
24 figures as to the liabilities on the property, and find that the equity would be in the



1 region of CUS\$23,000, upon sale. It is the property in which he resides. It is not a
2 substantial property. I have regard to the fact that it was a property which he lived
3 in for many years before he met the wife and one which he purchased just over
4 three years before their marriage. It was a short marriage to separation. I accept that
5 payments over a two year period were made from PSM accounts towards the
6 property and have carefully considered whether this would amount to the wife
7 being able to claim the property to be a matrimonial asset. I am also aware that both
8 parties' personal expenses as well as the wife's salon's expenses came from sums in
9 the PSM account. If the parties had, through PSM, gone ahead and borrowed
10 CUS\$107,000 from Cayman National Bank in January 2007 to repay the mortgage
11 then, unquestionably, the property would have been regarded as being a
12 matrimonial asset. It is at least arguable that it could be viewed as such an asset.

13 90. However, the wife's contributions (if they can be called that) through PSM, were
14 not substantial and the equity in the property is small. The wife has resided rent free
15 in the more substantial former matrimonial property since the parties' separation in
16 2009. Therefore, I am satisfied that the small amount that she may have been
17 entitled to claim from the Ocean Club property, even on an equal split, can be fairly
18 offset against her residence for a substantial period of time in the former
19 matrimonial home, which may be considered a set-off as occupational rent.

20
21 *PSM*

22 91. PSM was incorporated in or around January 2005 and the business licence
23 approved on 5th April 2005. PSM is a company offering security services. As the



1 wife was a Caymanian national, she became a 60% shareholder and the husband a
2 40% shareholder in PSM. It is agreed by both parties that PSM should be treated as
3 a jointly owned matrimonial asset.¹¹

4 92. The wife contends that the husband has benefited from the marriage as he was only
5 able to work for and profit from PSM because he gained the requisite immigration
6 status due to her Cayman nationality. She contends that this should be reviewed as
7 one of her contributions to the matrimonial assets as well as the abovementioned
8 Ocean Club property. The husband has, since the parties' separation, obtained
9 permanent residency in the Cayman Islands.

10 93. The husband states that in August 2009 the parties had a meeting concerning the
11 affairs of PSM. He said it was called due to his concerns about the amounts that the
12 wife was withdrawing from the accounts for herself and the salon. The wife
13 contends that it was called due to concerns about the pension liability with the
14 resulting consequences which might flow to her personally, non payment of staff
15 salaries and her concerns about him using PSM's funds for his personal use.

16 94. The meeting resulted in a signed written agreement between the parties dated 27th
17 August 2012, the terms of which seemed to attempt to address both parties' above-
18 expressed concerns. The agreement, drafted by Twyla Escalante, the wife's sister in
19 law and a practising attorney, provided that: (i) The husband was to deposit cheques
20 that he was holding on behalf of PSM, (ii) the wife was to return company cheque
21 books and to reinstate the husband on the checking account of the company, (iii) the
22 wife agreed that that she would not withdraw any funds from the PSM account until



¹¹ Para 12 Wife's affidavit sworn on the 5th February 2010 and para. 25 of the Husband's affidavit sworn on the 1st February 2012.

1 all liabilities and bills have been settled, (iv) the husband agreed to settle the
2 outstanding salaries of security officers by 1 September 2009, (v) the husband
3 would continue to pay all of the security officers their salaries and keep them up-to-
4 date, (vi) the husband would use any funds in the account solely to the benefit of
5 the company and he would provide details to the wife of all checks written on a
6 weekly basis, (vii) the husband would pay the monthly health insurance coverage
7 for himself, (viii) the wife and all of the security officers and finally (ix) that in the
8 near future he would contact the pension board to arrange a payment plan for the
9 amounts owing.

10 95. The husband contends that the agreement was adhered to until December 2009,
11 when the wife "*began to dissipate the company accounts*" again. He said that she
12 removed him as a signatory to PSM's account and transferred substantial money
13 from the accounts into her personal accounts. The wife accepts that she transferred
14 C\$6000 into her account due to her belief that he would likely utilise the sums for
15 his personal use. She stated in her affidavit sworn on the 5th February 2010 that the
16 C\$6000 would be repaid into the PSM account.

17 96. The wife contends that, in breach of their agreement, the husband failed to keep
18 staff wages up to date, did not use the PSM accounts solely for the business, he
19 failed to provide her with a list of all cheques written on that account.

20
21 97. The husband contends that the wife, relying upon her 60% shareholding, took
22 control of PSM without consulting with him. The husband states that the wife
23 changed the locks at the business premises preventing him from operating the



1 Company, as well as unilaterally writing to employees and clients telling them that
2 he had resigned.

3 98. It is evident that the wife wrote to the PSM's employees on 28 January 2010
4 informing them that the husband had ceased his employment with the company and
5 that they should no longer take instructions from him.

