

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2014/FAM/DIV/FP00059
BETWEEN

RALPH EICKELBECK
Petitioner

AND

CHERYL ANN EICKELBECK
Respondent

BEFORE The Hon. Mrs. Justice Estelle Gray-Evans
APPEARANCES: Mr Sean Moree along with Ms Vanessa Lee for petitioner
 Mrs Petra Hanna Weekes, Mr Robert Adams and
 Miss Taccara Wright for respondent

HEARING DATES: 2015: January 21; April 22; May 13

JUDGMENT

Gray Evans J.

1. These are applications for ancillary relief following divorce proceedings.
2. The parties met in the early 1990s. Both of them had been married before and divorced – the husband twice and the wife once. They began living together in or about 1995. They eventually discussed getting married and also talked about executing a prenuptial agreement prior thereto. The husband made it clear to the wife that in the absence of a prenuptial agreement he would be unwilling to get married again. The husband presented the wife with a prenuptial agreement for execution. Although she initially resisted doing so, the wife eventually signed the Agreement dated 5 April 1997 (“the Agreement”) and the parties were married a week later on 12 April 1997. At the time, the wife/respondent was 42 and the husband/petitioner was 62. There are no children of the marriage, although the husband has three adult children and several grandchildren.
3. In this judgment “petitioner” and “husband” are used interchangeably, as are “respondent” and “wife” respectively.
4. After the marriage, the parties cohabited at various units in Bell Channel Club owned by the husband and subsequently at the matrimonial home until in or about 2009, when the husband vacated the same.
5. On 18 May 2009, the husband commenced divorce proceedings against the wife in Supreme Court Action No. 2009/FAM/DIV/FP0063. Those proceedings were, with leave of the Court, discontinued by order made on 29 May 2014. The husband filed the petition in this action on 30 May 2014. A decree nisi on the ground of five years’ separation was granted to the husband on 30 July 2014. The Decree was made absolute on 19 February 2015.
6. By a notice filed on 17 September 2014 the husband gave notice of his intention to apply to the Court for the following relief:
 - 1) That there be a property adjustment order pursuant to the prenuptial agreement entered into between the petitioner and respondent on 7 April 1997;
 - 2) The petitioner be granted such further and other relief as the Court deems just; and
 - 3) The respondent be ordered to pay the costs of this suit.
7. The husband’s application is supported by the following:
 - (1) His affidavit of means filed 17 September 2014;
 - (2) His supplemental affidavit filed 19 January 2015;
 - (3) Affidavit of Margaret Malone filed 19 January 2015;
 - (4) His second Supplemental affidavit filed 28 January 2015.
8. By a notice filed 12 May 2015, the wife also gave notice of her intention to apply to this Court for the following relief:
 - 1) A property adjustment order pursuant to section 28 of the Matrimonial Causes Act; and

- 2) A financial provision order: namely, a periodical payment order (alimony) or a lump sum(s) payment order, pursuant to section 27 of the Matrimonial Causes Act.
9. In response to the husband's application and in support of her own, the wife relies on the following:
- (1) Her affidavit of means filed 14 January 2015;
 - (2) Her supplemental affidavit filed 19 January 2015;
 - (3) Affidavit of Paula Fingland filed 19 January 2015.
10. Only the petitioner and respondent were subjected to cross-examination.
11. The Agreement contained, inter alia, the following provisions:
- i) That each of the parties would retain all rights to property each owned in their names whether acquired before or during the marriage to the exclusion of the other party;
 - ii) In the event property is acquired during the marriage in joint names the property shall be split on a pro rata basis as to each party's contribution to the said property upon the termination of the marriage;
 - iii) That any earnings, wages or other compensation personally received by each party during the marriage shall be for the sole benefit of the owner of the property;
 - iv) Neither party shall be entitled to claim spousal maintenance, support or alimony in the event divorce proceedings are commenced; and
 - v) Upon divorce proceedings being commenced, each of the parties would release and waive all rights and interests they had in properties solely owned by one of the parties.
12. The Agreement also contained net worth statements setting out each of the parties' assets at that date. Included amongst the wife's assets was Unit B-6 Bell Channel Club, Jolly Roger Drive, Freeport, Grand Bahama. Listed amongst the husband's assets was beneficial ownership of shares in (1) Megeve Investments Limited ("Megeve"); (2) Cross Island Investment Limited; and (3) Cross River Cruising Inc.
13. Megeve is a company incorporated in the Commonwealth of The Bahamas and is used by the husband as an estate planning vehicle to hold real property assets in The Bahamas.
14. In addition to those assets, the parties acquired the following properties during the marriage:
- 1) Unit D-1 Bell Channel Club, Freeport, title to which was taken in the wife's name;
 - 2) Property in Abaco, title to which was taken in the name of Megeve Investments Limited;
 - 3) Lot 10 Block 10 Fortune Bay Subdivision Unit 3, Freeport, Grand Bahama, title to which was taken in the wife's name and used as the matrimonial home.
15. The husband proposes an ancillary relief order in the following terms:

- 1) That the beneficial ownership of the Fortune Bay property be adjusted as to 85% to himself and 15% to the wife on the basis of the investment made by each of them in that property;
 - 2) The wife to pay the husband \$117,919.00 in rental proceeds being a 50% portion of the rental proceeds received by the wife in relation to the Fortune Bay Property since the separation of the parties;
 - 3) All other property owned by the parties in their name to remain in their respective names; and
 - 4) Each party bears their own costs.
16. The wife made several proposals for settlement of the ancillary matters. Her first proposal, set out in paragraph 59 of her 14 January 2015 affidavit, is as follows:
- (1) The husband is to release in favour of the wife his interest in the Fortune Bay property in consideration for which she will make no claim for alimony from him; [underline mine]
 - (2) The wife is to release to the husband all claim to an interest in the Abaco property;
 - (3) The wife is to retain as her absolute property Units B-6 and D-1, Bell Channel Condominium.
17. Five days later, the wife at paragraph 13 of her 19 January 2015 affidavit said:
- “In the circumstances, I respectfully submit that I ought to be entitled to alimony from the petitioner. I verily believe that he is capable of providing me with such alimony in order for me to maintain a decent standard of living more in keeping with the lifestyle to which I had become accustomed during the marriage. [underline mine]”
18. Then, in his closing submissions, counsel for the wife urged the Court to make the following orders:
- 1) A property adjustment order declaring that the wife is in fact the sole owner of the Fortune Bay property; and
 - 2) A financial provision order (alimony or lump sum payment) in the sum of \$500,000.00.
19. In support of the husband’s position, counsel for the husband cited the following cases: *M v M* [2002] 1 FLR 654; *K v K* [2003] 1 FLR 120; *Edgar v Edgar* [1980] 1 W.L.R. 1410; *Crossley v Crossley* [2008] 1 FLR 1467; *Granatino v Radmacher* [2010] 3 W.L.R. 1367; and *M v F* [2011] 2 BHS J. No. 13
20. In support of the wife’s position, counsel for the wife cited the following authorities: *Edgar v Edgar supra*; *Radmacher v Granatino* [2010] UKSC 42; *M v F supra*; *Royal Bank of Scotland v Etridge (AP)* [2011] UKHL 44 (11th October 2001); *Barbieri v Barbieri*, Supreme Court of The Bahamas, Action No. 37 of 1998; *Scatliffe v Scatliffe*, Eastern Caribbean Supreme Court, unreported; and *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34.
21. Sections 27 and 28 of the Matrimonial Causes Act, chapter 125, Statute Laws of The Bahamas (“the Act”), empower the Court to make financial provision and property adjustment orders in ancillary relief proceedings.

