In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2018 No: 28

BETWEEN:

LIONEL D PARKER

Petitioner

and

GAIL K PARKER

Respondent

RULING

Before:	**Hon. Alexandra Wheatley, Registrar**
Appearances:	**Mr Adam Richards of Marshall Diel & Myers, for the Petitioner**
	The Respondent, Mrs Parker, In Person
Dates of Hearing:	**22 and 28 February 2023**
Date of Written Submissions:	**15 March 2023**
Date Draft Circulated:	**10 January 2024**
Date of Ruling:	**12 January 2024**

Final Application for Ancillary Relief; Third Party Claim for Interest in Matrimonial Property; Beneficial Ownership in Matrimonial Property; Constructive Trust; Proprietary Estoppel; Whether Loans to be Considered in Asset Calculation; "Hard" or "Soft" Loans; Matrimonial and Non-Matrimonial Assets; Principle of Fairness; Principles of Needs and Sharing

REGISTRAR, Alexandra Wheatley

INTRODUCTION

1. The parties married in 1987. The Petitioner (hereinafter referred to as **the Husband**) is 63 years old and the Respondent (hereinafter referred to as **the Wife**) is 61 years old. The Husband is a U.S. citizen (who now holds Bermuda Status through marriage), and the Wife is Bermudian. There are two children from the marriage who are now adults and financially independent. The parties separated in August 2015. Decree Nisi was pronounced on 27 July 2018 and made absolute on 18 September 2018. The parties were therefore, in a long marriage of over thirty years.

2. The Husband filed an application for ancillary relief dated 21 March 2022 (**Husband's Application**) seeking periodical payments, a lump sum, a property adjustment order, and such other relief as may be just. The Wife did not file her own application for ancillary relief.

3. The Husband relies on his first affidavit sworn on 3 May 2022 (**Husband's First Affidavit**) as well as his second affidavit sworn on 9 August 2022 (**Husband's Second Affidavit**). In addition, the Husband submitted an affidavit by his sister (hereinafter referred to as **HS**) which was sworn on 29 September 2022 (**HS's Affidavit**).

4. The Wife relies on her affidavit sworn on 17 June 2022 (**Wife's First Affidavit**), as well as her second affidavit which was in response to the HS's Affidavit and was sworn on 10 February 2023 (**Wife's Second Affidavit**).

5. The parties attended the final hearing and provided *viva voce* evidence updating their respective financial position since the filing of their respective affidavits. Both parties were cross-examined as was the HS who appeared for the purpose of giving her evidence. The Husband and HS both appeared remotely through an audio-visual link whereas the Wife attended physically in the courtroom.

ASSETS

6. There is no dispute between the parties whether the assets they now own, which are held in joint names or in either of their sole names, were created during the marriage and are matrimonial assets.

7. The primary point of dispute relates to the ownership of a property in Georgia (**Georgia Property**). The Husband asserts that the parties have a negligible interest in the Georgia Property due to the purported interest he says his sister (HS) holds, whereas the Wife asserts that she and the Husband hold a fifty percent (50%) interest and the Husband's mother (hereinafter referred to as **HM**) the other fifty percent (50%) interest. Initially, the wife disputed HM's 50% share in the property; however, this was conceded during the hearing.

8. The other issues for determination are in relation pension equalization as well as alleged debts incurred during the marriage and/or after separation.

Former Matrimonial Home

9. The former matrimonial home (**FMH**) is located in Southampton Parish. The FMH was purchased at the outset of the marriage. There are factual disputes regarding renovations undertaken during and after the parties' separation as well as their respective contributions towards the monthly mortgage payments. Specifically, (1) who should be responsible for the debts incurred for work carried out after the Husband vacated the FMH in August 2015; and (2) what compensation, if any, should be accounted for in favour of either party when the Husband ceased contributing to the monthly mortgage payments in December 2018.

10. Since the Husband vacated the FMH in August 2015, he continued to contribute to the monthly mortgage payments until December 2018 when he notified the Wife that he would no longer be contributing to the said payments. It is noted that there is no evidence of the outstanding mortgage at the point of separation nor is there any evidence of its value 2015.

11. The Wife advises that she has made payments of $260,000 since separation towards the mortgage. The Husband states that he has separately made payments of $124,000 which were made for the period August 2015 to December 2018. He has not made any further contributions to the mortgage payments since December 2018.

12. The FMH was valued in 2019 by Main Point Real Estate for $1,500,000 (**First Valuation**). The valuation lists 16 items of works that the valuer flagged as needing to be addressed. The First Valuation also shows that the FMH would be valued at $2,000,000 upon completion of these works. The FMH was appraised again by the same valuer in May 2022 for $1,430,000 (**Second Valuation**). The Second Valuation listed 18 items of works which need to be completed but does not have a projected value upon completion of the works. However, it should be noted that the descriptions of the suggested works to be carried out are extremely vague and unhelpful in being able to properly assess the full extent of the work required. For example, one description states “Stairwell”, another “Lower bathroom”, another “Electrical”. There were photographs attached to the First Valuation that purportedly exhibit some of the items on the list which require to be completed however, the quality of the pictures makes it very difficult to properly ascertain the extent of the work required. There was also no evidence provided by either party proposing an estimated amount of funds that would be required to complete all the renovations.

13. The Husband accepted the calculations at paragraph 32 of the Wife's First Affidavit showing an approximate net equity in the FMH as being $10,000 which is calculated as follows:

Gross Market Value	$1,435,000.00
Less Agent Commission	$71,750.00
Less ½ Conveyancing Costs	$38,204.25
Less Outstanding Mortgage	$1,353,758.75
NET EQUITY:	**$9,566.75**

14. Whilst the FMH is not in the parties' joint names, the Husband signed off as a guarantor on the mortgage. The Husband continues to remain a guarantor as the bank will not agree for him to be removed based on the Wife's sole income.

15. Further, it is the Wife's evidence that the Land Tax for the FMH is in arrears in the sum of approximately $20,536.48 as well as home insurance. She has asserted that the bank's position is that the land tax arrears and home insurance payments must be brought current for consideration to remove the Husband as a guarantor. It should be noted that the only evidence of what the alleged arrears of land tax was a table created by the Wife and a Land Tax Demand Note for the period 1 January 2022 to 30 June 2022 showing there was $1,583.23, but this only relates to one of the rental units. At the end of the hearing the Wife was directed to produce a letter or other correspondence from the relevant government department confirming the amount outstanding for all assessment unit for the FMH, but this was not provided.

Outstanding construction debts

16. The Wife avers there were several debts which were outstanding at the time of separation which total approximately $27,000 (**Renovation Debts**). It was the Wife's contention in her oral evidence that she and the Husband continued to affect certain renovations/works on the FMH for some time after the initial period of separation.

17. The breakdown of the Renovation Debts is as follows:

SAL	$4,453.99
Skyline trucking	$5,562.84
Eldon Raynor	$900.00
Pitts plumbing	$7,400.00
Aptech	$3,909.00
Hunt's trucking	$1,505.00
Bierman's	$3,600.00
TOTAL:	**$27,330.83**

18. The Wife was unable to provide any evidence of the invoices or any payments she made to the Renovation Debts save for, producing a single bill from SAL in the total sum of $3,903.99. There is no evidence of any payments being made against the SAL invoice save that the balance has reduced by approximately $500 from what it was five years ago. The Wife avers that the $500 was paid by the Husband.