6 99. It is evident that in February 2010 a significant part of PSM's client base and a
7 number of PSM employees trained by the husband wished to keep their connection
8 with the husband and followed him to Scott Security. The husband relied upon the
9 fact that a number of employees followed him to refute the wife's allegation that
10 there were arrears of wages.

11 100. The wife contends that between the 23rd and 24th December 2009 the husband
12 tendered his resignation from PSM and informed her that he was accepting a job to
13 commence in January 2010. The wife referred to a text message exchange with the
14 husband on 23rd December 2009 in which he questioned why she had taken money
15 out of the company account. Following her response to the question he responded:



16 *I take it that your no response means that you don't care. So I am letting you*
17 *know that I am down (done) the PSM Ltd and will be clearing my stuff out."*

18 The wife said that in a text sent the following day he had informed her that he
19 would be visiting the office to clear some things out and in a later text that he said
20 he had accepted a job which would commence in early January 2010.

21 101. The husband submitted that text messages should be put in context, namely as
22 forming a part of a series of argumentative texts between a husband and wife. He

1 said he sent the texts because he could not continue running PSM as his wife was
2 “plundering” the company accounts. He says that the alternative job to which he
3 was referring to was a possible security job in Afghanistan. He stated that he would
4 not have applied to the Court in February 2010 to try to retain control of PSM if he
5 was trying to set up another company. He contends that it was only after his
6 unsuccessful application before Henderson J that he felt, as his livelihood in his
7 area of expertise had been taken away by the wife, he had no option but to try to set
8 up another security company.

9 102. The wife interpreted these texts to be a tendering by the husband of his resignation
10 from PSM. She stated that this view was fortified by an indication from Mr Loxley
11 Haylock at the Labour Department that the husbands’ actions could be so
12 interpreted. As a consequence, she wrote to the husband on the 21st January 2010
13 acting upon the same. I note that this was only one day after she filed her petition
14 for the dissolution of the marriage. The wife said that she did not receive a reply to
15 that letter, but the husband on the same day removed the remaining approximately
16 C\$4500 from the PSM account.

17 103. It was at this juncture, as sole director and majority share holder, that she stated that
18 she assumed responsibility for running PSM and sought to address the
19 mismanagement of the Company’s financial affairs. The wife said she had to
20 immediately try to attend to PSM’s receivables, pension liability, six months health
21 insurance arrears¹², arrears in staff wages and the imminent expiry of the business
22 license. She indicated that the task was made difficult as the husband had refused to

¹² 17th August wife paid C\$11,386.45 towards outstanding health insurance premiums.





let her have access to PSM documents which were in a locked cabinet. At the time she was able to obtain information from a PSM lap top, but only up to April 2009.

3 104. The husband feared that the wife's actions would lead to the collapse of PSM. He
4 said he had not resigned and despite the wife's actions he was still dealing with
5 PSM's clients, staff and the Health Insurance Commission. He exhibited an email
6 dated the 3rd February 2010 from Rohan Marshall, Senior Labour Inspector,
7 indicating that a number of staff had not been paid for seven weeks. The husband
8 says this was the period when the wife assumed control of PSM. The husband felt
9 the Company's financial position could be redeemed - especially due to the fact that
10 as at the 1st February 2010 it was owed a total of C\$162,244.35 from various
11 clients.

12 105. As a consequence, the husband filed a summons in February 2010 in the attempt to
13 regain control of the Company. The summons came before Henderson J on the 8th
14 February 2010 who, on applying company law principles, refused the application.
15 Henderson J went on to order that the wife was to provide within four months, at
16 her own expense, a valuation of the company as at August 2009, that being the date
17 of the parties' separation.

18 106. The wife said that it was not until two hours after the hearing on the 8th February
19 2010 that she realised that the security business license for PSM was in the
20 husband's name and not the Company's name. As the wife had taken over the
21 running of PSM, as required the husband returned the licence to the Security
22 Licensing Department. The wife, unlike the husband, did not have the requisite
23 skills to be awarded the license. The wife brought in Jeremy Dufour from Canada to
24 run the business but was informed that he did not have acceptable qualifications to

1 fill the post. She was unable to renew the business licence until the 19th March
2 2010. By that time the PSM's customers had left the Company and moved to Scott
3 Security. The wife felt that by that stage PSM had been forced out of business.

4 107. The valuation report eventually provided by the wife prepared by Mr Madhavi
5 Mathura, a certified accountant with Accounting & Enterprise Solution Ltd, was in
6 fact dated 7 June 2010. The husband for the reasons set out at paragraphs 51 to 53
7 of his affidavit sworn on 17 June 2011 did not agree with the contents and despite
8 earlier indicating his intention to obtain his own expert report¹³, one has not been
9 produced. The husband maintains that as at August 2009 and even February 2010
10 the Company could have been saved and had value.