22. By section 29(1) of the Act, the Court, in the exercise of its powers under sections 27 and 28 is mandated to take certain factors into consideration when making financial provisions and property adjustment orders, including the following:

- 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 family 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 contribution 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) 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 practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.”

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

23. The wife is a hairdresser by profession, but she has been out of the salon business for about 20 years. She says that she is no longer able to work as a hairdresser on a full time basis. It is, therefore, not feasible for her to restart a hairdressing business and she says she has no other professional skills. Although she does not provide a dollar amount, she says she also earns a small income from baking and occasionally cutting her friends' hair, for which she charges a nominal sum. She says she has received assistance from family members and had to sell some of her jewelry in order to pay her legal fees and “make ends meet”.

24. The wife is the sole owner of two units in Bell Channel Club, Units D-1 and B-6. There is no evidence as to their value, appraised or otherwise. The combined rental income from Unit B-6 and the matrimonial home is \$7,042.00 per month or \$84,500.00 per annum. In her 19 January 2015 affidavit, the wife said she had approximately \$41,000.00 in her bank accounts and she owned a 2007 Dodge Dakota.

25. Title to the Fortune Bay property is also held in the wife's name alone. However, she executed a declaration of trust declaring that she held the same on trust for the husband and herself as joint tenants. In 2009, the house had an appraised value of \$1,253,880.00.

26. It is unclear just how much the husband earns annually. However, it appears from the evidence that his annual income exceeds \$100,000.00.

27. The husband says that he receives \$2,000.00 per month or \$24,000.00 per annum in Social Security benefits; that he (or Megeve) receives a fee of \$70,000.00 per annum (that is,

“two sets of \$35,000.00 per annum”) from the Bell Channel Condominium Association for managing that development; and he also earns 10% of the rental income from the units in Bell Channel Club which he (or Megeve) manages. In that regard, the husband’s evidence is that he received \$10,636.66 for 2014, a decline, he says, from the years, 2012 and 2013, in which he earned \$13,308.16 and \$13,286.98 respectively.

28. I say “the husband or Megeve” because on several occasions while giving his evidence the husband seemed to have difficulty separating the two and although he denied it, it was, in my view, clear that he did not see the company as different from himself.

29. The husband says he has approximately \$80,000.00 in savings; he owns three boats, the combined values of which he estimates at \$98,000.00. In addition to his beneficial ownership of the shares in Megeve, he is also beneficial owner of shares in two Delaware companies: Cross River Cruising Inc. and Cross River Island Cruising Inc., which own the three planes to all of which he has access.

30. The husband has provided no evidence as to the value of his shares in any of the aforesaid companies.

THE FINANCIAL NEEDS, OBLIGATIONS AND RESPONSIBILITIES WHICH EACH OF THE PARTIES TO THE MARRIAGE HAS OR IS LIKELY TO HAVE IN THE FORESEEABLE FUTURE

31. The wife estimated her average monthly expenses at \$7,124.70, made up as follows:

Power Bill	\$ 400.00
Cable	\$ 100.00
Phone	\$ 100.00
Food	\$ 500.00
Condo Fees – B-6 and D-1 (year behind)	\$ 910.00
Gas (Car)	\$ 200.00
House Insurance	\$ 283.00
Health Insurance	\$ 455.00
Car Insurance	\$ 50.00
Maintenance – B-6	\$ 300.00
Maintenance – Lot-10	\$1,000.00
Maintenance – D-1	\$ 50.00
Medical – Glaucoma eye drops	\$ 200.00
Loan – Lot 10 Fortune Village [sic]	<u>\$2,576.70</u>
Total	<u>\$7,124.70</u>

32. I note, as counsel for the wife pointed out, that the wife’s expenses do not include clothing, travel or “normal feminine or woman-related upkeep” expenses, nor does it include costs for doctor’s visit or credit card payments.

33. The balance outstanding on the mortgage of the Fortune Bay property, at 14 January 2015, was \$137,199.17, but there is no evidence as to how many years are left on the

mortgage. The wife continues to make the mortgage payments in the sum of \$2,576.00 per month, from the rental proceeds of that property.

34. In his September 2014 affidavit of means, the husband said he has monthly expenses of \$4,680.00, made up as follows:

Electricity	\$ 400.00
Water	\$ 200.00
Cable	\$ 80.00
House maintenance	\$ 500.00
Groceries	\$ 600.00
Car gas	\$ 200.00
Plane fuel	\$1,500.00
Travel	\$ 800.00
Health insurance	<u>\$ 400.00</u>
Total	<u>\$ 4,680.00</u>

35. Other than an averment in his affidavit of means that he has a loan facility with Megeve with an outstanding balance of \$284,347.45, the husband has provided no other details. No sum representing payment on account of that or any other loan is included in his list of monthly expenses.

36. Both parties anticipate that their healthcare expenses are likely to increase in the near future. The wife says she requires a total replacement of her right knee, the estimated cost there for being \$15,000.00. She says she has not had the surgery as yet because she does not have the funds with which to do so. Both parties require medication for chronic illnesses.

THE STANDARD OF LIVING ENJOYED BY THE FAMILY BEFORE THE BREAKDOWN OF THE MARRIAGE

37. It appears from the evidence that the parties enjoyed a relatively high standard of living. The wife says she and the husband enjoyed a "high standard of living compared to the average person". The husband says that it was "a little above average". They lived in a 5,208 square feet 3-bedroom, 3-bathroom home which they purchased in 2005 for \$350,000.00, but which, as a result of renovations and refurbishment at a cost of approximately \$800,000.00, was, in 2009, valued in excess of \$1.25M. They frequently vacationed with and entertained friends at the Abaco property, a 3-storey house valued at between one and three million dollars. They traveled via private airplane between The Bahamas, Florida and New York. They also traveled by private boat and often went abroad to shop. The wife referred to it as their "jet setting" life.

THE AGE OF EACH PARTY TO THE MARRIAGE AND THE DURATION OF THE MARRIAGE

38. The wife is 60 years old and the husband is 80. The marriage lasted approximately 12 years, although they were living together for about two years before the wedding. They were, therefore, living together for approximately 14 years before the marriage broke down.