19. Aside from the Renovation Debt, there is also a debt owed to Sub Zero for approximately $20,000 (**the Sub Zero Debt**). Judgment was obtained against the parties in the Supreme Court for a total sum of approximately $42,000. The parties separately entered into Consent Orders with Sub Zero accepting equal responsibility for the debt; i.e. $21,000 each. The Husband provided evidence that his $21,000 share was paid and the Wife's evidence showed that she has only paid back $600 since entering into the Consent Order.

20. In addition, the Wife was required to take out a loan to have certain works completed at the FMH for it to be safe for their grandchildren. She says that she obtained this loan through her daughter for a principle sum of $50,000 (**the Construction Loan**). The current outstanding balance is $30,724.82.

The Georgia Property

21. There is a great deal of contention between the parties surrounding this property. The Georgia Property was purchased in 2008 when the parties were considering moving back to Atlanta. It was purchased jointly between them as well as with both the Husband's mother and father. The purchase documents show that the Husband and Wife paid $20,000 as a down payment plus closing costs and the remainder was secured by mortgage. The parties accept that the father's credit rating was required to obtain the mortgage. At some later date, the father transferred his share in the Georgia Property to HM so that it is now held with HM holding a 50% interest and the remaining 50% between the parties.

22. It is the evidence of the Husband and HS that shortly after just six months after purchasing the Georgia Property the mortgage had fell into arrears. HS stated that she renegotiated the mortgage with the bank to make payments more affordable. The Wife accepted she was not aware of this reduction in the monthly payments. Whilst it was accepted by the Wife that the parties had not made further mortgage payments since HS moved into the house, she said that this occurred because the monthly rent which HS was paying was the equivalent to the mortgage, and as such there was nothing additional that was required to be paid.

23. It was accepted by both parties that there was never any written rental agreement between them and HS as a basis to support the notion that HS was never considered to be renting the Georgia Property. The Wife also stated that it was agreed for HS to reside in the Georgia Property as HS had contacted the Husband stating she wished to leave her marriage and needed somewhere to reside with her young child which presented as an opportunity to assist HS.

24. The Husband says that the Wife did not raise any issues regarding the Georgia Property until he issued these proceedings and reiterated that the Georgia Property does not appear on the schedule of expenses the parties created to discuss settlement.

25. It is the Husband's position that the parties effectively washed their hands of the Georgia Property fifteen years ago as all matters regarding their home were left to HS to decide. The Husband also relied on the Wife's lack of knowledge regarding the alleged foreclosure

proceedings and the decrease in the mortgage payments as well as not being aware of the transfer of the Husband's father's interest to HM to support this position. The Wife conceded that she never checked the mortgage payments or knew about these other transactions.

26. The Husband also says that both he and the Wife have always referred to the Georgia Property as "*[HS]'s house*" and relied on the Wife accepting that his sister had the "*run-of-the-mill of the property*". The Wife accepted that the parties generally referred to the Georgia Property *"[HS]'s house*" and then when they attended the property they would ask for permission. The Wife, however, says that as HS was living there when they wished to visit, they would consult with HS because it would not be appropriate to simply show up unannounced. The Husband also relies on when the Wife was questioned as to whether she thought HS would consider she had an interest in the Georgia Property and that it was her home she stated "*after 15 years of doing whatever you want to do you would feel it's your house too, it's understandable, she's lived there from the outset, it's not unexpected*".

27. In HS's Affidavit, she contended that she met all the costs in relation to the property and made all decisions as to the property including maintenance issues and any renovations that were required. She went further to state that she did this because of assurances from both parties that the "*[Georgia Property] was my house and would always be my house*".

28. The renovations that HS says she funded included upgrading of the bathroom and new flooring in various areas of the house. It was noted that the renovations to the bathroom were specifically to make it more easily accessible for the parents due to their physical limitations. No evidence was produced to show either what sums were paid out for the renovations or who paid these costs.

29. During cross-examination, HS also confirmed that HM had always contributed towards the monthly mortgage payments and for at least the last two years HM's and their father's pension [continue to cover these payments]. HS stated she had made payments towards the mortgage and other expenses for the Georgia Property from HM's funds as she has had a

power of attorney over the mother for several years. As such, she is responsible for making any payments for her benefit.

30. HS accepted in her evidence that $2,900 per month would be a realistic market rent for a similar property in Georgia. She therefore accepted that is a significant difference between the true market rent and the mortgage payments of $1,400 per month for the Georgia Property. It was further confirmed by HS that mortgage payments are inclusive of the fees for the land tax and house insurance. The Homeowners' Association fees are $100 per month.

31. The Georgia Property was valued during these proceedings in the sum of $550,000. The updated information provides that the outstanding mortgage on the property as of 16 December 2022 as being $243,337.50.

32. The Husband submitted that an appropriate cost of sale for the property is between 8% and 10%. As no documentation was provided to support this proposition regarding the costs of sale in Georgia, I carried out an online search and found that the average seller pays between 5% and 9% of the sales price. Therefore, I have used 7% as a more accurate figure to represent the costs to the seller.

Valuation	$550,000.00
Less costs of sale,	$38,500.00
Less Mortgage	$243,337.50

Net equity	$268,162.50
Less Mother's 50%	$134,081.25
Husband and Wife's 50% interest	**$134,081.25**

The law

33. The generally accepted procedure where a third-party claims to have an interest in property which is held by one or both parties to the marriage is that it is ordinarily necessary to determine the extent of the third party's interest and how that interest should be dealt with within the proceedings.

34. In the UK case of *TL* v *ML* [2006] 1 FLR 1263, Mostyn J was required to determine whether one the husband held a beneficial interest in a property where one of his relatives held the sole legal interest on the basis the purchase price was in some way funded by the husband. At paragraph 33 reaffirmed the position as it relates to matrimonial proceedings wherein a third party is asserting beneficial ownership of what would be considered matrimonial property:

> "*33. It is well established that a dispute between a spouse and a third party as to the beneficial ownership of property can be adjudicated in ancillary relief proceedings: see Tebbutt v Haynes [1981] 2 All ER 238, per Lord Denning MR:*
>
> *'It seems to be that, under s.24 of the 1973 Act, if an intervenor comes in making a claim for the property, then it is within the jurisdiction of the Judge to decide on the validity of the intervenor's claim. The Judge ought to decide what are the rights and interest of all the parties, not only of the intervenor, but of the husband and wife respectively in the property. He can only make an order for transfer to the wife, of property which is the husband's property. He cannot make an order for the transfer to the wife of someone else's interest.'*
>
> *34. It is to be emphasized, however, that the task of the Judge determining a dispute as to ownership between a spouse and a third party is of course completely different in nature to the familiar discretionary exercise between spouses. A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division.*"

35. Mostyn J further emphasized at paragraph 36:

> "*36. In my opinion, it is essential in every instance where a dispute arises about the ownership of property in ancillary relief proceedings between a spouse and a third party, that the following things should ordinarily happen:*
>
> *i) The third party should be joined to the proceedings at the earliest opportunity;*
> *ii) Directions should be given for the issue to be fully pleaded by points of claim and points of defence;*

iii) Separate witness statements should be directed in relation to the dispute; and

iv) The dispute should be directed to be heard separately as a preliminary issue, before the FDR.

...

37. In this way the parties will know at an early stage whether or not the property in question falls within the dispositive powers of the court and a meaningful FDR can take place…"

36. Therefore, the guidance in *TL* v *ML* provides the party claiming interest should intervene in the proceedings, that claim should be determined as a preliminary issue prior to the final ancillary relief hearing and that the claim should be determined based on civil/property law principles.