11 108. In the absence of contrary expert evidence, I am satisfied that Mr Mathura's report
12 is right when it concludes that PSM was unable to pay its debts as they fell due and
13 was thereby insolvent.

14 109. The wife stated at paragraph 4 (14) of her affidavit sworn on 16 June 2011 that all
15 PSM liabilities amounted to CUS\$225,000. It appears that this total may wrongly
16 include the cost of the valuation of PSM, which Henderson J. ordered the wife to
17 obtain at her own expense. She said that from the 8th February 2010 up to the 22nd
18 July 2011, she has received CUS\$71,153.85. Details of a number of the receipts are
19 set out in paragraphs 12 to 22 of the wife's affidavit sworn on the 22nd July 2011, at
20 paragraphs 23 and 33 of her affidavit sworn on the 11th October 2011 and at
21 paragraphs 17 to 25 of her affidavit sworn on the 2nd December 2011. The husband
22 said that he received CUS\$37,000 in cheques payable to PSM, which he in turn sent
23 to his attorneys for forwarding to PSM.



¹³ Paragraph 16 of husband's affidavit sworn on 10 August 2010

1 110. On the 21st August 2012 the wife filed an affidavit in which she set out details
2 concerning her attempts to recover sums owed to PSM from clients. Initially she
3 instructed Waide Dacosta, attorney at law, to pursue recovery. The husband
4 criticises the wife concerning the delay in seeking payment of receivables, in
5 particular in relation to the most significant amount owed to PSM, that being
6 CIS\$77,309.22 by Fourth Quarter Properties (the umbrella company for the
7 Courtyard Marriott). He states that Scott Security was able to successfully recover a
8 debt from the same company during the same period. Although the husband
9 criticises the wife for the manner in which she went about collecting the
10 receivables, I find that part of the delay was caused by the husband's inefficient
11 record keeping and accounting/invoicing when he was running PSM coupled with
12 some delay in providing or clarifying all the necessary documentation concerning
13 the fees. I accept the wife's evidence that she was unable to locate any agreement or
14 other helpful signed paperwork concerning the Fourth Quarter Properties work
15 resulting in the need for a time consuming inquisitive approach to that client's
16 representatives in order to try to ascertain the true position.

17 111. In November 2011 the wife instructed Murray & Westerborg Attorneys, who sent
18 out demands and, in some cases, issued summonses and obtained judgments in
19 default. In relation to the amount owed to PSM by Fourth Quarter Properties,
20 default judgment in that amount with costs and interest was obtained on 26th July
21 2012. However, both of the parties appear to agree that the prospect of realising
22 any funds in respect of this debt is remote.

23 112. The wife states that she paid off overdue wages to staff and debts to the Water
24 Authority, Lime, A.L Thompson, Cayman Islands Government, Digicel and some



1 legal fees. The wife's evidence is that between the period 27th February 2010 and
2 22nd April 2010 she paid PSM expenses totalling CI\$78,087.99.

3 113. The wife says that PSM equipment was sold to Security Centre Limited for
4 \$10,000, and that the proceeds were used to meet an August 2010 judgment arising
5 out of a claim made by Mr Darko Vidas for unpaid wages, health insurance
6 premiums and unpaid pension deductions. The husband claimed that there was a
7 dispute with Mr Vidas as he had already received some of the sums which he was
8 claiming were due. The wife states that she was not provided with information and
9 documentation by the husband to enable her to challenge the judgment. The
10 husband contends that the total value of PSM's alarm/CCTV/access and cable
11 equipment as of July 2009, the majority of which he claims was purchased on his
12 First Caribbean personal credit card, amounted to CI\$44,456.72. He states that
13 PSM's monitoring equipment at the same time was valued at CI\$30,689.40. It
14 appears that the husband is questioning why the items were sold for only CI\$10,000
15 and what amount was received from Island Electronics for PSM's monitoring client
16 list. The husband says that between 19th December 2006 and 1st May 2009 he spent
17 CI\$100,283.10 on PSM equipment using his personal credit card, which he is still
18 having to repay.

19 114. PSM has a US dollar chequing account and Cayman dollar account at First
20 Caribbean Bank to which both parties were signatories. The husband contends that
21 his personal finances were managed through the company accounts, as he had no
22 personal accounts save for a Scotia Bank account that was used to make payments
23 towards the mortgage for the Ocean Club property. He contends that the wife
24 withdrew monies, against his wishes, from the company accounts for her personal



1 use and for her salon. The husband contends that this greatly contributed to the
2 financial problems of PSM and his inability to pay PSM's bills. He accepts that
3 funds in the PSM accounts were used to fund a comfortable lifestyle during the
4 marriage, but it was a lifestyle which he contends both parties enjoyed.