ANY PHYSICAL OR MENTAL DISABILITY OF EITHER OF THE PARTIES TO THE MARRIAGE;

39. The wife says she has inoperable glaucoma and requires a total replacement of her right knee. She says that the problem with her knee is "quite debilitating"; that some days are "more painful than others"; and although she can still walk and ride a bicycle, she is unable to stand for

long periods of time and, so, it will be difficult for her to resume working as a hairdresser on a full time basis. She says she has no other professional skills.

40. Approximately seven years ago, the husband was diagnosed with “polymyalgia rheumatic” which attacked his joints and nearly paralyzed him. The disease is currently in remission with the assistance of steroid treatment, although, the husband says, it may return at any time. He also suffers from high blood pressure, for which he takes medication.

THE CONTRIBUTION 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

41. There is no dispute that throughout the marriage, the husband was the wage earner and except for the mortgage payments on the matrimonial home, which were paid by the wife since January 2006, the husband always paid all of the family’s expenses. The wife says that she made other non-monetary contributions to the welfare of the family. She says she quit her job as a hairdresser at the husband’s request, moved in with him prior to the marriage and began working with him.

42. According to the wife, when she met the husband he was just starting out as a property developer on Grand Bahama. She said that after moving in with him, she started helping him build and manage the condominiums at Bell Channel Club. She described herself as his “Girl Friday” and said she did “everything for him” and that it was through their joint efforts that Bell Channel Club “became what it is today”.

43. According to the wife, she assisted the husband by:

- 1) Showing units in Bell Channel Club to prospective purchasers;
- 2) Cooking meals for prospective purchasers;
- 3) Traveling to Florida to shop for furniture and house wares for units sold with furniture and house wares packages;
- 4) Arranging to have containers with furniture and house wares shipped to Freeport;
- 5) With assistance of workers, unpacking shipping containers upon their arrival in Freeport;
- 6) Putting furniture together and placing them in respective units.

44. The wife said that over a period of about 10 years she did the same thing about 30 times in all and that there were a few times when she went to Florida to purchase furniture and other household items for two units at the same time.

45. The wife’s evidence is that she and the husband had agreed that whatever money was left over when all of the purchases were made and the unit fully furnished would be hers. However, when doing the paper work after the closing of the sale of a unit, she would ask the husband for some of the money and he would say “you don’t pay rent, this is our money.” She said she did not remember ever getting a salary from the husband or Megeve.

46. The wife said she and the husband also handled a number of the rentals at Bell Channel Club; that when renters moved out she would prepare the Unit, doing whatever it took to get it ready, for the new tenant; that although the husband got paid a percentage from the unit owner to “manage it”, she got nothing. The wife said she also spent many hours working on the original landscaping at Bell Channel Club, ordering and picking up plants; working with the workmen; and directing them as to where to put the plants.

47. The husband denies that he asked the wife to quit her job as a hairdresser. His evidence is that he simply told her that if she were to move in with him and rent out her condominium, Unit B-6, at the time, she would make more money in rent than she would have at the job she then had, which, he says, as it turned out, was correct. However, he said that the decision to leave her job was solely the wife's, whose "social life took up most of her time".

48. According to the wife, when the Bell Channel Club development was near completion she and the husband started talking about building a house in Hope Town, a Settlement in Abaco with which they had fallen in love. She said that they found a plot of land in The Northern Point of Elbow Cay in Hope Town ("the Abaco property"), where, in or about June 1997, they begun the construction of their "dream house". She said that the final product, a three-storey building that could accommodate 16 or more people, was completed in or about July 1999; that they named the house "Bunny's Burrow". "Bunny" is the wife's nickname.

49. She said that after the house in Abaco was completed in 1999, she and the husband often entertained his children and grandchildren as well as their friends there, during which times she would do all the cooking and cleaning until she persuaded the husband to hire a housekeeper, to help her.

50. The wife said that although the trips to Abaco became less frequent after they moved into the Fortune Bay property in 2006, there was still a lot for her to do in the new house.

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.

51. The wife's evidence is that although title to the house in Abaco is held by Megeve, the Abaco property was supposed to be their retirement home, to which they both had access. However, while the husband still has access thereto, by virtue of the dissolution of the marriage, she will not.

THE AGREEMENT

52. It is common ground that the Agreement is another factor which the Court may take into consideration when exercising its powers under section 29.

53. As observed by Barnett, CJ, in the case of *M v F* supra, for some time courts in the United Kingdom and The Bahamas did not give effect to such agreements because, as a general rule, parties cannot by agreement oust the jurisdiction of the court. However, in 2010, the English Supreme Court, in the case of *Radmacher (formerly Granatino) v Granatinosupra*, gave some guidance as to how to treat nuptial agreements in proceedings for ancillary relief.

54. In that regard, the factors which detract from, or enhance, the weight to be accorded to such agreements are set out in the majority judgment delivered by Lord Phillips of Worth Matravers PSC and were helpfully summarized by Mostyn J in the case of *Kremen v Agrest* [2012] EWHC 45 (Fam), (Transcript) as follows:

i) The court should give effect to a nuptial agreement which is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement (para 75).

ii) In determining whether an agreement has been "freely entered into by each party with a full appreciation of its implications" there is no absolute black and white rule for full disclosure or independent legal advice. Rather, the question is whether in the individual case there is a material lack of disclosure, information or advice. Each party must have all the information that is material to his or her

decision that the agreement should govern the financial consequences of the marriage coming to an end. An absolute rule would only be necessary if the agreement were to be contractually binding, but this is not the case as there is a safety-net of (un)fairness (para 69).

iii) The presence of any of the standard vitiating factors of duress, fraud or misrepresentation will negate any effect the agreement might otherwise have (para 71). Further, unconscionable conduct such as undue pressure (falling short of duress) will likely eliminate the weight to be attached to the agreement (ibid). Other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, will reduce or eliminate the weight to be attached to the agreement (ibid). The court may take into account a party's emotional state, and what pressures he or she was under to agree, as well as their age and maturity, and whether either or both had been married or been in long-term relationships before (para 72). The court may take into account foreign elements to determine whether or not the parties intended their agreement to be effective (para 74).

iv) In determining whether "in the circumstances prevailing it would not be fair to hold the parties to their agreement":

a) The agreement cannot be allowed to prejudice the reasonable requirements of any children of the family (para 77).

b) Respect should be accorded to the decision of a married couple as to the manner in which their financial affairs should be regulated particularly where the agreement addresses existing circumstances and not merely the contingencies of an uncertain future (para 78). This is likely to be so where the agreement seeks to protect pre-marital property (para 79). By contrast it is less likely to be so where the agreement leaves in the hands of one spouse rather than the other the most part of a fortune which each spouse has played an equal role in their different ways in creating (para 80). If the devotion of one partner to looking after the family and the home has left the other free to accumulate wealth, it is likely to be unfair to hold the parties to an agreement that entitles the latter to retain all that he or she has earned (para 81).

c) Is likely to be unfair to hold the parties to an agreement which leaves one spouse in a predicament of real need, while the other enjoys a sufficiency or more (para 81). However, need may be interpreted as being that minimum amount required to keep a spouse from destitution. For example, if the Claimant spouse had been incapacitated in the course of the marriage, so that he or she was incapable of earning a living, this might well justify, in the interests of fairness, not holding him or her to the full rigours of the ante-nuptial agreement (para 119).