37. As it relates to the law on constructive trusts and proprietary estoppel, Mr Richards provided an extract from Underhill and Hayton on Law of Trusts and Trustees which provides a helpful summary of the position of the law in relation to constructive trusts.

"***Paragraph 2(a)***

Common intention constructive trusts

[32.9]

A constructive trust may be imposed on property, such as a house in A's name that is occupied by A and B as a shared home, to give effect to A and B's express or inferred (but not imputed) common intention (whether at the time of the purchase or subsequently) that B should have a beneficial interest therein, so leading B to act to her detriment in reliance on that intention, this making it unconscionable to allow A to deny B any interest by pleasing the lack of the necessary written formalities for a valid declaration of trust or contract."

38. Underhill and Hayton also confirmed that the most recent UK, Court of Appeal case of *O'Neill v Holland* [2020] EWCA Civ 1583 supports the position that "common intention" alone is not enough to meet the threshold to establish a constructive trust. The test must be that there is a common intention as well as evidence showing the party acted to his or her detriment based on the reliance of the common intention.

39. Mr Richards did not produce any legal text or case law in relation to the doctrine of proprietary estoppel. To summarize this doctrine very briefly, the aim of an equitable estoppel-based remedy is to prevent the unconscionable repudiation of promises or assurances about property (usually land) upon which the promisee had relied to his detriment.

The parties' positions

40. Mr Richards submitted that only a US Court can determine HS's beneficial interest in the Georgia Property. He submitted that because the Georgia Property is located in the U.S. then one must apply U.S. principles of law to determine any equitable interests. It was asserted that to do this, the parties would have likely required an expensive and potentially disproportionate exercise involving expert advice from US attorneys and for that matter to be determined as a preliminary issue.

41. The Husband accepts that HS did not formally intervene in accordance with the guidance set out in *TL* v *ML* but notes that HS has provided affidavit evidence and was cross-examined at the hearing. Mr Richards submitted it would have been unlikely to have assisted the court for HS to intervene given that this court would need to consider the basis of her legal interests under US law. He asserted that this would have likely required an expensive and potentially disproportionate exercise involving expert advice from US attorneys and for that matter to be determined as a preliminary issue. Furthermore, Mr Richards submitted that the reality of this case is that there extremely nominal interests involving parties with modest incomes and so, it is therefore unsurprising that neither party sought to proceed in this manner.

42. Additionally, Mr Richards submitted that it would be "*readily apparent under Bermuda and British law*" that HS has an equitable interest in the Georgia Property by way of either a constructive trust or proprietary estoppel. The following factors are those which the Husband relies on to support this position:

(i) HS has, for fifteen years, contributed towards the Georgia Property directly by way of all payments for the mortgage;

(ii) HS says that the Husband and Wife assured her that the Georgia Property was her house;

(iii) HS has contributed huge sums of monies to the Georgia Property which she did upon the reliance that this was her house; and

(iv) HS has acted to her detriment in undertaking renovations and maintaining the home.

43. Mr Richards asserted that the difficulty in this case is that if this Court simply ignores that potential beneficial interest (by way of constructive trust or proprietary estoppel) and requires the Husband to make any, or any significant lump sum payment based on the equity, that at some later date in the future, a court in US may determine that the Husband has no interest or just a nominal interest in the Georgia Property.

44. Notwithstanding the above difficulties, we say that the courts can and must look to the fairness of the situation and the reality of the parties' respective contributions and interests in the Georgia Property. Moreover, Mr Richards submitted that in weighing whether a lump sum should be paid by the Husband the court must consider what would be fair and reasonable in all the circumstances as well as take into account the possibility that HS may have a claim against the Husband if there is a dispute in the future.

45. The Wife rigorously disputes that HS has any interest in the Georgia Property as she says that HS obtained the benefit of having to pay a significantly reduced monthly rental payment to reside there in comparison to a similar property of the same size and location and she is a family member. She reiterated that HS conceded during cross-examination that HS agrees a fair, market rental value for the Georgia Property is $2,900 and her monthly payments are significantly less than this.

46. Additionally, the Wife submitted that it is not out of the norm for there to be no written rental agreement where the person occupying the home is a family member. Albeit the Wife accepted that the Georgia Property was generally referred to as "*[HS]'s house*", she asserts that does not infer that HS should expect that she has an interest in the Georgia Property and this does not mean that she and the Husband were giving HS any assurance to her of this.

47. The fact that no evidence was provided regarding the payment for any renovations carried out at the Georgia Property was also relied on by the Wife as well as noting that HS's evidence was that both HM and the Husband's father had been paying the monthly mortgage payments using the earnings received from their respective pensions.

Findings on interest held in the Georgia Property

48. I reject the submission that U.S. law must be applied in relation to the determination of any interest in the Georgia Property purely on the basis it is located overseas. I am not aware of any precedent for this and notably, Mr Richards did not provide supporting case law or otherwise. What is more, is that the case of *TL* v *ML* which is relied on by Mr Richards regarding the court's jurisdiction to make determinations regarding beneficial interests where third parties owned the assets, involved the English Courts decision where legal and the beneficial ownership was disputed, *inter alia*, of family-owned offshore companies.

49. In the alternative, the Husband's position (on the basis that this court does not have jurisdiction), he is asking this court to not only consider what would be "*fair*", but also for it to simultaneously have regard that HS may or may not make some claim against the Georgia Property in the U.S. Courts in the future. This would be an insurmountable task because if I accepted this, it would require a finding to be made regarding HS's interest and consequently the value (if any) of that interest, thereby contradicting the position that this court does not have jurisdiction.

50. I am satisfied that I have jurisdiction to decide this issue, but also that I must be guided by *TL* v *ML* in than I must apply civil law principles. Flowing from this, I do not accept that I can consider the possibility of some future claim being made without making a finding regarding HS's interest which I have already found I have jurisdiction to determine. The findings of HS's interest follows below.

51. Despite Mr. Richard's submissions that it would be readily apparent under Bermuda and English law that HS would be able to establish a beneficial interest by way of a constructive trust or proprietary estoppel, submissions specifically addressing these respective principles were not provided even though some legal text was provided in the authorities presented by Mr Richards on constructive trusts. I can only assume this is the case given Mr Richards's ultimate submission that principles of U.S. law must be applied in such circumstances.

52. As it relates to the parties' evidence differs, I prefer that of the Wife. I did not find the Husband's evidence reliable at all when it came to the issue of the Georgia Property as he what little evidence he was putting forward regarding HS's contributions were not supported by HS's evidence in cross-examination. HS's evidence at the hearing clearly contradicted the assertions made not only in her affidavit evidence but also in the Husband's evidence, of her alleged contributions to the Georgia Property. These significant discrepancies are summarized as follows:

    (i) It was revealed that HM's funds which were used to pay the monthly mortgage payments as HS had been granted a Power of Attorney for her mother. The sister was clear that "*I was making the payments on her behalf…*".

    (ii) There was no evidence produced that HS contributed towards the monthly mortgage payments directly from her available income.

    (iii) HS confirmed that some of the renovations which were completed were paid for by HM.

(iv) No supporting evidence was provided at all to show the total sum of monies used to renovate the property which were purported to be "*extensive*".

(v) The monthly homeowner association fees were only approximately $100 per month rather than $500 per month as suggested by the Husband.

