

13.12.99

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. D 122/94

BETWEEN: H Petitioner
AND: H Respondent

For the Petitioner: Nicholas Mostyn Q.C. instructed by
David McGrath of Quin & Hampson
For the Respondent: James Turner Q.C. instructed by
Linda DaCosta of Myers & Alberga

Before Graham J.
Hearing: 16th, 17th & 18th November 1999

JUDGMENT

1. INTRODUCTION

The parties, whom I shall refer to as husband and wife, are respectively aged 50 and 51. They were married on the 1st April 1969 and had two children together. One is aged 30 and the other is aged 24. The wife worked for what is now known as Scotia Bank from the birth of the first child up until the present time. There was a break at the time of the birth of the second

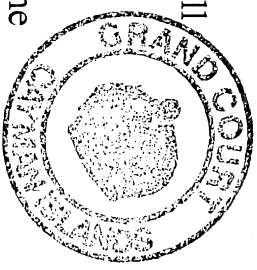


child but she returned to work relatively soon thereafter. The husband qualified as a electrical technician, and in 1977 set up a business with a partner in the electronic field. That company went into liquidation in 1981 after which he set up his present company "IEL". Of the 100 issued shares he held 98 and his brother and his wife held the other 2. He expanded the business from his own resources and loans. In 1972 he inherited 18.75% of the equity of HL Company, an office block in central George Town. In 1981 he inherited a further share of the equity in that company bringing his total share to 38%. He founded "IE" (S & M) Ltd. in 1996 with the same shareholding arrangement as IEL. In April 1990, he inherited the family home in Bodden Town. The then matrimonial home at Whitehall Estates, which was built on a plot donated to the parties by the husband's father, was let for a time and the parties lived together in the family home in Bodden Town. A building plot adjacent to the Whitehall house was bought by the parties out of their savings in or about 1980. Around that time, the husband bought his first boat out of his inheritance topped up with a loan. In 1990 "IEL" bought part of its present premises in the Industrial area of George Town. It was financed by a loan from a bank, that being the bank in which the wife worked and works. He also sold some of his mini-warehouses to finance the purchase. It is quite obvious to the court that he was treated as a

valued customer, not only because of his own credit rating, but also because of his wife's trusted position at the bank.

In December 1991 a house was bought at Jellicoe Quay, Governor's Harbour, George Town. A mortgage was raised to finance this purchase.

The wife was able to secure part of the mortgage (now standing at \$82,000 at a preferential rate, at a staff member. Both the husband and the wife benefited from this situation. The parties then moved into their new matrimonial home and both the Boddin Town property and the Whitehall property were let. A considerable income was then coming into the marriage from those two properties. It is the wife's evidence that from the time her husband starting trading on his own account in 1977, she worked in the evenings and at week-ends in a vital support role: she sent out invoices, she did the typing, she dealt with customers; she cleaned the premises and even held a torch for her husband when he performed certain technical operations. All of this was in addition to her full time work at the bank, and her normal work in the home as a wife and mother. A servant was employed in the house, as one would expect, in the economic position the parties were then in. This pattern of work by the wife continued until 1993 when she stopped going to the husband's place of work as, according to her, his



conduct made her feel unwanted and uncomfortable; that her direct contributions as to the business stopped then is the responsibility of the husband. None of these assertions were disputed by the husband, nor is it disputed that there were many times in the early years when her regular salary from the bank, modest as it was, kept the family afloat. It is my view that without her vital support in those years his present business would never have survived. I observed the wife when she gave evidence and came to the conclusion that she was a business-like and capable woman whose contribution to the home, businesses and the family were very considerable indeed. By way of contrast, I found that the husband was much less able and to put matters as kindly as I can, disorganised.

In 1993 the husband purchased the remainder of the premises from where he now operates. Funding was again provided by the bank where the wife worked. In November 1993, the husband secured the valuable "Radio Shack" franchise. It is owned by GP H Ltd., the shares are wholly owned by "TEL".