5 115. The husband contended that one of the major factors for PSM's financial problems
6 and resultant inability to pay liabilities as they fell due over the years, including the
7 pension debt, was due to the sporadic nature of payments from the Government,
8 one of the Company's largest clients.

9 116. However, when looking at the documentary evidence and upon hearing the husband
10 during cross-examination, it is clear that, even when substantial payments were
11 received from Government, the funds were not put towards the pension liability but
12 were partly used for the parties' personal expenses.

13 117. The records show that, almost throughout his tenure, the husband failed to
14 adequately address PSM's duty to meet this important responsibility. A letter from
15 Jose Massias at the Pension Board dated 27th May 2010 stated that the only
16 payment that had been made was for April 2008 and therefore there were arrears for
17 October 2005 to March 2008 and May 2008 to present.

18 118. The wife says that, upon assuming control of PSM, Jose Massias informed her that
19 the husband had not contacted them since 2008. This does not appear to have
20 actually been the case, as in a letter from Mr Massias to the wife dated 27 May
21 2010 he stated:

22



1 *“We have had numerous correspondence in the past with Mr Scott, where he*
2 *has acknowledged that pension contributions are outstanding, however to date*
3 *the arrears have not been paid.”*



4
5 119. The husband states that another reason for non-payment was due to the fact that
6 when the Company did have monies set aside to pay the Board, he was unable to do
7 so as the wife was 'plundering' the company bank accounts. This statement is not
8 backed up with clear evidence and, although she did make withdrawals, this cannot
9 be regarded as the primary cause of the Company's failure to make the pension
10 payments as they fell due or, in fact, hardly at all.

11 120. The wife stated that the husband withdrew substantial amounts of money, had high
12 personal expenditure from business bank accounts¹⁴ and had heavy credit card
13 usage for his personal benefit. It is submitted that the Court must have such conduct
14 in mind when reaching its decision about the division of assets and apportionment
15 of the marriage liabilities. The figures quoted by the wife as being exclusively the
16 husband's expenditure cannot be relied upon because even a limited review of the
17 statement shows a number of withdrawals for the hairdressing business, for her
18 personal items as well as for joint expenses.

19 121. Although, to his credit, the husband may have run and developed the practical
20 security side of the business well, the persistent non -payment resulting in a sum of
21 \$121,745 being due as of October 2011 was significantly contributed to by the
22 husband's mismanagement of PSM's financial affairs. Although the wife disagrees,

¹⁴ Summary attached to Petitioner's written closing submissions has entry "Total for Andrew's Expenditure \$1,058,41.50, Total for Andrew's expenditure \$992,125.74, Total confirmed withdrawals from Andrew Scott \$464,637" - Figure from wife's Schedule of assets and liabilities "Money already taken by A. Scott \$1,097,796.89 - Figure at page 2062 bundle "Total for Andrew's Expenditure" from Belfor and PSM bank accounts \$1,097,796.89

1 I find that the wife benefited from this mismanagement because PSM's income,
2 which should have been going to the Pension Board, was, as evidenced by the bank
3 and credit card statements, used to fund both of their private lifestyles during the
4 marriage. I accept Mr McGrath's insightful comment at paragraph 11 of his written
5 submission when he stated "*Financial irresponsibility is another hallmark of how*
6 *this couple conducted their affairs.*" This is not a case in which the parties can
7 expect to now have the same standard of living enjoyed before the breakdown of
8 the marriage.

9 122. The final determination of the ancillary relief issues was delayed because the court
10 felt it had insufficient information concerning PSM. Important issues throughout
11 have been the uncertainty as to quantum and recoverability of the potentially
12 significant accounts receivables of PSM and the balance of the substantial
13 outstanding pension liability owed by PSM to the Government. I had hoped that, at
14 this final ancillary relief hearing, the Court would have been in a better position to
15 conclusively determine whether the Fourth Quarter Properties receivable would be
16 forthcoming. Having regard to the parties' view that this judgment may never be
17 satisfied, the court concluded that further delay would likely be 'fruitless' and in no
18 one's interest to further delay this hearing. Regrettably there is still a lack of clarity
19 as to any other receivables that are likely to be forthcoming as well as outstanding
20 liabilities of PSM. There appears to be realism in the parties' approach to this and
21 other receivables, so I have to consider what should happen in relation to the
22 discharge of PSM's pension liability if the judgment sum is not forthcoming.

23 123. On reviewing the evidence I am satisfied that the pension liability should be
24 regarded as being a matrimonial debt. It should be equally borne by both parties.