(vi) Both the Husband's father's and HM's pension incomes continue to be used to pay the monthly mortgage payments which has been the case for at least the last two years leading up to the hearing as they both reside there.

(vii) HS accepted that she is receiving a substantial benefit from being a member of the Husband's family in that the monthly rent of the Georgia Property is less than half the true market rental value.

53. HS has had the clear benefit of residing in a house where the monthly payments are less than half the market rental value. The fact that there was no written rental agreement does not negate this as I accept that amongst family members the absence of such would not be out of the ordinary.

54. I reject the suggestion that as the parties only contributed financially, initially when the Georgia Property was purchased that as a result their legal and/or beneficial interest would be reduced. It is quite common for spouses (or anyone for that matter) to purchase a property (or properties) where no additional financial injections are required as the rental income covers the property's expenses.

55. Furthermore, I do not accept HS has acted in any way to her detriment by ensuring the mortgage payments and other maintenance expenses were paid. In fact, I am not convinced at all that HS has "*invested*" any monies in the Georgia Property when her own evidence is that HM and the Husband's father have always contributed towards the expenses for the last fifteen years. Moreover, I reject any notion that simply by residing in the Georgia

Property and essentially managing her parent's finances by using their funds to pay for its ongoing expenses amounts to anything even close to being deemed to be a beneficial interest particularly when both parents had a legal interest in the Georgia Property.

56. Additionally, there was no evidence to support the notion that the Husband and Wife gave HS assurances that the Georgia Property was hers. I do not believe that it would be unusual for any person renting a property to refer to it as his or her house, but this does not result in a beneficial interest being created.

57. Taking into consideration my findings above as well as applying the principles surrounding the law of constructive trusts and proprietary estoppel, I do not accept HS has proven on the balance of probabilities that she has any beneficial interest in the Georgia Property.

58. Alternatively, If I am wrong in finding that there is no constructive trust and the doctrine of proprietary estoppel does not apply, and Mr. Richards is right that the Georgia Property falls under the US jurisdiction, I still do not accept that I can consider any "*interest*" in making my final determination. Quite simply, no proceedings have been commenced in the US and as such no beneficial interest has been declared in those courts. Therefore, there is no interest to take into consideration for the determination of the Husband's Application. The Husband cannot benefit from the lack of action of his sister to either be joined as an intervener in these proceedings or take any action in the U.S. courts. Consequently, I find that the parties' interest in the Georgia Property stands at 50% which has a value of $134,081.25.

Pensions

59. Both parties have superannuation pensions as they were employees for the Bermuda Government. The Husband's superannuation recorded contributions of $156,249.77. He had a total pensionable service of 12 years and one month. Upon relocating to the U.S., he received a lump sum of $13,793.89 which also resulted in him receiving monthly pension payments of $1,899.16 (before U.S. taxes). No evidence was provided as to what portion

of the Husband's monthly pension payments was required to be paid in taxes. In addition, the Husband has a private pension with an invested value of $79,063.67.

60. The Wife's superannuation pension shows that she has contributed a total of $209,452.31 but has a closing balance of $176,460.45. Her total pensionable service is 20 years and 11 months. Mr Richards submitted that if the Wife were to select the option where she would receive roughly the same monthly payment as the Husband ($1,778.68) she would receive a lump sum of $81,819.17. The difference between the lump sum the Husband received and the one the Wife will receive is approximately $68,000. It was noted that this difference is comparable to the value of the Husband's private pension which is roughly $79,000.

61. The alternative scenario that was presented was that if the Wife were to accept a lump sum from her superannuation which is comparable to the Husband's, the lump sum of $16,363 she would receive monthly payments of $2,252.99.

DEBTS

Loan from the brother

62. The circumstances surrounding the original loan are generally agreed in that the Wife's brother (hereinafter referred to as **WB**) loaned $40,000 to the parties to assist with a purchase of property in 1990. The purported debt therefore refers to a payment from thirty-three years ago. There is no loan document setting out the contractual terms or which provides a date for repayment.

63. The Husband asserts that the debt was repaid in 1995 using the proceeds of sale from that property to repay WB. The Wife contends that the debt was never repaid and continues to be outstanding. She did, however, accept that no monthly repayments were ever made during the last thirty-three years. The Wife also conceded that there have been no formal written requests or otherwise for those funds to be paid back to HB during this period until HB produced a letter during these proceedings.

64. Neither the Wife nor the Husband were able to provide any evidence in support of their respective positions.

Loan from the Wife's mother

65. The Wife contends that her mother (hereinafter referred to as **WM**) loaned the parties approximately $150,000 to make an investment during the marriage. The Wife was unable to confirm the exact sum of the monies allegedly owed. During her evidence she contended that the amount loaned was greater than the sum referenced in her First Affidavit, i.e., $150,000. All funds were lost in a Ponzi scheme.

66. It is the Husband's position that he expressly disagreed with the Wife taking any monies from the WM. The Husband raised the following points disputing this debt:

    (a) This is a debt owed to WM's estate and so is a matter for the estate representatives to pursue this loan if they choose to do so;

    (b) There is no evidence of the debt by way of a loan agreement;

    (c) The Wife accepted there have been no repayments of the said loan;

    (d) The Wife has not produced bank statements showing those monies being transferred into the parties' accounts; and

    (e) The Husband is aware of what discussions took place between the Wife and WM or what commercial terms were agreed to, if any, in relation to the purported loan.

67. In response to these points, the Wife says that the Husband has benefitted from the monies provided by WM throughout the marriage and is only disputing that anything is owed during these proceedings. The Wife accepted that there was no written loan agreement or

any other document evidencing the loan. As the parties had a joint bank account, the Wife averred that the Husband would have seen the funds deposited from WM into this account.

68. The Wife also drew the Court's attention to a document which was exchanged between the parties when they sought to resolve their financial affairs. She says that at first the document did not include the loan from WM so she requested the Husband to add it. As the Husband added the debt to the document, the Wife averred that this meant that he accepted the monies were owed. The Husband's evidence regarding this document is that it was nothing more than a working document and that every item which either party considered relevant was placed in the document for the purposes of those discussions, without acceptance of the validity or otherwise of the debt.

The law

69. Mr Richards accurately submitted that it is trite law that debts cannot be allocated between the parties as they are not property which can be subject to an adjustment order. Nonetheless, it is accepted that they form part of the balance sheet and there can be an offsetting of other assets or the payment of a lump sum to account for those outstanding liabilities.

70. The question in this case, which is the issue in most cases, is whether those debts are likely to be enforceable. In the recent case of *P* v *Q* [2022] EWFC B9 which is a case from the UK Family High Court, Justice Hess was required to determine whether sums provided to the husband and wife from the husband's mother and the wife's father were loans which should be taken into consideration when calculating the parties' overall asset position. Justice Hess set out the following at paragraph 19:

> "*...(viii) The first question is whether these advances should be regarded (in strict legal terms) as gifts or loans. As a matter of general principle, for an advance of money to be a gift there must be evidence of an intention to give – the animus donandi. In neither instance in this case has either party produced persuasive evidence of such intention in the respective advancing parent and I am inclined to accept what the husband's mother told me and what is contained in the 2004*

document. On the face of it, both these transactions are loans which could, in theory, be enforced.

(ix) In the family court, however, that is not the end of the matter because the inclusion or exclusion of a technically enforceable debt in an asset schedule can depend on its softness/hardness. This is perhaps an elusive topic to nail down, but it falls for determination in the present case as in many others.