In June 1994 the parties separated. The wife moved into the house at Whitehall Estates and was joined there on their graduation by her two

children. She still lives there with both her daughters, the husband of one of them and their child. They share the expenses of the house. It is clear to me that on the basis of her present earnings she could not hope to remain in that house without the contributions from those income-earning adults. She tells me that she expects to be living alone in the course of the year as the parties have been buying property with a view to setting up homes of their own. She wishes to stay in the house where she has lived for many years. It has three bedrooms and she is comfortable there. She hopes to use it as a family centre. The reason for that is that neither she, nor her two children and son-in-law have any contact with the husband. This is a tragic situation, the cause of which does not concern the court. The wife tells me that it was her sacrifice and the contribution of another family member which enabled the eldest child to complete her Master's degree. That is not seriously disputed by the husband, although he claims that he bought that child an expensive car when she graduated. I accept his evidence in this regard but I find that the wife, by dint of considerable self sacrifice, made a significant contribution to the family by enabling that child to acquire a higher academic qualification. The husband's contribution to the higher education of his children can best be described as limited despite his greater

economic resources. This fact must be considered when adjudicating upon the wife's "*deserts*".

Under-capitalisation and consequent heavy borrowing compelled the husband, in or about April 1997, to liquidate his share in the "HL" company. This raised \$520,000. Indebtedness to the bank was considerable ameliorated. It was only under pressure from the bank that he took that long overdue step. He then recklessly spent a considerable amount of money on motor cars, so far as I can see in the region of \$100,000. There then followed an equally extravagant expenditure when he bought a replacement boat for \$94,300 in part financed by the sale of its predecessor. All of this was at the time when he told me that he was under pressure from his creditors and was "having to tighten his belt". It is fair to say that the wife retains the Mercedes motor car given to her in 1997 by the husband.

Proceedings for matrimonial relief were commenced by the wife on the 16th July 1995. The petition was proved shortly thereafter. Since then, a date for the resolution of the claim for ancillary relief was postponed in January 1996 as the wife's father was seriously ill, he was to die in March 1996. The husband had treatment for an undisclosed condition in September 1997. An

attempted reconciliation took place between that date and January 1998 when the parties finally separated. Nothing was done by either side until these proceedings were revived, at the instigation of the husband, in October 1998. Directions were given for the trial of the matter shortly thereafter. A hearing was vacated by this court on the 1st July 1999 and directions were given as to interrogatories. It is submitted that the delay has been the occasioned by the wife and that as the husband's economic position has improved between the issue of the proceedings and the present time I should reduce the value of the wife's claim. I reject this submission as the law is quite clear that I must deal with the assets as I now find them to be. In any event, the improvement in his position has been achieved in large measure, by re-deploying the assets required during the marriage. I note, *en passant*, that between January and October 1998 the husband took no steps to expedite or compel progress in the cause.

2. ASSETS

The Whitehall Estates house, occupied by the wife	\$340,000.00
The adjacent building plot	60,000.00
IE (S& M) Ltd.	288,611.00
GP Holding Ltd.	29,611.00
IE ((Pager) Ltd.	112,978.00
C.E. Ltd.	182,371.00
Loan receivable from IEL	368,735.00
Cash deposit in his name	79,126.00

Mortgages

247,480. 00

Accordingly, there are undisputed assets of about \$790,000.

The value of the following assets is disputed by the parties.

- (a) The husband's boat.
- (b) The value of the Governor's Harbour house in which he lives.
- (c) The value of IEL
- (d) "Unaccounted" funds of \$71, 409.

(a) The Boat

The boat is said by the wife to be worth \$94,300. It was bought in 1996. As indicated above, the husband sold his old boat and spent about double it's sale price to finance the actual purchase price of \$94,300. In evidence to me, he told me that at the time of purchase its real value was \$114,800. He contends that it is now worth \$82,000 which is a depreciation of \$32,800 in about three years. I regard that claim for depreciation as far too high. Neither side has troubled me with a valuation from an expert and I accordingly value the boat at \$90,000.