1 124. Neither party gave evidence on, nor did their counsel make submission during the
2 hearing about, liabilities listed as being those of the wife but characterised as being
3 PSM related in the wife's Schedule (if still outstanding and upon production of
4 appropriate documentation). I have no submissions as to whether they are actually
5 only PSM's debts. I note that the wife lists the \$20,000 fee for the preparation of
6 the valuation report of PSM as a PSM liability. This is an incorrect characterisation
7 of that liability as Henderson J., in February 2010, ordered that the wife obtain the
8 aid report at her expense. It is right that they be discharged from any balance in
9 PSM's Bank account (balance shown in schedule as being US\$2,218.40) and from
10 any receivables hereafter recovered.

11 125. In principle the legal fees mentioned in the wife's schedule for Waide Dacosta for
12 CIS\$10,841 (if directly related to recovery of PSM receivables), and any legal fees
13 for Murray & Westerborg directly related to the recovery of PSM receivables,¹⁵
14 should be considered as an applicable liability and be paid from the proceeds of sale
15 of the former matrimonial home. I say this as these are receivables that the husband
16 should have better sought to recover for PSM funds at a time when he was still
17 controlling and utilising PSM funds for personal matrimonial expenses and also
18 because a significant reason for recovery is to try and reduce the pension liability
19 which both parties agree should be a shared responsibility. For the purpose of
20 calculating these legal fees I will tentatively adopt the figures which total
21 CIS\$21,155 as a joint liability when calculating available matrimonial assets.
22 However, this figure will only be justified if the wife can produce detailed fee notes
23 to the husband – satisfying a contention that they were legal fees incurred solely for



¹⁵ Unclear whether figure of \$10,314 is for PSM work alone or partly for representation in the divorce proceedings

1 purpose of the collection of PSM receivables.¹⁶ If the wife fails to do this then the
2 figure to be paid from the proceeds of sale should be reduced accordingly.

3 126. The following are apparently PSM liabilities listed by the wife in her schedule
4 namely: wages outstanding totalling C\$5,500, outstanding rent \$4,317, Shamoo
5 Electric C\$634, Alba Electrical C\$1000, Cayman Free Press \$768. These should
6 be paid from any PSM receivables as they come in. The wife should satisfy the
7 husband that the purported loan from Karen Ebanks for C\$6000, the purported
8 loan from Emille Scott for C\$1000 and the purported loan from Catherine Gomez
9 for \$1000 are actually owed by PSM. On the evidence before me, and in the
10 absence of any submissions on the same, I am unable to determine whether they
11 are. If they are, then they should be addressed in the same way as the
12 abovementioned liabilities. Any payments should be meticulously accounted for
13 and information shared between the parties.

14 127. The former matrimonial home should be marketed for sale forthwith and the
15 proceeds of sale should be first applied to the outstanding stamp duty, then the PSM
16 pension liability (which both parties have characterised as being a matrimonial
17 debt) and then, upon production of detailed fee notes, the abovementioned legal
18 fees for the recovery of receivables.

19 128. In the unlikely event that any account receivables are forthcoming after all of
20 PSM's liabilities have been met they should be split equally between the parties.
21 Again, the wife should ensure that amounts received and payments made are
22 properly accounted for.

¹⁶ I have reviewed the fee notes exhibited to the wife's affidavit of the 21st August 2012



1 129. PSM has no value that can today be apportioned. However, as mentioned, some of
2 the account receivables detailed in the Wife's "Schedule of PSM Receivables"¹⁷
3 may still be forthcoming and the Company still has liabilities to discharge. Ideally
4 PSM should be liquidated, but it appears that the parties cannot fund a liquidator. In
5 light of this, the parties should endeavour to co-operate by appointing an agreed
6 third party to monitor the collection of any sums owed to the PSM and to process
7 the Company's liabilities. This would be in both of their best interests.

8 *MOTOR VEHICLES*

9
10 130. In the wife's schedule of assets, these are listed as being a Nissan Xterra at
11 C1\$11,000, a Toyota Liteace Van at C1\$5000 and a Cadillac Escalade at C1\$15,000.
12 From the limited evidence before me concerning the vehicles, their ownership is
13 unclear.

14 131. In the wife's affidavit of 16 June 2011 she indicated that she owned no vehicle as
15 she had sold the 2004 Land Rover Discovery to pay for Paul Mitchell products. I
16 note that she lists as an asset only C1\$2000 of remaining Paul Mitchell stock.

17 132. The husband in his affidavit of 7 October 2011 indicated that the wife has use of a
18 vehicle, although it may not be registered in her name. He indicated that he had
19 seen her Mitsubishi Pajero Evolution parked outside of her salon at the time. He
20 noted that the Land Rover was purchased using PSM funds.