(x) I have looked at a number of authorities which deal wholly or partly with this point and I include the following in that category: M v B [1998] 1 FLR 53; W v W [2012] EWHC 2469; Hamilton v Hamilton [2013] EWCA Civ 13; B v B [2012] 2 FLR 22; Baines v Hedger [2008] EWHC 1587; and NR v AB [2016] EWHC 277. I have also looked at an article by Alexander Chandler (as it happens the FDR tribunal in this case) on the subject: Family Loans an intervener claims – taking the bank of mum and dad to court [2015] Fam Law 1505. I derive the following summary of principles from this reading:-

(i) *Once a judge has decided that a contractually binding obligation by a party to the marriage towards a third party exists, the court may properly wish to go on to consider whether the obligation is in the category of a hard obligation or loan, in which case it should appear on the judges' computation table, or it is in the category of a soft obligation or loan, in which case the judge may decide as an exercise of discretion to leave it out of the computation table.*

(ii) *There is not in the authorities any hard or fast test as to when an obligation or loan will fall into one category or another, and the cases reveal a wide variety of circumstances which cause a particular obligation or loan to fall on one side or other of the line.*

(iii) *A common feature of these cases is that the analysis targets whether or not it is likely in reality that the obligation will be enforced.*

(iv) *Features which have fallen for consideration to take the case on one side of the line or another include the following and I make it clear that this is not intended to be an exhaustive list.*

(v) *Factors which on their own or in combination point the judge towards the conclusion that an obligation is in the category of a hard obligation include (1) the fact that it is an obligation to a finance company; (2) that the terms of the obligation have the feel of a normal commercial arrangement; (3) that the obligation arises out of a written agreement; (4) that there is a written demand for payment, a threat of litigation or actual litigation or actual or consequent intervention in the financial remedies proceedings; (5) that there has not been a delay in enforcing the obligation; and (6) that the amount of money is such*

that it would be less likely for a creditor to be likely to waive the obligation either wholly or partly.

(vi) *Factors which may on their own or in combination point the judge towards the conclusion that an obligation is in the category of soft include: (1) it is an obligation to a friend or family member with whom the debtor remains on good terms and who is unlikely to want the debtor to suffer hardship; (2) the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangement; (3) there has been no written demand for payment despite the due date having passed; (4) there has been a delay in enforcing the obligation; or (5) the amount of money is such that it would be more likely for the creditor to be likely to waive the obligation either wholly or partly, albeit that the amount of money involved is not necessarily decisive, and there are examples in the authorities of large amounts of money being treated as being soft obligations.*

(vii) *It may be that there are some factors in a particular case which fall on one side of the line and other factors which fall on the other side of the line, and it is for the judge to determine, looking at all of these factors, and maybe other matters, what the appropriate determinations to make in a particular case in the promotion of a fair outcome*." [Emphasis added]

The parties' positions

Loan from WB

71. Mr Richards for the Husband submitted that in applying the principles set out in *P* v *Q*, that on the balance of probabilities, there is no evidence upon which the court can determine that the loan remains outstanding. He further submitted that even if such a loan existed and created a contractual obligation, applying the *P* v *Q* criteria it must be considered a soft loan and therefore should not form part of the computation of the assets. The factors to be considered the Husband says are as follows:

(i) Thirty-three years has elapsed since the "loan" was made;

(ii) There is no formal loan agreements or any other documents recording contractual terms;

(iii) It was accepted by the Wife that no payments have been made to WB since the initial loan was given (albeit the Husband believes that it was repaid in full when the property was sold); and

(iv) WB did not make any demand for payment until these proceedings commenced.

72. The Wife averred that the Husband knows WB was never repaid and raised the point that the Husband accepted that the loan was given to them in 1990. She also submitted that it was disingenuous of the Husband to deny this loan is outstanding now as it was loaned to them in good faith that it would be repaid. She submitted that they share this debt equally so that they both pay WB $20,000.

Loan from WM

73. The Husband's submission is that the Wife has incorrectly included this matter for the Court to determine as he avers that any alleged debts owed to WM's estate would be pursued by the estate administrators and would not be appropriate to address in these divorce proceedings. It was also noted that the Wife would be a beneficiary of the estate so effectively anything paid on the purported debt, the Wife would benefit.

74. Having said this, Mr Richards submitted that even if WM remained alive today, and this debt existed as a contractual obligation, the Court must consider it to be a soft loan applying the criteria *P* v *Q* against the facts of this case. The factors to be considered the Husband says are as follows:

(v) A significant period of time has elapsed since the "loan" was made;

(vi) There are no formal loan agreements or any documents recording the terms of repayment or otherwise;

(vii) The money was provided by a family member who is now deceased; and

(viii) No payments have been made by way of repayment of the loan nor have any repayments being sought.

75. The Wife remained steadfast in her position that it would be unfair for her to be left with the burden of paying this debt as well as averred that it would damage her relationship with her sibling who would receive a 50% interest in WM's estate. The Wife further stated that she had spoken with her family regarding this debt and it was agreed that the debt can be reduced by 50% which would represent the benefit she would receive from the estate. Thereafter, the Wife has submitted that she is willing to share the remaining 50% of this debt with the Husband which would mean that they each pay WM's estate $37,500.

Findings

Loan from WB

76. Applying the criteria in *P v Q*, I accept Mr Richards' submissions that loan to WB is not a contractually binding obligation based on the facts relied on. I do find that that it was more likely than not that this loan was repaid when the parties sold the property as purported by the Husband.

77. Additionally, I also accept that even if I found that this debt a legitimate legal obligation, I find that is a "soft" loan in that WB will very likely not pursue the parties for payment. As such, this loan will not form part of the computation of the distribution of the matrimonial assets which should form part of the computation.

Loan from WM

78. I also agree with Mr Richards' submissions that applying the criteria in *P v Q*, the loan to WM was not a contractually binding obligation based on the facts relied on. Additionally, I also accept that even if I found that this debt a legitimate legal obligation, I find that is a "soft" loan in that WM's estate will very likely not pursue the parties for payment. As

such, this loan will not form part of the computation of the distribution of the matrimonial assets.

THE HUSBAND'S POSITION[1]

79. Mr Richards submitted that fairness dictates that the Husband should retain any interest he may have in the Georgia Property and for the Wife to retain the FMH. He asserted that this provides each of them with a roof over their heads as they approach their final working years and into retirement.

80. Mr Richards also asked the court to bear in mind that the Georgia Property will not only provide a home for the Husband but also for his extended family and submitted that as the Georgia Property provides a home for the Husband's ageing parents, it would be "*unfair and unconscionable*" for it to be sold to "*free up equity*". It was further submitted that if the Husband is required to make a lump sum payment to the Wife which would require the sale of the Georgia Property, that the sale would likely be challenged in the US courts both by HM and HS.

81. It is accepted by the Husband that on a *prima facie* assessment, the equity in the Georgia Property is greater than the FMH; however, the Husband reiterated the below factors which he says mitigates against an equalization payment in the net equity of the Georgia Property:

    (i) Since the parties separated, the Husband has always maintained that the FMH should have been sold. He asserts that he has always told the Wife that it made no financial sense to retain the FMH due to the large mortgage secured against it, the significant expense of completing the construction/renovations and as well as the large monthly mortgage payments which are significantly higher than their incomes. Therefore, he avers that the Wife's choices led to a reduction in value and a diminution of the equity in the FMH.