(b) The house at Governor's Harbour

This is a canal side property situate in "millionaire's row" near the Seven Mile Beach in George Town. It has three bedrooms and a dock. Mr. Alistair Patterson, a well-known quantity surveyor, gave evidence for the husband. He has a life-time experience in this work in the Cayman Islands. His "Woolf" mid-range figure is \$575,000. With great respect to him, I took

the view that his valuation of what is agreed by both sides to be a difficult property to value, was to a degree dependant upon the value which he put up on his own house which is situated nearby. His view is that his house is by far the better one. Mr. Simon Taylor, who gave evidence for the wife, is less experienced than Mr. Paterson and has been in practise on this Island for 2 years. He too is very well qualified. He pointed to a recent sale on Nelson Cay (where the house in question fetched over 1 million dollars and has a swimming pool) and gave his opinion that this was the kind of home in which rich American buyers might well be interested. He added to his estimate a 10% premium which he termed the "developers profit". When this is decoded it amounts to an instant gratification premium which rich people are said to be prepared to pay. This avoids the necessity of obtaining planning permission, the aggravation of building and all the other steps which must be taken to make a house habitable. I am bound to say that I regard this 10% addition as entirely speculative and accordingly propose to subtract from his mid-range "Woolf" figure of \$656,000. This produces a mid-range figure of \$594,400. Mr. Paterson's valuation is based upon a site visit in 1996. His update on that valuation was based on what he termed "quick and dirty" inspection in August 1999. I would have expected that an update with a view to contested litigation would be rather more searching than the one he appears to have conducted. I propose to split the difference between the \$590,400 and the \$574,000 and achieve a figure of \$582,200. I therefore value the Governors Harbour home where the husband lives at the round figure of \$580,000. I am, of course, very conscious of the position that the only way to determine the real value of such a property is by selling it. So far as I am aware this is not going to occur.

(c) The value of IEL

This property in which the husband carries out his business enterprises, constitutes the most contentious dispute in relation to the appropriate valuation to be put upon the various assets in question. Messrs. Paterson and Taylor were again the rival valuers with a significant input from a previous valuation put upon the premises by the husband himself. In June or July of 1994, Scotia Bank, his then and present bankers, were concerned with the level of borrowing given the security then available. They threatened to review his line of credit. As a result, he submitted an application to the bank (Trial bundle B 1 page 116) in which he admits that he told the bank that he valued the company's assets at 1 million dollars. He conceded in evidence that he had had an offer for the building and its adjacent workshop from a prominent local businessman who was on the board of CITN, the local television company. He had tried to extract a better offer from that gentleman who, in the event, did not pursue the matter. The company then built its own premises on an adjacent site. I have to assume that when the husband made that representation to the bank he did so in an honest and straight-forward manner, based not only on the offer made by the board member of the television company but on his own estimate as a respectable businessman. He was then in his late forties and therefore mature and experienced.

Despite all of that, he now puts forward a valuation (which excludes the good will of the Radio Shack Franchise) of \$672,674. The wife's valuation is pitched at \$994,675. The structure itself is a "Butler Building" which is a steel-framed construction clad with pre-fabricated steel attachments.

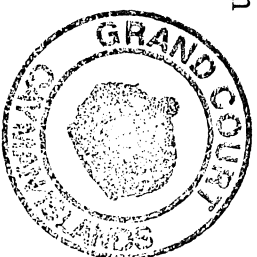
The land on which the building stands appreciates, or so I am told, at the rate of 15% per annum whilst the structure tends to depreciate in view of the climatic conditions of the Island. I was told nothing to suggest that the one figure does other than cancel out the other save that the level of depreciation of the structure is perhaps at a lower level than the inflation/appreciation of the land. The real dispute between the valuers depends on the method used to reach the most reliable method of valuing the building in question. Both valuers again agreed that this particular building is difficult to value and that what is going on is an artificial exercise. I remind myself that the only reliable valuation is produced upon sale. The court must endeavour to find a figure which is realistic having regard to what is an artificial exercise. Mr. Paterson valued the premises in March 1996 on the basis of "comparables". I understand that by that he means other sales of similar premises in the Industrial area. Unfortunately he did not support that view by reference to specific sales. His valuation was based on a figure of 8,000 square feet for the "footprint" of the building at \$48 per square foot. Unfortunately for the reliability of his valuation, the next door building was sold a month after his valuation, with a square footage of 5,000 square feet on the basis of \$108 per square foot. In an attempt to put into context what he regarded as an inflated price he told me that that building is again up for sale. Mr. Taylor updated the figure of \$108 per square foot to \$130 per square foot for interim inflation and produced a figure of \$1,024010. He removed the figure of \$253045 in respect of the mezzanine floor as the next door property, which had sold for the sum of \$108 per sq. foot, did not have a mezzanine floor. He deducted a further 10% by way of depreciation to arrive at a final figure of \$921,000. It was put to him that his methodology was flawed as the correct approach was to consider the square footage of the