55. It is contended on behalf of the husband that the Court should hold the parties to the Agreement and enforce the same; or, in the alternative, that significant weight should be given thereto. In support of that contention, counsel for the husband makes the following observations and or submissions:

1) The parties freely entered into the Agreement with a full appreciation of its implications;

- 2) The respondent was aware that the petitioner insisted on the Agreement because he wanted to ensure that the assets which he acquired prior to the marriage would be inherited by his children and grandchildren;
- 3) The respondent has given no evidence of any circumstances that would make it unfair to hold the parties to the terms of the Agreement;
- 4) There is no better case than the present to apply the terms of the Agreement in that:
 - i) The parties are mature adults;
 - ii) There are no children of the marriage;
 - iii) Each party had acquired significant assets prior to the marriage;
 - iv) The husband and wife have been previously divorced;
 - v) The Agreement was reviewed and the parties were advised by independent counsel retained by each party;
 - vi) There is no suggestion of fraud or duress;
- 5) The parties acted in pursuance of the Agreement throughout the life of the marriage and they sought to keep their finances separate and distinct from one another during the marriage pursuant thereto;
- 6) It is the wife's evidence that all assets acquired prior to the marriage and all proceeds derived there from would not be matrimonial assets;
- 7) The wife maintains that the husband can have no claim to an interest in Unit B-6 as it was acquired before the marriage, or in Unit D-1 because it was purchased with funds from the rental of Unit B-6 as a premarital asset even though Unit D-1 was purchased during the marriage. This is entirely consistent with the terms of the Agreement; it is clear that the wife managed her assets during the marriage in accordance with the Agreement;
- 8) It would be contradictory for the wife to say that the husband is not entitled to a half interest in Unit D-1 because it was purchased from rental proceeds of Unit B-6, which is consistent with the Agreement, yet refuse to acknowledge the husband's interest in the Fortune Bay property on the basis of his pro-rata investment. It should be noted that the husband's investment in the Fortune Bay property was out of funds acquired prior to the marriage;
- 9) Both parties obtained legal advice from separate and independent legal counsel in relation to the Agreement;
- 10) Both parties divulged their net worth to the other;
- 11) The respondent had substantial time to consider the Agreement prior to its execution;
- 12) The respondent conducted herself in accordance with the Agreement during the life of the marriage and subsequent to the divorce.

56. On the other hand, it is contended on behalf of the wife that having regard to the circumstances under which the Agreement was entered into, and, having regard to the length of the marriage and all of the circumstances of this case, it would be manifestly unfair for the Court to treat the Agreement as enforceable or to give any weight thereto. In support of those contentions, counsel for the wife makes the following observations and or submissions:

- 1) The evidence is that from the wife's perspective, she was under tremendous pressure to sign the Agreement;
- 2) The wife did not get good advice before signing the Agreement. In fact she got bad advice. So the fact that she got advice is not enough. The fact that she got bad or inaccurate advice is equally relevant and takes away from the weight to be given to the Agreement;
- 3) The wife signed the Agreement, not with the intention of the Agreement being binding in light of the advice given, but on the understanding that the intention of the document that she signed would not have legal force and effect;
- 4) The Agreement having been executed in 1997 is pre-Granatino. If the Agreement had been signed post-Granatino, the position would be different because the decision of the UK Supreme Court case actually clarifies almost affirmatively what the legal position is going forward. And the court itself recognized that in the future, this is what the position would be. So that should be taken into account in assessing the weight to be accorded to the Agreement in this case;
- 5) The terms of the Agreement are unfair in that the Agreement lacks mutuality. It speaks to what is to be the case in circumstances where the wife commenced proceedings against the husband but says nothing about circumstances where the husband commenced proceedings against the wife. It is also one-sided on the issue of spousal support;
- 6) Future circumstances which could add to the weight of the Agreement if properly addressed in the Agreement have not been so addressed.
- 7) The Agreement was made early in relation to a 12-year marriage and life evolved for the parties. They saw the formation of a fortune in which each played a role in their different ways, but that fortune is in the hands of the husband and it would, therefore, not be right to give the same weight to the Agreement.

57. The evidence which I accept is that the husband and wife when discussing getting married, also discussed signing a prenuptial agreement. The husband was at the time 61 years old. This was his third marriage. He had three adult children and several grandchildren, none of whom was with the wife and it is understandable that he wanted to ensure that financial provision was made for them. Indeed, while I agree, as counsel for the husband pointed out in his closing arguments, that the wife was aware that the reason the husband insisted on the agreement was because he wanted to ensure that the assets which he acquired prior to the marriage would be inherited by his children and grandchildren, it is clear that the Agreement did not only deal with pre-marital assets.

58. Additionally, I accept the husband's evidence that he made it very clear to the wife that there would be no wedding unless she signed the Agreement. However, I do not accept counsel for the husband's submission that the parties freely entered into the Agreement with a full appreciation of its implications.

59. The wife's evidence, which I accept, is that although she and the husband had discussed signing a prenuptial agreement, she understood that such agreement would relate to the property owned by the husband prior to the marriage, in which she was to have no interest. I accept her evidence that although she was saddened that the husband was considering divorce

even before they were married, she was willing to sign the Agreement because she did not want any of his pre-marital owned assets. I accept her evidence that she and the husband did not discuss, nor did she agree to forego her interest in any property acquired during the marriage. I find that the terms of the Agreement were not agreed to or formulated by the parties, but rather that the husband prepared the document without any input from the wife, or her counsel, save for a list of her pre-marital assets, and simply presented the document to her for execution. In that regard, I find that the case of *Crossley v Crossley* is distinguishable from this case. In *Crossley v Crossley* the parties had negotiated the terms of the agreement with the assistance of experienced lawyers.

60. The evidence in this case is that at the husband's suggestion, the wife sought legal advice and I accept her evidence that the advice given to her was simply that prenuptial agreements were not enforceable or recognized in Bahamian courts; and that it was up to her whether or not she signed the document.

61. I also accept the wife's evidence that she conveyed that information to the husband who told her to sign the Agreement "anyway". Indeed, the husband admitted as much.

62. In light of that admission, I do not accept the husband's evidence that if he had known that the Agreement was not enforceable, he would not have married the wife; or that "during the life of the marriage it was always understood that the Agreement was both effectual and enforceable"; or that the wife "on numerous occasions confirmed her acknowledgement of the effect of the Agreement upon our divorce."