21 133. At the hearing little was said about the vehicle. No submissions were made as to
22 what should happen. The appropriate approach in relation to unsold vehicles are

¹⁷ Total amount outstanding C1\$101,861 – amount outstanding if exclude Fourth Quarter Properties default judgment C1\$24,551



1 that each party should retain their vehicle, however if a vehicle is registered to PSM
2 (a company car) then, as a PSM asset, it should be sold and the proceeds be utilised
3 to pay off PSM debts.



4 *CREDIT CARD DEBTS*
5
6

7 134. The husband contends that he has taken sole responsibility for payment of three
8 credit cards since the marital breakdown. He claims that the debts on each card are
9 attributable to expenditure of PSM, Cut Above as well as the personal expenditure
10 of both parties when married. He claims that the amounts on the cards should be
11 regarded as being a matrimonial debt.

12 135. The first card is a First Caribbean Mastercard in the husband's sole name which as
13 at August 2009 had a balance of US\$35,305.09 and September 2012 of
14 US\$23,725.37. The second card is a Scotiabank Mastercard, also in the husband's
15 sole name, with a balance of US\$11,647.53 as of August 2009 and US\$11,784.99
16 as September 2012. Lastly the parties have a joint ScotiaLine card with an August
17 2009 balance of C\$5,914.92 and a balance of C\$3886.77 as of September 2012.

18 136. The husband contends that since the breakdown of the marriage he has had to
19 service the credit card debts himself. He defaulted on the First Caribbean
20 Mastercard and, following the issue of a writ by the Bank, he agreed a consent
21 order to repay the balance in the sum of C\$1200 per month. He has been making
22 these payments since December 2010. He says that he has already paid C\$26,400
23 and that by the time the debt is cleared, with interest, he will have paid a total
24 of C\$53,985 (US\$65,835). The husband's primary contention is that he should
25 receive this amount plus an amount equivalent to the balance of the other cards,

1 making a total of C\$69,950, from the proceeds of sale of the former matrimonial
2 home before division. In the alternative, it is submitted that the husband should
3 receive C\$46,674.71 (the only amount plus interest sought in the skeleton
4 argument filed on 31 August 2012) from the proceeds of sale, being the card
5 balance as of August 2009, when the parties separated.

6 137. Regrettably, the issue as to the credit cards is not mentioned in the skeleton
7 argument or in the closing written submission filed on behalf of the wife. During
8 the hearing, the content of the credit card statements was only briefly referred to,
9 and that was only during the cross-examination of the wife and the evidence in
10 chief of the husband. The husband was not cross –examined by Mr Murray in
11 relation to the credit cards.

12 138. In cross-examination the wife’s position was that some of the credit card
13 expenditure was related to the businesses, some were personal expenses and a small
14 amount for the house. She contended that only a small proportion would relate to
15 her, but that the majority would be the husband’s. She said that he was the one who
16 controlled the credit card usage.

17 139. Mr McGrath notes that it is not possible to provide a perfect audit in respect of the
18 credit cards. However, at Tab 5 of the skeleton argument the husband presents a
19 credit card expenditure breakdown. Even on a cursory review of the credit card
20 statements, which is the limited exercise the parties undertook during the hearing,
21 one can see that they reflect a very comfortable standard of living and expensive
22 lifestyle for both parties during the marriage. I note the various entries for Hugo
23 Boss clothing which, if added up, are not insignificant and are an illustration of the
24 nature of other male orientated expenditure entries indicating that the figure given



1 in the husband's breakdown for his personal expenditure is on the conservative
2 side. I accept that a significant proportion of the amount outstanding on the credit
3 cards may be viewed as a matrimonial debt. However, that must be balanced by the
4 fact that the husband had primary control of the cards and the main say as to their
5 usage. I accept that considerable payments for the setting up and running of the
6 Salon were made using the cards but, as with PSM, any revenue from the salon
7 could be viewed as being to the benefit of the parties whilst married.

8 140. I am satisfied that the credit cards were utilised to fund a lifestyle beyond the
9 parties' means during the marriage. I do not view that the debts were recklessly
10 incurred solely for the husband's benefit. I am satisfied from the evidence and in
11 particular my review of the expenditure outlined in the statements that both parties
12 benefitted from the card usage during the marriage.

13 141. The credit card expenditure was not examined in any real detail with the witnesses
14 when they gave evidence, which otherwise might have enabled me to now
15 accurately apportion the benefits with specificity. I have regard to the fact that the
16 husband managed the cards as well as the nature and greater frequency of some of
17 the male related expenditure. When considering these factors I conclude that it is
18 fair that the parties should both be equally responsible for the outstanding liability,
19 given as C\$46,674.71. I accept, having regard to paragraph 136 above, that the
20 husband will have paid out a sum greater than this in credit card payments. The
21 order I make reflects, as best I can having regard to the manner in which the parties
approached this evidence during the hearing, the husband's responsibility as the
card user and to some extent the expenditure to benefit himself.