footprint of the building plus the mezzanine. He agreed and settled on a final figure of \$85,000 as the correct figure based on "comparables". He argued that the other methods mutually agreed between the parties were based on income and reinstatement in the event of a total loss. Mr. Taylor's preferred method is an income evaluation and his figure is 1.175 million. His reinstatement figure was 1.02 million. The average of this three methods is 1.038666 million. His "Woolf" range is therefore 1.05 million to 1.15 million. Mr. Paterson faced with the force of that evidence, reversed his previous opinion as to his preference for the income method of evaluation and opted for the re-instatement method as being the most reliable. He then told the court that in respect of re-instatement it was not necessary to replace a "Rolls Royce building" by one of similar quality. I regret to say that that observation greatly undermined my confidence in his calculation and I accordingly prefer the evidence of Mr. Taylor to that of Mr. Paterson. I take his lowest valuation of 1.05 million and making allowances for depreciation and land inflation. I find that the value of the building is 1 million dollars. This is the figure put to the bank by the husband 5 years ago. It may be that I am too low!

(d) Unaccounted Funds

In the course of the husband's cross-examination he was constrained to agree that \$71,409 appeared to be unaccounted for (Counsel for the wife had already "found" \$50,000 which did not appear in the affidavits nor his schedules). That \$50,000 has been allowed for in the sum of \$368,898 already quoted as representing the husband's loan to IEL. I must record that when pressed about the details of his inter-company payments and his own

financing of the companies the husband was a very poor witness indeed. He did not seem to understand his own book-keepers accounts. He gave his evidence under great strain and in a rather emotional manner. Whilst I recognised the force of the wife's argument that it is for him to account for money which appears to be missing, I do not feel able on the facts of this case to find that the sum of \$71,409 now actually exists. One only has to observe him and his inability to remember his own cash transfers to feel unable to conclude that he was trying to mislead the court. I therefore conclude that whilst that this sum is indeed unaccounted for, I am not sure that it represents part of the assets presently available. It is therefore my conclusion that the entire assets come to \$2,460000. I reject his contention that his true worth is \$2,069346. I make it clear that all amounts in this judgment are quoted in Cayman Islands dollars.



The husband's income is now \$96,000 per year, together with the interest on his loan to the companies which provide him a further \$25,000 a year on reducing balances. I recognise that the management accounts show both loss and profit making years but I also accept the husband's evidence that the security company has now broken even and he is optimistic that it will soon provide him with additional income. By way of contrast the wife earns \$25,550 per annum and has the benefit of payment of 80% of medical and surgical expenses. She will retain that benefit on retirement at the age of 60. The husband has presently no such cover although I will return to that topic at a later stage. The wife will receive the truly miserable and insulting pension of \$2,131 per year at age of 60 after a life-time of loyal service. The munificence of the bank will permit her to shop for food once per month. The husband has no pension fund as such.

3. The wife's needs

As a result of my disallowing or modifying certain claims items of present and future expenditure a revised schedule was submitted to the court which shows a monthly expenditure based on her alleged reasonable needs of \$4092.40 annualised at \$49,109,84. It is agreed by the husband that she shall have the Whitehall house and the adjacent plot. A Duxbury calculation on the basis of a life expectancy of 34 years and, in effect no pension at the age of 60, together with an income yield of 3.75% capital growth of 4% and allowance of 3% inflation produces a claim of \$667,109 less the \$60,000 being the value of the building plot. In the context I am bound to point out that that inflation rate is very modest against the background of present inflation in the Cayman Islands. She also claims \$11,750 being half the cost of one of the children's weddings and an additional \$8,400 for medical treatment. This represents a total claim of \$1,027,259 or 41.75 of the total assets. On the other hand, the husband's submits that she should receive the Whitehall house and plot plus \$100,000, together with agreed sum of \$11,750 in respect of the wedding. This is a total of \$501,1750, a percentage of 20.7% of the total assets.