63. I also accept the wife's evidence that it was a week before the wedding, when plans had already been made, and when, no doubt it would have been quite embarrassing to postpone or cancel the wedding, that the husband again raised the issue of the execution of a prenuptial agreement and that he made it clear to her that there would be no wedding if she did not sign the document.

64. In my judgment, the husband insisting on the wife executing the Agreement in those circumstances was an exertion of undue pressure (falling short of duress) as recognized in *Granatino*, by the husband on the wife.

65. In that regard, I adopt the following sentiments expressed by the majority in *Granatino*:

"[71]...unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such as exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.

[72] The court may take into account a party's emotional state, and what pressures he or she was under to agree."

66. In the circumstances, I find that the wife did not freely enter into the Agreement with a full appreciation of its implications, but rather that she executed the Agreement as a result of undue pressure from the husband, and in the belief that the same was not recognized or enforceable in The Bahamas.

67. Furthermore, I agree with counsel for the wife that the terms of the Agreement are unfair. For example, at Article Second on page 5, the Agreement provides that:

"If an action or proceeding for divorce or annulment is commenced by [wife] against [husband], [wife] shall have no rights to any alimony, spousal maintenance and/or support, or any similar payments or distributions from [husband], nor shall [wife] have any rights to any of [husband's] property."

68. However, the Agreement makes no provision for circumstances where, as in this case, the husband is the one who commenced divorce proceedings against the wife, nor, as counsel for the wife pointed out, does the Agreement take into account or address circumstances where, as is contended in this case, the parties started out when the husband was struggling, then worked together in a business, developed the business together, made a success of their efforts and then separated.

69. I, therefore, agree with counsel for the wife that in the present prevailing circumstances, and for the arguments advanced by counsel, that it would be unfair to give full effect to the Agreement.

OTHER FACTORS

70. Mr Adams for the wife argues that in the exercise of its power under section 29 aforesaid, and in addition to the aforesaid factors, and the Agreement, the Court should also take into consideration the evidence that during the marriage the husband controlled the wife's finances. In that regard, counsel for the wife pointed out that, in response to counsel for the husband's question as to why she did not have more savings, considering that over the years she would have collected rent from Units D-1 and B-6 Bell Channel Club as well as the Fortune Bay property since 2010, the wife said that the husband handled all of her finances from the beginning of the marriage until they separated, at which time the husband gave her a cheque for \$2,000.00 and said that was all that she had left in the account.

71. I note from the income and spending statement in relation to the husband's management of the wife's rental account, exhibited to the husband's supplemental affidavit at Exhibit 6, for the period October 1996 to April 2009 that funds were paid to the wife over the years and I also note the wife's evidence that Unit D-1 was purchased from the rental proceeds of Unit B-6. There is no evidence of the purchase price or the amount borrowed to assist with the purchase or the amount of the monthly mortgage payments or the period over which such payments were made with respect to Unit D-1. Additionally, the said statement shows the sum of \$2,074.97 as the balance on the account at 30 January 2009 and also the payment of that sum to the wife with a memo "to zero out account". So it would appear from that evidence that the sum of \$2,000.00 which the wife says was paid to her by husband after 10 years of managing her finances was made up as shown on the aforesaid statement.

72. The wife does not say that the accounting is incorrect; nor, as counsel for the husband pointed out, does she allege fraud on the part of the husband in the management of her funds. Moreover, as counsel for the husband also pointed out, there is no evidence from the wife as to the status of those accounts after the husband discontinued managing them, which may have given this Court an opportunity to make a comparison between the two.

73. So, although I accept the evidence that the husband gave the wife only \$2,000.00 or thereabouts when he discontinued managing her rental accounts, it is clear from the copy statement that the wife received, or benefited from, much more than that sum over the years and in my judgment, it is unfair to attribute the wife's present financial position to the husband's management of her rental accounts during the marriage.

THE PROPERTIES

74. As indicated, three properties were acquired by the parties during the marriage: Unit D-1 Bell Channel Club, the Abaco property, and the Fortune Bay property. In addition to those properties, the husband is also beneficial owner of shares in Megeve and the owner of three boats.

75. Lord Denning in *Wachtel v Wachtel* [1973] Fam 72 at page 90 defined “matrimonial assets” as “those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.” See also *Dean v Dean* [1991] BHS J., No. 175.

76. In my judgment, Unit D-1 Bell Channel Club, title to which was taken in the wife’s name alone, is not a matrimonial asset. Although purchased during the marriage, it was purchased and paid for by the wife with funds derived from the rental income of Unit B-6, which she owned prior to the marriage. It was never used as a matrimonial home. It was rented out and the rental proceeds utilized principally for the wife’s benefit. As opined by Campbell, JA in *Dean v Dean supra*: “if the house was acquired in similar circumstances but was rented and the rent proceeds utilized principally for the benefit of that spouse it would not be a family asset even though under the powers of the court, it could be sold or transferred to the other spouse if the just share of the latter in the family assets, usually the matrimonial home and their joint earning capacity, could not otherwise be provided.”

77. It is accepted that the Abaco property, although acquired during the marriage and used for the benefit of the family as a whole, is not a matrimonial asset, as title thereto is held in the name of Megeve. However, counsel for the wife argues, and I agree, that the value of the Abaco property is relevant for the purpose of assessing the value of the husband’s shares in Megeve.

78. In that regard, the value of the husband’s shares in Megeve is relevant for determining the husband’s financial status, or as counsel for the wife submits, his net worth, with a view to an equitable distribution of the matrimonial assets.

79. So, what is the value of the husband’s shares in Megeve?

80. The evidence is that the husband owned the shares in Megeve prior to the marriage, having purchased them in or about 1988. The husband lists his ownership of those shares in the Agreement. However, there was no indication in the Agreement, nor was there any evidence at the trial, of the value of the shares at the date of the Agreement, 5 April 1997, nor, for that matter, has the husband provided any evidence of the current value of those shares or what dividends/income he has earned from them during the marriage.

81. Consequently, Mr Adams for the wife accuses the husband of failing to disclose all of his “income, earning capacity, property and other financial resources” as required by section 29 aforesaid. In his submission, it is obvious that the husband enjoys a high standard of living, which he himself reluctantly conceded is ‘above average’. In the circumstances, Mr Adams submits, this Court ought to draw inferences adverse to the husband with regard to his income, earning capacity, property and other financial resources.

82. On the other hand, counsel for the husband argues that it is the wife who has failed to provide documentary evidence to support claims made by her in her affidavits. For example, Mr Moree for the husband points out, the wife has produced no evidence as to the status of her rental accounts since the husband discontinued managing the units in Bell Channel Club nor has she produced any accounting for the rental proceeds collected from the rental of the Fortune Bay property since February 2010.

83. Clearly, as is often the case of proceedings such as these, neither party has been as forthright as he or she should have been and although more information may have been provided or obtained through the discovery process, that avenue was not pursued by either party.