1 142. When considering the above, it follows that the asset/liabilities¹⁸ in this case
2 (excluding the Ocean Club property, outstanding PSM receivables, PSM liabilities
3 mentioned in paragraph 126 herein, small balance in PSM and Cut Above Bank
4 accounts and the motor vehicles) are as follows:

5	Matrimonial home after payment stamp duty and costs of sale	\$472,000.00
6	PSM pension	(\$121,745.00)
7	Credit cards	(\$ 46,674.71)
8	Legal fees Murray & Westerborg	(\$ 10,314.00) ¹⁹
9	Legal fees Waide De Costa	(\$ 10,841.00) ²⁰
10	<u>Total</u>	<u>\$282,425.29</u>

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INCOME /OUTGOINGS – SPOUSAL MAINTENANCE



143. The wife seeks periodical payments. It is submitted that her circumstances have
changed for the worse due to the marriage and its breakdown. The wife sets out her
current employment situation at paragraph 6 of her updating affidavit sworn on the
10th August 2012. She therein reconfirms that she no longer owns her own salon
and it is submitted that she now works on a commission basis as a self employed
hairdresser at another salon. She told the Court that she used to have a reliable

¹⁸ Following circulation of the draft judgment to the attorneys, the full terms contained in paragraph 2 of the order made by Henderson J on the 8th February 2010 were drawn to the Court's attention by Mr McGrath. Henderson J ordered that the valuation of PSM be obtained by the wife "at her own expense". The draft version of this judgment incorrectly referred to that valuation as being a joint liability. Pursuant to Practice Direction 1/2004, *Smith v Smith* [2004-05 CILR 225] Forte J at para 5 on page 228 and *Uzzell v Uzzell* [2001 CILR Note 17], paragraphs 105,109, 124,142 and 159 of the draft judgment have been amended to rectify the inaccuracy. The corrected figures have been considered and have not altered the Court's conclusion as to the appropriate approach to the division of the assets set out in the draft judgment.

¹⁹ Amount subject to verification via detailed fee note – fees only for collection of PSM receivables

²⁰ Amount subject to verification via detailed fee note – fees only for collection of PSM receivables



3 clientele but apart from a few loyal ones they have since moved on to other salons.
4 She retains the Paul Mitchell distributorship. The wife indicates that she has no
5 pension provision. I have not been informed how this may change if the PSM
6 pension contributions are paid.

7
8 144. There is no up to date evidence about the wife's outgoings. She gave no detail of
9 her expenditure in her oral evidence. The absence of this information gives force to
10 an argument for the introduction of a standardised localised version of the Form E.
11 It is clear that she will need to have sufficient funds to put a reasonable deposit to
12 purchase a small property and have manageable mortgage payments. Regrettably no
13 evidence was given to the Court or submission made concerning the amounts
14 required and how this might be best achieved.

15
16 145. The husband puts his current income from Scott Security at \$5,000 per month due
17 to the ongoing set up costs of the business. The husband states that he must meet all
18 his outgoings, including credit card debts from that account. The wife contends that
19 the husband has considerable earning potential due to the fact that as of October
20 2011 the business had service contracts totalling C\$230,544.

21
22 146. It is evident that the husband has been able to position himself in such a way that he
23 will have a greater income potential than the wife. At the time of the separation the
24 wife owned a fully equipped and modern salon. If run properly that would have
given a reasonable income, albeit not at the likely level to be derived from Scott
Security. However, partly because of the way the business was run, namely being
reliant on PSM and not efficiently, it amassed rental debts. I note the rental arrears
are given as one of the reasons by the wife for closing the salon and selling the
businesses equipment to her sister for the disclosed sum. I accept that she also had

1 to take up responsibility for PSM, but I am not satisfied that the wife's reason for
2 closing the salon in the way that she did and disposing of its equipment was the
3 most sensible and business-minded decision she has made. She would have been in
4 a better position today if she had retained the salon and it was her decision to close
5 the same resulting in her current employment circumstances.

6 147. When comparing the parties' respective foreseeable needs, it is clear that the
7 husband's will be met. His housing needs are met as he has a property (with equity
8 in the region of C\$22,630), and importantly with low monthly mortgage payments.
9 He has two Police pension policies. If the credit card debts are cleared, having
10 regard to the figures given in his evidence in chief²¹, he will have a disposable
11 income of \$2,922 before other normal deductions such as food and vehicle costs.

12 148. The wife's circumstances are less clear. It may be that one option for the wife
13 would be to seek to re-establish a small salon. This would of course involve starting
14 up costs. The Court will have to see whether the wife can receive sufficient capital
15 from the division of the assets to enable her to re-house and put herself in a position
16 to earn a reasonable income.