It is obvious that there is a great gap between the submissions on either side. Both sides however, are agreed that I should effect a "clean break". Accordingly, I will do so.

4. The Law

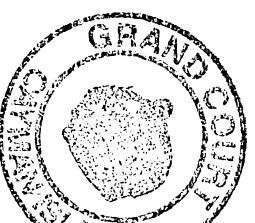
The law and practice relating to ancillary relief cases of this type and size are well settled. They are as follows:

(a) A broad analysis is the correct approach and the court must not become engaged in fractional determination. *Vide Dart v. Dart [1996] 2 F.L.R. @ page 295 per Thorpe L.J.*

(b) The most relevant of all considerations are the wife's reasonable requirements. I adopt the dictum of Thorpe L.J. in Dart (ibid). *"The essential function of the judge in "big money" cases is to declare the boundary between the applicant's reasonable and unreasonable requirements, applying all the statutory criteria to the myriad relevant facts of the individual case".*

(c) The Duxbury approach is a tool and not a rule; vide Butler- Sloss L.J. in *Gojkovic v. Gojkovic [1990] F.L.R. @ page 144*. In the words of Thorpe L.J., which were specifically approved by the House of Lords in *Wells v. Wells [1998] 3 W.L.R. 329*, it is *"to be preferred to the Ogdon method of calculating lump sums because it permits a specific assumption about changes in needs and receipts in future years to be programmed."*

(d) Contrary to the suggestion by the husband, Duxbury calculations do not allow for reduction of receipts on a parties' retirement nor for the possibility that the payer's circumstances may alter for better for or



worse. In that respect they are conceptually different from periodical payments which both sides has asked me not to consider.

- (e) Public policy now dictates that there shall be no discrimination between a husband's formal contributions and a wife's non-formal contributions vide *Conran v. Conran* [1997] 2 F.L.R. 615 @ pp 624-5.

- (f) When seeking guidance from cases decided in the 1970's and 1980's the Court is enjoined to be aware of the progress of social change in the exercise of its judicial discretion vide Thorpe L.J. in *White v. White (ibid)* @ page 319.

- (g) In a "big money" case of which this is one, if the potential payer seeks to contend, as in this case he does, that he is unable to pay then the evidential burden is on him to show as much. The husband points to the indebtedness of the business (mainly to himself) and the other financial responsibilities he has assumed. He contends that it is thereby obvious to the court that he cannot raise anything like the wife's claim. He did not call his bank manager nor his accountant nor any other evidence to show that he is unable to pay, although he is represented by experienced attorneys and leading counsel.

This is a far cry from the proper way of dealing with the matter as set out in *Newton v. Newton* [1990] 1 F.L.R. per Sir Roualeyn Cumming-Bruce at page 45 to the effect that it is for the husband to

call evidence from financial institutions and not for the wife in a "big money" case. The court further notes and accepts the comments made by his Lordship at page 44 that in "*appalling difficult lump sum cases the court must take a course that will not "kill the goose that lay the golden egg and must not condemn the husband to abandon his business life"*."

- (h) Where the bulk of a capital has been provided, as in this case, by the potential payee; then the court should not disregard the contribution of the wife. In the case of *OD v. OD [1975] F.L.R. 512* the capital had been provided largely by the husband in respect of a hotel which had been purchased. She worked as a "receptionist chamber-maid, cook, waitress and cleaner as required". Those facts are akin to the assertions of the wife in this case. The court went on to indicate that a court making a large award should allow sufficient time for it to be carried out. I propose to do so.

On the basis of all of the foregoing, it is my view that the husband has failed to demonstrate to me that he is not capable of providing an appropriate lump sum to the wife, but that I must take into account such information as I have to see that he is not forced to abandon his business life. I must also make due allowance for the fact that the bulk of the capital was inherited from his side of the family, albeit during the currency of the marriage. Vide *H v. H [1993]*

2 F.L.R. 335.

English case law is very useful in assisting the court in determining the matter, but the court must remind itself that in some respects the law is different in this jurisdiction. The Matrimonial Causes Law, in its memorandum of objects and reasons reads:-

"In the new law no distinction is made between the sexes for the purpose of financial provisions and periodical payments, but the court would be guided by the financial resources, responsibilities, earning capacity and deserts of the parties".