84. In any event, Mr Moree submits, the cases to which Mr Adams referred are all distinguishable from the present case in that there was a deliberate refusal by the respondents in those cases to provide information. In that regard, counsel for the husband pointed out, in *Scatliffe v Scatliffe*, there were numerous applications and orders for discovery which the husband had ignored. In *Prest v Petrodel*, the husband was an “expert in ducking and dodging” between jurisdictions. In *Barbieri v Barbieri*, the husband was “intent on hindering discovery of the truth”. In counsel for the husband’s submission, the conduct of the husband in this case is in no way analogous to the conduct of the respondents in those cases.

85. Nevertheless, it is settled that the Court is entitled to draw inferences adverse to any party who fails to make full and frank disclosure. See *Payne v Payne* [1968] 1 All ER 1113 at 1117; *Hughes v Hughes*, 45 WIR 149, as well as the aforesaid authorities relied on by the wife.

86. The husband admits to a beneficial interest in Megeve. However, it is unclear the extent of that interest. He says that he has partners but he has provided no evidence as to how many such partners or the extent of their interest. At some point during the marriage, the wife held all but one of the 50,000 issued shares in the company in trust for the husband. In his 19 January 2015 affidavit the husband deposed, inter alia, that he had placed the shares in trust with the wife for estate planning purposes.

87. It is common ground that Megeve owns the Abaco property which is valued at between \$1M (the husband’s estimate) and \$3M (the wife’s estimate). There is also evidence that a few years ago, when contemplating a sale of that property, the husband’s asking price was \$2M. There is no evidence that the Abaco property or the shares in Megeve are encumbered in any way.

88. In the circumstances, and in my judgment, the inference which the Court can properly, and do, draw, is that the husband is the sole beneficial owner of the shares in Megeve and as such he has a net worth of at least \$1M. I say that because in addition to owning the Abaco property, Megeve also owns units in Bell Channel Club, the numbers and values of which have not been disclosed; the husband admits to owning three boats valued together at about \$98,000.00; as well as shares in two other companies which own between them three small planes, to all of which the husband has access. No values of the shares in those companies or the planes have been disclosed.

89. So, if the husband is not the sole beneficial owner of all of the shares in Megeve and his net worth is less than \$1M, it is his fault for not having made full and frank disclosure in connection therewith and leaving it to the Court to speculate thereon.

90. As observed in the case of *Hughes v Hughes supra*, the burden of proof could not be placed on the wife because this knowledge is peculiarly in the possession of the husband and he was under a duty to make full and frank disclosure.

91. On the other hand, although the wife admits to owning two units in Bell Channel Club, one of which was purchased during the marriage, no evidence was provided as to the value of either of those units. Moreover, the wife does not refute the husband’s claim that she collected in excess of \$250,000.00 in rental income from the Fortune Bay property since February 2010, although she is resistant to his claim for one-half of such proceeds. The wife admits to having approximately \$25,000.00 in her savings and \$16,000.00 in her checking account which latter sum, she said, represented pre-paid rent.

92. Clearly, both parties’ net worth is more than has been disclosed by them.

93. There is, however, no dispute that the Fortune Bay property is a matrimonial asset, ownership in which is capable of being adjusted.

94. The property was purchased in December 2005. The purchase price of \$350,000.00 was paid as to \$280,000.00 by a mortgage obtained by the wife and the balance along with closing costs totaling \$114,742.50, by the husband. Except for the monthly repayment amount, no other details about the mortgage, for example, the term of years or the interest rate, were provided. In addition to the closing costs, the husband also paid the costs of renovating and refurbishing the matrimonial home in the sum of \$817,060.11. Included amongst the husband's documentary evidence is what appears to be a computer generated statement of disbursements totaling \$817,060.11.

95. Although the wife says she is not able to say how much money was spent in the refurbishment of the Fortune Bay property, she does not say that the sum stated by the husband is incorrect. I, therefore, accept the husband's evidence that his total contribution to the acquisition, renovation and refurbishment of the Fortune Bay property was \$931,802.71, being closing costs of \$114,742.50 and refurbishment costs of \$817,060.11.

96. What the wife says, however, is that regardless of the amount spent by the husband on closing and refurbishment costs, as far as she was aware, the funds came from the husband's income from Bell Channel Club which she helped to generate.

97. In that regard, I accept the wife's evidence that she assisted the husband with the management/running of Bell Channel Club in the manner she said, both prior and subsequent to the marriage. I believe the wife and, therefore, find that prior to the marriage she was paid for her services but subsequent thereto she was not. I also accept the wife's evidence that she did what she did because he was her husband; that she received no direct monetary compensation there for, but that she also did not have to pay any of the household expenses, save, of course, for the mortgage on the matrimonial home. I also accept the wife's evidence as to her contribution to the welfare of the family by cooking and cleaning at the Abaco property and the matrimonial home.

98. The evidence is that when the couple decided to purchase the Fortune Bay property, the wife requested, and the husband agreed, that title thereto would be taken in the wife's name alone, on two conditions: firstly, that she would take out a mortgage for the maximum amount that she could get; and secondly, that she would be solely responsible for the repayments under such mortgage.

99. As I understand the wife's evidence, the reason for her request was to avoid having to move out of, and or sell, her home in the event of the husband's death, in order to give three-quarters of its value to the husband's children, in accordance with the terms of his will. It appears that in his will, the husband had directed the wife, upon his death, to give to his children three-quarters of his shares in Megeve, which, at the time, the wife held in trust for him; and she was concerned that if the husband placed title to the matrimonial home in Megeve, as he had done with the Abaco property, his children would become entitled, on his death, to three-quarters interest therein.

100. Having met the two conditions, title to the Fortune Bay property was placed in the wife's sole name. However, approximately two months after acquiring the Fortune Bay property, the wife, at the request of the husband, executed a declaration of trust dated 14 February 2006 declaring that she held that property on trust for the husband and herself as joint tenants.

101. There was apparently no discussion, prior to, or at the closing of the purchase of the Fortune Bay property, about the wife holding any part thereof on trust for the husband and it is now contended on behalf of the wife that the aforesaid declaration of trust should be set aside.

102. The wife's evidence, which is admitted by the husband, is that she was asked by the husband to attend the office of Mr Terrence Mr Gape in the law firm of DuPuch & Turnquest, to

sign a document which was "like a will" and which made provision for the Fortune Bay property "to go to him" in the event she predeceased him. The wife says she did not read the document; that no one at the law firm explained the document to her; that she believed the husband; and that she did not get any legal advice. The husband claims that Mr Gape was the wife's attorney on the purchase of the Fortune Bay property as well as the preparation and execution of the declaration of trust.

103. I gathered from that evidence that the husband was implying that the wife was represented by counsel when she signed the declaration of trust and, therefore, she would have received advice from such counsel prior to signing the document.