²¹ Mortgage \$706, Strata \$621, CUC \$200, Pension \$300, Medical insurance \$201, Medication \$50,



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LEGAL FEES/COSTS

149. The husband submits that there should be no order for costs. Mr McGrath seeks to persuade the Court to adopt the modern approach in England and Wales, contending that there should be adding back of the parties' legal costs so that they can be accounted for as a matrimonial liability in advance of the division of the matrimonial assets. This is no doubt motivated by the fact that his client's costs appear to be greatly in excess of the wife's. The husband's costs, which are in excess of CI\$92,000, are out of proportion to the assets involved.

150. I am satisfied that, in this case, the approach traditionally adopted in the Courts is applicable. As a consequence of the finding I make in this matter, there will be no order for costs and each party will pay their own costs from sums they may receive. I am cautious to adopt the English approach in the absence of the safeguards which are in place in England, namely the filing of updated costs assessment as the case moves forward. This is designed to enable parties to assess the reasonableness of the level of their and the other party's fees being incurred as the case progresses and the court to monitor the fees.

CONCLUSIONS

151. I remind myself of the principles set out at paragraphs 54 to 74 herein. The obligation is to be fair. When considering fairness and both parties' needs, the disparity of income earning capacity can justify a departure from equality when considering the assets. If there is to be any such departure there has to be a good reason for doing so.

1 152. I have regard to the wife's age and her limited income capacity as a self-employed
2 hairdresser due to the loss of her business and client base when compared with the
3 husband's potentially lucrative involvement with Scott Security.

4 153. I am satisfied that, the disparity of income capacity, coupled with the parties'
5 respective needs, are good reasons to depart from equality but only on a clean break
6 basis.

7 154. I have considered whether the wife should be permitted to remain in the
8 matrimonial home with a charge in favour of the husband. However there are joint
9 liabilities that need to be met and there are no other significant and firm assets. A
10 decision allowing the wife to remain in the home would be unfair to the husband.
11 There is no child of the marriage whose best interests might be best met by
12 remaining in the home.

13 155. Accordingly, I conclude that the Venetia property should be marketed for sale
14 forthwith with the intention of it being sold as soon as possible. The parties should
15 agree on the realtor to be used. The wife, if she remains in the property pending
16 sale, should pay the utility bills and the strata fees in the interim. She should
17 undertake to keep the property in good order and to use her best endeavours to
18 make it available for viewings.

19 156. A central issue in this case is the distribution of the proceeds of sale. I am satisfied
20 that there are reasons for a departure from equality in favour of the wife. I say this
despite being fully cognisant that this has been a short marriage. The reasons are:
(a) the availability to the husband of the Ocean Club Property (which means he will
have no incidental costs of moving and/or acquiring a rental or purchased property)



1 and the wife has no such property; (b) the husband has some pension provision
2 whereas at this stage the wife does not; and most importantly (c) the current and
3 foreseeable income disparity between the parties and the fact the husband has a
4 significant interest in a potentially lucrative business.

5 157. When considering the disparity of income as a justification for a departure for
6 equality in this case, I reiterate my reasons²² for adopting the reasoning of Sir John
7 Chadwick, P set out at paragraph 72 concerning the desirability of clean break
8 orders. Therefore a departure from equality on the disparity ground makes a clean
9 break order just having regard to the parties' ages and needs.

10 158. This will mean that the husband's earnings will be his own without obligation to the
11 wife. Having regard to my approach outlined above concerning other debts, the
12 credit card liabilities will be discharged. The wife will have to manage on whatever
13 she can earn from her hairdressing skills and how she invests her share of the net
14 proceeds of sale.

15 159. The net assets following deductions will be in the region of \$282,425.29. There
16 should be a split of 55/45 in favour of the wife. This is as fair as it can be and is
17 justified on the facts of this case, fully taking into account s.19-21 of the
18 Matrimonial Causes law and s.25(1) of the Matrimonial Causes Act 1973. This
19 would mean that wife would receive in the region of C\$155,333 and the husband
C\$127,091. I accept that regardless of this amount, after deduction for her legal
costs and payment for the valuation of PSM ordered by Henderson J, the wife will
not be able to buy a property without borrowing. However, she may be able to buy
a small property with a significant deposit and have some money to set up or invest



²² Paragraph 73 above

1 in a small scale hairdressing salon. It is matter for the wife as to how she uses the
2 proceeds, but she could of course rent and use the capital to subsidise her income or
3 to set up a new business.

4
5

6 Dated this the 21st day of January 2013

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10 Honourable Mr. Justice Richard Williams
11 Judge of the Grand Court