The phrase "deserts" is not to be found in the English legislation. Section 18 reads:-

"In dealing with all ancillary matters arising under this law, the court shall have regard first of all to the best interest of any children of the marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties."

Section 21 reads as follows:-

"At the time of pronouncing a decree under this law the court shall, as appropriate, make orders for -

- (b) the disposition of matrimonial property, including the matrimonial home;*
- (c) varying any settlement of the property of the spouses made in consideration of the marriage, whether such settlement was made before or upon the treaty of the said marriage.*
- (e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse."*

As Summerfield CJ said in *Miller v. Miller* (unreported).



"Local legislation gives the court a freer hand and a much wider discretion than the English provision in exercising its powers in make orders "as appropriate" pursuant to Section 18 and 21 of the Matrimonial Causes Act."

5. The Husband

I am persuaded by the husband's submissions that if I make the order sought by the plaintiffs, he will be saddled with an unsustainable level of debt. He complains that he is in poor health, although he puts no medical evidence before me to justify his suggestion that he will not remain fit to carry on his commercial life. He intends to marry when he is free to do so. He tells me that his intended wife is an American lady who is a qualified teacher. She is in her mid-forties and has been offered a job as a teacher in a Government school on the Island. She will then earn at least \$2,800 per month annualised at \$33,600. This will be inflation protected to some degree and she will also have free medical treatment. As a matter of law the spouse of a civil servant receives free medical treatment under the Government scheme and so on his marriage to that lady, he too, will have free medical treatment if he chooses to avail himself of it. She will also commence to earn a pension of some sort. At the moment the husband spends \$1500 per month on food as he is unable to cook for himself. His marriage will therefore be of considerable and immediate economic benefit to him and I so find. I note that it is said

that the \$79,126 cash deposit is regarded by him as in part retained for the payment of his legal costs. I do not so regard it. Costs are matters for him. The wife, too, will have costs to pay irrespective of any order I may later make.

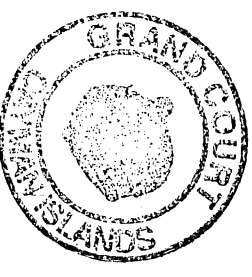
6. Conclusions

I conclude therefore that in addition to the \$400,000 that the wife will receive in respect of the Whitehall house and land she shall receive a further \$450,000 by way of lump sum. In addition I award her the agreed sum of \$11,750 in respect of the wedding together with the \$8,400 which I am satisfied she will have to spend in the near future in respect of a hip replacement. I am satisfied by her evidence to me in that regard. This represents the uncovered costs of her treatment and rehabilitation. The total award adds up to some \$870,150 which I round down to \$870,000. That amounts to 35.3% of the assets. I appreciate that the wife wishes to remain living in the Whitehall home as a family centre for the reasons I have already mentioned. I am bound to say that on the basis of this award she may not find it possible to do so and at the same time properly provide for her post-retirement years. If she were to retain \$250,000 from the sale of

the Whitehall assets for the purchase of accommodation appropriate for a single person with suitable guest accommodation she would have a lump sum of about \$600,000 to invest as advised. That is, of course, a matter for her and her advisors.

I therefore make the following orders:-

1. The Whitehall house and plot shall forthwith be transferred to the sole name of the wife.
2. The wife shall forthwith transfer her 2 shares in the companies to the husband.
3. The husband shall, within 2 months pay the sum of \$150,000 to the wife. Interest thereupon will run at 7% from the 1st February 2000.
4. The balance of \$320,000 shall be paid to the wife within 12 months of today's date. Interest will run at 7% from the 1st May 2000 until payment.



5. The payments and transfers ordered herein shall be in full and final satisfaction of all the wife's claims for ancillary relief.

The wife will receive 75% of her costs against the husband to be taxed if not agreed.



H.G.D. Graham
Judge of the Grand Court

13th December, 1999