[1] Mr Richard's submissions did include references in relation to HS's purported interest in the Georgia Property; however, these have been removed from this section given that a finding has now be made that HS has no interest in the Georgia Property.

(ii) The Second Valuation illustrates that the work required to repair the FMH now exceeds that which was necessary three years ago. The Husband contends that the this is as a direct result of the Wife's decision to retain the FMH which has led to the home falling into further disrepair thus reducing its value.

(iii) The FMH has the potential to be worth significantly more once completed.

(iv) The Husband should be given credit for the payments of $124,000 he made when not living at the FMH.

82. As it relates to the Renovation Debts, the Sub-Zero Debt and the Construction Loan, the Husband submitted that as the Wife would be retaining the FMH, that is an asset which will have a far greater value in the future. Moreover, the Husband says that the Wife will receive the benefits of any works having decided to retain the FMH and having had sole possession of the house for the past seven years. He also submitted that it is extremely unlikely that those debts are likely to be chased given their age and the sums owing and if they are, the amounts outstanding are unlikely to be comparable to the sums the Husband has already paid. Therefore, Mr Richards submitted that all debts relating to the FMH should not form part of the computation as the debts which remain owing by the Wife are less than the sum the husbands paid towards the Sub-Zero Debt.

83. Furthermore, it was submitted that it is likely that the Wife's pension entitlement is far greater than that received by the Husband. Accordingly, the Husband says there should be no apportionment in favour of the Wife which is clearly not justified on the facts. It was further submitted that it is probable that the Husband may be entitled to a small equalization payment in his favour if the Government Pensions were valued. Having said this, Mr Richards went further to submit that if the court considers that an equalisation order should be made then the parties should be required to obtain the valuations for the Government Pensions from a qualified actuary.

84. Additionally, Mr Richards submitted that in determining what is the fair outcome, the court will have to consider the liquidity of the parties. He noted that the Husband has no savings

and the lump sum that he received from his government pension of $14,000 which was used to pay towards his legal fees of which $32,000 remains outstanding. It was reiterated that the Husband's lump sum payment the Husband already received will be significantly less than what the Wife will receive upon her retirement. Accordingly, the Husband says there are no funds from which he can pay any lump sum, even if one was justified on the facts of this case.

85. It is the Husband's preference that the Wife sell the FMH because without a sale he does not believe it will ever be possible for the Wife to release him from the guarantee under the mortgage. Nonetheless, he is aware and understands that the court does not have power to order a sale and can do no more than judicially encourage the Wife to use her best endeavours to release him from those obligations. It is submitted that the continuing obligation as a guarantor must also be considered in assessing what is a fair and reasonable order in this case. The Husband will not be able to borrow further sums and will continue to be at risk if the Wife defaults on the mortgage payments and that he will be held accountable for those actions in the future long after his matrimonial claims have been determined.

86. The Wife also submitted that the current equity in the FMH, albeit minimal, is as a result of her paying the mortgage since the parties separated. Mr Richards for the Husband suggested that had the FMH been sold back in 2019 the result would have been the same given its higher value at that time would have made up the difference with the outstanding mortgage being higher at that time. Mr Richards further submitted that had the property been sold in 2015 it is likely that the money outlaid by both parties would have been significantly less. Having said this, Mr Richards submitted that this argument is unhelpful as there is no evidence to support what the value of the FMH was when the parties separated in 2015.

87. The Husband states that the value of the FMH of $10,000 should be the minimum value considered when seeking to achieve a fair outcome. He submitted that the following factors should be taken into consideration when assessing the value of that interest as well as

asserting that it would be wrong for him not receive any benefit from the equity in the FMH:

(i) The Husband paid $124,000 towards the mortgage when he did not live at the FMH. That is a significant contribution on his part in circumstances where he was deprived of the benefit to live at the home and was required to incur his own household expenses;

(ii) It was purported that the value of the FMH has decreased because of the Wife's unilateral decision to retain the property. If the FMH had, at the very least, maintained its value of $1.5 million, the Husband believes the equity would be approximately $75,000 at this time; and

(iii) The First Valuation confirms that the FMH would be valued at $2 million upon completion of the slated works.

(iv) The Wife has had sole benefit of residing in the FMH to the exclusion of the Husband. The Husband has therefore been required to obtain alternative accommodation and incur the costs for doing so.

(v) Any credit for the Wife's mortgage payments (in so far as they are greater than the Husband's payments) would be for capital payments only and must be off set against occupational rent due to the Husband. The exercise is therefore likely to be *de minimis*.

(vi) The repercussions of the Husband not being able to be removed as guarantor of the mortgage.

88. Mr Richards submitted generally that given the assets at play, a broad-brush approach should be adopted. He says this is justified as the assets are negligible and a strict

adherence to equalisation is likely to produce a result which is unfair and does not meet the parties' needs.

89. It is the Husband's position that there is no justification for any lump sum order to be granted in this matter. The Wife has sought to create arguments to bolster her claims so that she can receive a lump sum and affect the renovations on the FMH. The Wife confirms that is her intention in her affidavit evidence.

90. In summary the Husband is seeking the following:

    (a) The Wife retains the FMH on the following basis:

        i. that she uses her best endeavors to release the Husband from his under the guarantee; and
        ii. that should be responsible for all expenses and costs pertaining to the FMH (including all current liabilities).

    (b) The Wife shall transfer all her legal and equitable interests in the Georgia Property to the Husband;

    (c) there were no other orders for lump sum for pension sharing orders.

THE WIFE'S POSITION

91. The Wife's overall position is that given their thirty-one-year marriage, everything should be shared equally between them. The Wife raised that the fact that the Husband, despite bringing home a paycheck more than $8,000 per month for the last four years leading up to the date of the hearing, has removed himself of the burden of paying the sizable mortgage as well as giving any contribution to the maintenance and works completed at the FMH.

92. Contrary to the Husband's submissions, the Wife asserts that had the FMH been sold when they separated or indeed in 2018, the sales proceeds would not have cleared the outstanding mortgage. As such, she submitted that they both would have been left indebted to the bank in addition to her no longer having a roof over her head.

93. The Wife remained adamant that the Renovation Debts and the Sub-Zero Debt remain outstanding. She was steadfast in her submission that the Husband knows the various vendors would be unable to enforce payment from him as he has left Bermuda which she says results in her shouldering the debt.

94. As it relates to the mortgage payments paid since the parties were separated, whilst the Wife has not submitted that she should be reimbursed by the Husband for the payments she has made towards the mortgage since the parties' separated, she contends that the Husband should not receive any benefit by way of the equity in the FMH given his failure to contribute since December 2018.

95. Now that the Husband has moved back to Georgia the Wife says he is in a far more favorable financial position than her as he has secured new employment, is receiving a pension from the Bermuda Government and he also has the benefit of a significantly lower cost of living. Further, she notes that the monthly mortgage payments are covered by his parents for the Georgia Property, so he does not have this significant expense. The Wife submitted that due to all these factors, the Husband would be able to secure funding to pay her a lump sum.

96. The Wife says that it if it was not due to her consistent mortgage payments since their separation the FMH did not go into foreclosure and now has the equity it does. She does not accept the Husband's assertion that she cannot afford to keep the FMH. Indeed, she stated that the bank has discussed with her a plan to be able to remove the Husband from the position of guarantor. The Wife says that the bank's position for the Husband's to be removed as guarantor will be contingent on the land tax and home insurance arrears being cleared. She avers that the arrears can only be paid after she receives a lump sum from the Husband which she will immediately apply to these outstanding balances. In addition, the

bank will add the parties' two children as guarantors to the mortgage and release the Husband. On this basis, the Wife says that this will extend the mortgage duration thereby lowering the monthly which will establish an acceptable debt/service ratio for the bank.