104. It is not disputed that the wife was represented in the purchase of the Fortune Bay property by Mr Gape or the firm of DuPuch & Turnquest. However, I do not accept that such representation was "independent". as it is clear from the evidence that Mr Gape and or his firm, DuPuch & Turnquest, represented the husband and his company, Megeve, prior to, and during, the marriage. Such representation is reflected in the Agreement, as well as the copy Annual Statements exhibited to the wife's 19 January 2015 affidavit. Moreover, under cross examination, the husband agreed with counsel for the wife's suggestion that Mr Gape represented him in the preparation and execution of the declaration of trust. He also admitted that neither he nor Mr Gape suggested to the wife that she should get independent advice in connection therewith.

105. I am satisfied then that the wife did not receive independent advice on the execution of the declaration of trust. Indeed, I accept her evidence that except for the husband's explanation that the purpose of the document was to ensure that in the event she predeceased him the Fortune Bay property would go to him, she had no other explanation of the import of that document, from the husband or an attorney.

106. In that regard, I also accept the wife's evidence that she had on many other occasions, at the husband's request, gone to Mr Gape's office to sign documents; that she had always signed them without question; and, that the occasion dealing with the declaration of trust was no different. I also accept the submission of counsel for the wife, that the wife simply trusted the husband who misrepresented to her the nature and effect of the document she was being asked to sign.

107. In addition to the aforesaid declaration of trust, which had been executed in February 2006, two months after the property was purchased and title thereto taken in the wife's sole name, included amongst the documentary evidence is a certificate of registration issued by the Investments Board with respect to the husband's interest in the Fortune Bay property which certifies that the acquisition of:

"a one-half interest in Lot 10 Block 10 Unit 3 Fortune Bay Subdivision, Freeport, Grand Bahama, The Bahamas, has been registered with the Investments Board on the 30th day of March 2011 in the name of Ralph Eicklebeck for use of residence."

108. Interestingly, the certificate is dated 30 March 2011, more than five years after the execution of the declaration of trust and approximately two years after the husband vacated the matrimonial home.

109. Although the husband does not specifically ask that the declaration of trust be set aside, it seems to me that by their respective proposals for settlement of the matrimonial property, both sides are arguing for the declaration of trust to be set aside or, at a minimum, disregarded.

110. I say that because notwithstanding the declaration of trust states that beneficial ownership in the Fortune Bay property is held by the wife upon trust for herself and the husband as joint tenants, and the certificate of registration with the Foreign Investments Board certifies that the husband has a 50% interest in that property, both parties are asking for a share greater than 50%. In the case of the husband, he, in reliance on the Agreement, is asking for an 85% interest; while the wife is asking that she be given the entirety of the beneficial interest in the said property, that is, 100%.

111. The husband bases his proposal on his aforesaid financial contribution to the closing, renovation and refurbishment costs, while the wife bases hers on the purported agreement that the house was hers and that she did not intend by signing the declaration of trust at the husband's request and or direction, to relinquish any part of her interest therein to the husband during her life. In that regard, counsel for the wife submits, and I accept, that there was a common intention that she would execute a document which would give the husband an interest in the Fortune Bay property on her death, in the event she predeceased him, but not that she intended to create a joint tenancy with him during her life.

112. In the circumstances, I find that the declaration of trust should be set aside, and I so order.

113. So, if the Agreement is not to be given full effect and the declaration of trust is set aside, it is merely left to this Court to determine how to distribute the matrimonial assets, so as to achieve fairness, or, as required by section 29 aforesaid, to place the parties so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

114. The Fortune Bay property was appraised in 2009 at \$1,253,880.00. The amount of the outstanding mortgage at 14 January 2015 was \$137,199.17. At that date, the value of the equity of redemption in the Fortune Bay property was, therefore, approximately \$1.1M and the value of the husband's shares in Megeve was at least \$1M for a total value of at least \$2.1M of disclosed matrimonial assets. Megeve also owns units in Bell Channel Club, the numbers and values of which have not been disclosed, which suggests that the husband's net worth is more than \$1M.

115. An order in the terms proposed by the husband would result in the husband getting approximately \$1,935,000.00 or 92% of the value of the disclosed assets (that is, all of the shares in Megeve Investments Limited and 85% of the value of the Fortune Bay property/matrimonial home) with the wife receiving \$165,000.00 or .08% of the value of the disclosed assets, (that is 15% of the value of the Fortune Bay property/matrimonial home).

116. That hardly seems fair and would not, in my judgment, result in the fairness contemplated by section 29 aforesaid.

117. On the other hand, on the wife's proposal for a property adjustment order, she would get 100% ownership of the Fortune Bay property valued at approximately \$1.1M with a mortgage, while the husband would keep 100% of his shares in Megeve Investments Limited along with its unencumbered assets, including the Abaco property, valued in excess of \$1M.

118. In my judgment, that seems reasonable in the circumstances.

119. In any event, it seems to me that at the time the Fortune Bay property was purchased, it was intended that the same be wholly owned by the wife. The evidence is that title was taken in the wife's name, rather than Megeve's, at her request because she did not want to have to share the property with the husband's children or sell the same to compensate them, in

accordance with the terms of the husband's will, for a share therein in the event the husband pre-deceased her.

120. However, it is not just that title was taken in the wife's name alone, she was also required by the husband to take out a mortgage over the said property, which she did, and for which she has been solely responsible for repaying since 2005. It seems to me that if the husband did not intend for the property to be wholly owned by the wife, he would have had the title taken in Megeve, as he had done with the Abaco property, for estate planning purposes. Indeed, I gathered from the husband's evidence that it was only when he realized how much it would take to renovate and refurbish the property that he decided he should have an interest therein, hence his "tricking", as counsel for the wife suggests, the wife into signing the declaration of trust on the "pretext" that it was "like a will".

121. So because it was, in my judgment, the intention of the parties at the time the property was acquired that the same should be wholly owned by the wife, and because it is, in my judgment, the fair thing to do in all of the circumstances, this Court hereby declares that the wife is the sole beneficial owner of Lot 10 Block 10 Unit 3 Fortune Bay Subdivision, Freeport, Grand Bahama.

122. In the event I am wrong in finding that the declaration of trust should be set aside and that the husband is therefore entitled to an interest in the Fortune Bay property by virtue of the wife's declaration therein, I would nevertheless order that the husband within thirty days of the date hereof transfer any such interest to the wife, as, in my view, that would result in the fairness contemplated by section 29 aforesaid.

Application for Financial Provision

123. As indicated, the wife in her 14 January 2015 affidavit proposed that if the husband released his interest in the Fortune Bay property to her, she would make no claim for alimony. Then, in her 19 January 2015 affidavit, the wife said that she ought to be entitled to alimony and that the husband was capable of providing such alimony.