97. The Wife proposes to retain the FMH, free from any claim by the Husband and will release him from the debts which she says includes the Renovations Debts and the Construction Loan. Taking into consideration these debts (without considering the outstanding balances of land tax and house insurance), the Wife says the FMH will have negative equity which means there is no equity in this property.

98. As it relates to the pensions, the Wife is seeking that the pensions be equalized fairly. She submits that the Bermuda Government Pensions are similar but accepts that hers is greater than the Husbands by $20,210.68. The Wife avers that if the Husband's private pension with a value of $83,826.47 is reduced by the excess she has in her government pension by $20,210.68 which would leave a balance of $63,615.79. The Wife submits that the $63,615.79 should be shared equally which would result in the establishment of a new policy in her name with a value of $31,807.89.

99. The Wife asserts that as she has a quarter interest in the Georgia Property, she is prepared to convey her share to the Husband upon receipt of payment of 25% of the net equity which she says is approximately $67,000.

100. Therefore, in summary, the Wife submitted that the following would be a fair outcome considering the parties' thirty-one-year marriage:

    (a) The Wife will retain the FMH and will be responsible for the mortgage.

    (b) The Wife will be responsible for all purported, outstanding debts which relate to the FMH.

    (c) The Wife will take all steps necessary to attempt to have the Husband removed as a guarantor of the mortgage.

(d) The Husband shall pay to her a lump sum of $67,000.00 which she says represents her interest in the Georgia Property.

(e) That there be a pension equalization so that the Husband transfers to a new private pension plan in the name of the Wife in the sum of $31,807.89 from his private pension.

(f) The Husband and the Wife each pay $37,500 to WM's estate for repayment of the purported debt.

(g) The Husband and the Wife each pay $20,000 to WB for repayment of the purported debt.

THE LAW

101. Sections 27 and 28 of the Matrimonial Causes Act (**MCA**) set out the financial orders that the Court can make following the dissolution of the marriage. In making an ancillary relief order, the Court must consider the statutory matters prescribed under section 29(1) of the MCA which are as follows:

> "...
> *(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
>
> *(b) the financial needs, obligations, and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
>
> *(c) the standard of living enjoyed by the marriage before the breakdown of the marriage;*
>
> *(d) the age of each party to the marriage and the duration of the marriage;*
>
> *(e) any physical or mental disability of either of the parties to the marriage;*

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) In the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

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

102. In the recent case of *C.R.M.R* v *K.L.R.* [2019] SC Bda 7 the Chief Justice confirmed that the objective in Ancillary relief proceedings is to achieve a fair outcome and that the task of the court was not affected by the tailpiece continuing to be present in Bermuda. Chief Justice Hargun stated as follows in paragraph 48 to 50:

"48. In the circumstances it is not surprising that the House of Lords decision in White v White [200] 1 AC 596, has been treated by the Supreme Court and the Court of Appeal in Bermuda as a binding authority without any modification having regard to the fact that relevant time the English legislation had repealed the tailpiece…

49. Likewise the House of Lords decision in Miller v Miller [2006] 2 AC 618 has been followed in the Bermuda Courts without any modification on account of the fact that the Bermuda legislation continues to retain the tailpiece... Miller has also been followed in the Court of Appeal for Bermuda in Simmons v Simmons [2011] Bda LR 31, where Baker JA stated that: "The criteria in section 29 of the Matrimonial Causes Act 1974 are well known and I do not repeat them. As was said by Lord Nicholls in Miller [2006] UK HL 24 para 11 when the marriage ends, fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties housing and financial needs taking into account a wide range of matters such as the parties ages, their future earning capacity, the family standard of living and the disability of either party".

50. In the circumstances it is clear that the Bermuda Courts, including the Court of Appeal for Bermuda, have approached applications for ancillary relief on the basis that the objective must be to achieve a fair outcome. That is the same objective which the English Courts seek to achieve. It appears that the existence of the "tailpiece" in the Bermuda legislation makes no material difference. In

particular the existence of the "tailpiece" in the Bermuda legislation does not warrant a different approach to the principles of compensation and sharing as explained by Lord Nicholls and Baroness Hale in Miller."

103. The House of Lords case of *Miller* v *Miller*; *McFarlane* v *McFarlane* [2006] UK HL24 is the leading authority on the application of the principles enunciated in Section 29 of the MCA. In all cases the objective is fairness. In distributing the assets fairly the court must have regard to the considerations of needs, compensation (not applicable here) and sharing. Lord Nicholls in *Miller* stated as follows in paragraphs 11 and 16 respectively:

> "***[11]***
>
> *This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money earner, home maker and child carer. Mutual dependence begets mutual obligation of support. When the marriage ends fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties housing and financial needs taking into account a wide range of matters such as the parties ages, their future earning capacity, the family's standard of living and any disability of either party. Most of these needs will have been generated by the marriage but not all of them.".* [Emphasis added]
>
> "***[16]***
>
> *A third strand is sharing. This "equal sharing" principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. …the parties commit themselves to sharing their lives. They live and work together. When the partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary. Fairness requires no less. But I emphasis the qualifying phrase "unless there is good reason to the contrary". The yardstick of equality is to be applied as an aid, not a rule".* [Emphasis added]

104. *Miller* and in particular, the sharing principle established therein, reflects a modern, non-discriminatory approach that no distinction is to be made when considering the contributions of spouses to a marriage between monetary and non-monetary contributions. Further, the matrimonial home, regardless of source of funds is treated as matrimonial property and in ordinary circumstances is divided on an equal basis unless there is good reason to do otherwise. Lord Nicholls in *Miller* stated:

"*The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been.*"

105. As it relates to the Husband's position regarding occupational rent owed to him since he vacated the FMH, Mr Richards relies on the case of *Murphy* v *Gooch* [2007] All ER 350. At paragraph 10 Justice Lightman held as follows regarding the legal principles for occupational rent as well as referenced the case of *In Re Pavlou* [1993] 1 WLR 1046:

> "*10. To resolve questions between Co owners of the character raised in this case equity developed the doctrine of equitable accounting to facilitate the striking of the balance between the Co learners this consisted of a body of (non-binding) guidelines and rules of convenience aimed at achieving justice between the co-owners. The thrust of these guidelines was that where it is just to do so, co-owners may be given credit for monies paid and expenditure incurred on the jointly owned property, a co-owner in sole occupation of property may be charged with or required to give credit to his co-owner for an occupation rent that these credits may be offset against each other. At one time the prevalent practice appears to have been that a co-owner and sole occupation would only be required to give credit for an occupation rent if he had actually or constructively ousted the other coroner or Co owners from the jointly owned property. But more recent authorities made plain that an occupation rent may be ordered in any case where this is necessary to do broad justice or equity between the parties; see Lawrence Collins J in Byford v Butler [2004] 1 FLR 56 at 65. Lawrence Collins J cited with approval the judgment of Millet J in the case of In Re Pavlou [1993] 1 WLR 1046 at 1050 C-D where Millet J said:*
>
> *"I take the law to be to the following effect. First, a quart of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner and occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive. Secondly, <u>where is a matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co owner who remains</u>. <u>But that is not a rule of law; that is merely a statement of the prima facie conclusion to be drawn from the facts</u>. <u>The true position is that if a tenant in common leaves the property voluntarily, but would be welcomed back and would be in a position to enjoy</u>*

his or her right to occupy, it would normally not be fair or equitable to the remaining tenant in common to charge him or her with an occupation rent which he or she never expected to pay." [Emphasis added]