124. However, counsel for the husband, in his written closing submissions filed 12 May 2015, and provided to counsel for the wife, pointed out that the wife had filed no process seeking spousal maintenance. He argued that an affidavit could not be used to assert any type of relief in matrimonial proceedings and in his submission, there was, therefore, no proper application before the Court by the wife seeking maintenance.

125. Supposedly, to meet that argument, a day before the parties were scheduled to appear for closing arguments, a notice on behalf of the wife was filed on 12 May 2015, whereby notice was given of her intention to apply for, inter alia, a periodical payment order (alimony) or a lump sum(s) payment order, pursuant to section 27 of the Act.

126. Counsel for the husband objected to the late filing of that notice and submits that the filing of the notice at this stage of the proceedings is an abuse of the process of the court.

127. Moreover, counsel for the husband submits, the wife is estopped by virtue of Clause A of the Agreement from claiming maintenance from the husband. Clause A of the Agreement provides as follows:

"A. If an action or proceeding for divorce or annulment is commenced by Cheryl against Ralph, Cheryl shall have no rights to any alimony, spousal maintenance and/or support, or any similar payments or distributions from Ralph, nor shall Cheryl have any rights to any of Ralph's property."

128. In response, Mr Adams argues that it was "abundantly clear that from the very outset of these proceedings, both sides knew and understood that the application was being fought with

respect to (i) property adjustment order; and (ii) the claim for alimony, a financial provision order". He pointed out that in the course of cross examination, counsel for the husband in fact specifically directed questions to the wife on the issue of her claim for alimony. Therefore, he submits, the issue of prejudice, injustice or unfairness on the facts of this particular case, notwithstanding the lateness of the filing of the notice, does not arise. In the circumstances, Mr Adams submits, the husband's objection to the notice is "arid and without merit".

129. It appears from the Matrimonial Causes Act Rules ("the Rules") that although an order for alimony prior to the dissolution of the marriage (Rule 39) is permissible, an order for permanent alimony (Rule 42) is not; and while section 27 of the Act provides for periodical payments and/or a lump sum payment, by section 30 of the Act and Rule 41 of the Rules, where such application is not made in the answer or, as in this case, made more than two months after the final decree a respondent spouse requires leave to make such application.

130. No such leave was sought or granted prior to the filing of the notice on behalf of the wife on 12 May 2015.

131. It seems to me that as this is not an application made after a decree for judicial separation or for restitution of conjugal rights, pursuant to Rule 42 aforesaid, the respondent is not entitled to permanent alimony and although she may apply for a financial provision order, that is periodical payments and/or a lump sum payment, under section 27 of the Act, no such application was properly before the court.

132. However, I agree with counsel for the wife that in the circumstances of this case, the husband has suffered no injustice in the late filing of the notice as he had been alerted as early as January 2015 of the wife's intention to seek alimony or a financial provision order.

133. I, therefore, decided to consider the wife's application.

134. Although in her 19 January 2015 affidavit the wife said that she "ought to be entitled to alimony" from the husband and that she verily believed that "he is capable of providing [her] with such alimony in order for [her] to maintain a decent standard of living more in keeping with the lifestyle to which [she] had become accustomed during the marriage", counsel for the wife, in his closing arguments, said that the wife was, in fact, not seeking alimony. In that regard, counsel argues that in light of the husband's age and the overarching policy of the court to seek to promote a clean break between the parties, the wife was of the view that a lump sum payment order ought to be made instead of alimony or periodic payments. Such an order, counsel for the wife submits, ought to be sufficient to enable the wife to:

- 1) Completely retire the mortgage on the Fortune Bay property;
- 2) Have surgery on her knee;
- 3) Start a small business of her own.

135. In that regard, counsel for the wife submits that given the husband's lifestyle which he continues to maintain, the sum of \$500,000.00 as a financial provision order to be paid by him to the wife was "eminently reasonable".

136. Counsel for the husband disagrees. In his submission, any financial provision order would place the husband in financial difficulty when considering his age and pending retirement, as all of his savings will be needed to support him for the rest of his life.

137. Counsel for the husband argues further that the evidence is that the wife left her job on her own accord, albeit with the husband's consent and approval. In his submission, her occupation as a hairdresser does not require continuing or further education and there is no reason why she could not return to the workforce immediately. In any event, counsel for the

husband argues, it is the wife who should be ordered to pay moneys to the husband, as, he points out, the wife has been collecting rent for the Fortune Bay property since February 2010 without accounting there for to the husband. He calculated the amount collected by the wife at January 2015 as \$235,828.00 (by my calculation that is 58 months @\$4,066.00 per month) to one-half of which, namely, \$117,914.00, he submits, the husband is entitled.

138. In regard to that latter claim, I note that prior to vacating the matrimonial home the husband paid all of the household expenses except for the mortgage and after he left, he stopped. So to my mind, any funds collected by the wife in rent in excess of the amount required to pay the mortgage ought to be retained by her to meet other household expenses and the husband's request for one-half of those funds is refused.

139. In considering the wife's application for a financial provision order, I am mindful of the financial position of the parties as disclosed and I am aware that any such order must be governed by what is fair and reasonable in the circumstances; that in addition to meeting the needs of the wife, an order for financial provision must also be affordable by the husband. *Donaldson v Donaldson* [1958] 2 ALL ER 660.

140. I am also mindful of the husband's age, and although he was still working at the date of the trial, counsel argued that he would wish to retire. He is, after all, 80 years old. The husband's evidence is that he has \$80,000.00 in savings. As indicated, counsel for the wife argues that he has not been full and frank in disclosing his assets. It appears from the evidence that he or Megeve was able to purchase the Abaco property without a mortgage, although there is no evidence as to the cost of the property or the cost of constructing the house situate thereon. The husband also owns three boats valued at approximately \$98,000.00 as well as shares in companies which own airplanes.

141. The wife admits to having approximately \$41,000.00 in her bank accounts and says she cannot work in her chosen profession anymore, although her counsel has suggested that a financial provision order would enable her to start a small business. The wife also owns two condominium units. As I said, there is no evidence as to their value. However, the evidence is that they are both mortgage-free and although she lives in one of them, the other is rented.

142. It is, in my judgment, clear from the evidence of the parties, if it is to be believed, that neither of them has the means to meet the demand being made by the other.

143. In any event, on the evidence, I cannot say that the wife needs \$500,000.00, nor do I see how, even drawing an inference adverse to him, the husband would be able to meet such an order.

144. The wife's application for a financial provision order is, therefore, refused.

145. In summary then, the Order of this Court is as follows:

- 1) That beneficial ownership in the Fortune Bay property be adjusted to reflect that the wife is the sole beneficial ownership thereof.
- 2) The husband's application for payment of the sum of \$117,919.00, being a 50% portion of the rental proceeds received by the wife in relation to the Fortune Bay property since in or about 2010, is refused.
- 3) The wife's application for a financial provision order is refused.
- 4) Each side will pay its own costs.

DATED the 29th day of January A.D. 2016

Estelle G. Gray Evans
Justice