106. *Miller* also addressed the issue as to when the value of the assets should be determined from when the parties had been separated for a significant period prior to the hearing. Lord Mance at paragraph 174 stated as follows:

> "*174. Sixthly, if account is taken of the increase in the value of the parties' assets during the marriage (the matrimonial acquest), a question may arise about the date up to which one should measure it. Should this be up to the date when the parties ceased effectively to live as married partners (here April 2003), as Mr Mostyn considered in his judicial capacity in GW v RW (Financial Provision: Departure from Equality) [2003] 2 FLR r08, para 34? Or should it be up to a later date such as the date of trial, or even, in a case where an appellate court thinks it right to re-exercise the discretion, up to the date of the appellate decision? Reference was made by Mr Mostyn to my remarks in Cowan v Cowan [2002] Fam 97, paras r30-r35. The matters to which the court must have regard under section 25 include several which exist or appear likely as at the date the court has regard to them (cf section 25(2)(a), (b), (f) and (h)). Others of the listed matters require the court to look back at the past (e g section 25(2)(c), (f) and (g)). To the extent that the focus is on the matrimonial acquest, the period during which the parties were making their different mutual contributions to the marriage has obvious relevance. The present may be viewed as a case (paralleling the then unreported decision of Coleridge J in N v N (Financial Provision: Sale of Company) [200r] 2 FLR 69 to which I referred in Cowan v Cowan [2002] Fam 97) where the increase in value of the New Star shares between separation in April 2003 and trial in October 2004 or judgment in April 2005 was contributed to by the husband's further investment of time and effort, independently on its face of any contribution by the wife. Further, Mrs Miller had here no right to, and could not have been given, any part of Mr Miller's New Star shareholding in relation to which Mr Miller carried the risk. Mrs Miller has at all times been living in the house, which has now been formally transferred to her. Her only further claim was to a sum of money, assessed by the judge at £2·7m (which Mr Miller paid in two instalments in May and June 2005). Mr Miller cannot easily be said in this case to have been holding on to any asset which should have been Mrs Miller's, or to owe anything other than money. Assuming that the focus is on assets acquired during the marriage, rather than on the husband's overall means, it seems to me therefore natural in this case to look at the period until separation.*" [Emphasis added]

FINDINGS

FMH

107. As it relates to the Husband's position that there should be an accounting for occupation rent for the period he vacated the FMH in 2015 until he ceased making any contributions to the monthly mortgage payments in December 2018, I do not accept this. *Murphy* v *Gooch* was explicit in that occupation rent may apply to cases where there is joint legal ownership in the matrimonial home where the co-owner remaining in the property would be required to pay occupation rent to the co-owner who vacated the property. This is followed by a directive that it is not a "*rule of law*" that occupation rent would be payable in matrimonial matters. In this matter, the FMH is not owned jointly by the parties and no case law was produced to suggest that occupation rent would also apply in cases where one party is claiming a beneficial interest. In any event, the Wife has been solely responsible for paying the mortgage since December 2018 which is a period of approximately five years where the Husband contributed nothing.

108. Considering the costs incurred by the Wife regarding the Renovation Debts and the Construction Loan as well as her sole responsibility for the mortgage payments for the last five years, it cannot be disputed that there is effectively no equity in the FMH.

109. Whilst the point was raised regarding the fact that once the FMH has all suggested works completed, it will likely be of significantly greater value than the Georgia Property, it is evident that the Wife would need to incur substantial further costs for the works to be completed and there is no indication that she has the ability to obtain funding for this in the near future. On the other hand, the Husband living in the Georgia Property where no major works are required and there is significantly more equity available.

Pensions

110. It is not accepted that the Wife will be receiving a "*significantly greater*" lump sum as well as "*significantly greater*" monthly payments from her Government Pension compared to the Husband. The evidence shows that the difference when selecting the same option is

equates to the Wife receiving $353.83 more per month (which is just $4,245.96 more per annum) compared to the Husband. The lump sum difference is just $2,569.11.

111. Furthermore, I reject the Husband's suggestion that an actuarial valuation should be obtained for any pension equalization to be considered. I do not comprehend why such a valuation would be required when it was the Husband's submission that any pension equalization should be in his favour given the purported significant differences between their respective Government Pensions. It is clear the Husband's private pension was not given any consideration. Moreover, any suggestion of valuations to have been completed should have been made by the Husband at any of the case management appearances.

112. The Husband's pensions are of greater value than the Wife's as the combined value of this pensions equate to $235,313.44 compared to the value of $176,460.45 for the Wife's Government Pension.

CONCLUSION

113. Considering the findings above and those as it relates to the debts and the interest in the Georgia Property, the matrimonial assets to be considered for division with their respective values are follows:

Description	Value
FMH	NIL
Georgia Property	$134,081.25
Wife's Government superannuation pension	$176,460.45
Husband's superannuation pension	$156,249.77
Husband's private pension	$79,063.67

114. The overarching principle of fairness must be applied regarding the distribution of these assets between the parties. In this case the elements confirmed in *Miller* to achieve a fair outcome are twofold: (1) consideration of the needs of the parties; and (2) the sharing principle.

115. When considering the element of "needs", the factors set out in Section 29 of the Act must be applied. The Section 29 factors must also be weighed as it relates to the sharing principle; however, *Miller* is clear in that the starting point of the sharing principle is that there should be an equal division of matrimonial assets "*unless there is good reason to the contrary*".

116. Having taken into consideration the Section 29 factors, I believe that both parties' needs are met by each of them retaining the property where they reside. I am not satisfied that the Husband has provided any evidence to support any position that the matrimonial assets should be divided equally between the parties. As such, I make the following determination regarding the matrimonial assets:

    (i) The Wife shall retain the FMH free from any claim by the Husband.

    (ii) The Wife shall be responsible for all costs associated with the FMH (which include the Renovation Debt, the Sub-Zero Debt and the Construction Loan) and shall indemnify the Husband and hold him harmless against any potential claims.

    (iii) The Wife shall use her best endeavors to release the Husband from his guarantee under the mortgage and in any event shall indemnify the Husband and hold him harmless against any potential claims.

    (iv) The Husband shall pay to the Wife a lump sum of $67,000 representing her 50% share of the parties combined interest of $134,081.25 in the Georgia

Property. The said lump sum shall be paid to the Wife within three months from the date hereof.

(v) Upon payment of the lump sum to the Wife, the Wife shall transfer her interest in the Georgia Property to the Husband. All costs associated with the said transfer shall be borne by the Husband.

(vi) There shall be a pension equalization whereby the Husband shall transfer the sum of $29,500[2] to from his private pension plan to a pension account in the Wife's name. This shall be done within three months from the date hereof.

117. As it relates to costs, I am minded to make no order as to costs given that both parties were successful in differing portions of their respective submissions, unless either party makes an application to be heard on costs within fourteen days of this ruling being given.

Dated the 12th day of January 2024

ALEXANDRA WHEATLEY

REGISTRAR FOR THE COURTS OF BERMUDA

[2] The value of the Husband's two pensions equates to $58,852.99 more than the Wife's pension. This difference divided by two equals $29,426.50.