In The Supreme Court of Bermuda

DIVORCE JURISDICTION
2015 No: 60

BETWEEN:

B

Petitioner (Applicant Wife)

v

B

Respondent (Respondent Husband)

CHAMBERS RULING

Date of Hearings:	12 July 2016, 11 August 2016, 29 September 2016, 10 January 2017, 19 January 2017, 31 January 2017
Date of Ruling:	21 March 2017
Petitioner	Jai Pachai, Wakefield Quin Limited
Respondent	Georgia Marshall, Marshall Diel & Meyers Limited

Application to for discovery (Matrimonial Causes Rules 1974 R. 77(4))

RULING of Registrar S. Subair Williams

The Application before the Court

1. This matter has come before the Court on the Petitioner's application under Rule 77(4) of the Matrimonial Causes Rules 1974 for discovery of further information on matters

contained in the Respondent's affidavit evidence filed before the Court in the course of my investigation of the Petitioner's application for ancillary relief. The Petitioner in this case is the wife.

Background

2. The parties were married outside of Bermuda in 1998. Prior to the start of the marriage, the Petitioner had two years of gainful employment having obtained a Master's Degree in 1996. The Respondent husband, at that time, was in the early stages of building a large group of companies ("the companies" / "the company") which he would later own jointly with two other principal shareholders.

3. During the marriage, the Petitioner became the full time care-taker of the two children of the marriage and the Respondent continued to pursue the success and growth of the companies. The first child of the marriage, a son, was born in 1999. The couple's daughter, who is now of adolescent age, was born in 2002. The marriage lasted some 17 years before it broke down in 2014.

4. The parties' daughter has a history of grave medical conditions and her ongoing needs required the Petitioner's full time commitment over the last two years in particular, notwithstanding the assistance of a nanny over a nine year span. The Petitioner contends that their daughter will need to continue her education overseas in a facility that has the capacity to accommodate her special needs. The son of the marriage is already enrolled in overseas education as a pre-university boarder.

The Discovery Requests

5. The Petitioner is now in pursuit of further discovery of documents and information about the Respondent's assets. The Respondent, however, argues that there has already been sufficient disclosure made and that I should proceed straight to certifying this case as ready for trial before a judge.

6. The disclosure of information sought by the Petitioner is divisible by two main categories: corporate and personal assets.

7. In relation to the Respondent's corporate assets, the Petitioner is in search of the following:

   (i) Details concerning the Respondent's pecuniary interest in the companies (The specifics sought are outlined in the Petitioner's affidavit[1] evidence from Mathew

[1] Paras 12-13 of affidavit sworn on 13 September 2016

Clingerman. Largely, the request is for audited financial statements for the companies and an independent valuation of the companies.);

(ii) Copies of the Respondent's corporate credit card statements for the past three years;

(iii) Statements for the Visa HSBC business card ending in #9707 covering the last three (3) years;

(iv) Financial statements / Accounts for the company trust[2] for the past three years and the Respondent's Letter of Wishes;

(v) Proof of the Respondent's company meal allowances; and

(vi) The Respondent's 2016 company dividends declared.

8. In relation to the Respondent's personal assets, the Petitioner is in search of the following:

(i) Bank statements for two overseas accounts held in the Respondent's name:
- Banka Fideuram (January-June 2014 and January- June 2015) and
- Banca Popolared de Bergamo: the entirety of the year 2014 except the month of December and the entirety of the year of 2015 except the month of December.

(ii) Bank statements for Bermuda accounts held in the Respondent's name:
- Bank of Butterfield MasterCard debit card (for the past 3 years);
- Bank of Butterfield British Airways credit card for the whole of 2013 save July and for the months of February and July 2014;
- Details identifying the recipient of $150,000 transferred from the Respondent's HSBC account 010-****23-511 to 010-****29-511; and
- HSBC account … 001-566 covering a one (1) year period from 1 January to 31 December 2013

(iii) The Respondent's BF&M annuity statements covering the next seven years;

(iv) Details as to how the mortgage on the parties' joint apartment was paid; and

(v) A ledger showing the incoming and outgoing funds for the upkeep of the overseas properties owned.

[2] The trust holds property assets which are used to house company employees

Chronology

9. Following the finalization of the Decree Absolute made on 12 August 2015, the Petitioner's Notice of Ancillary Relief application was filed on 19 August 2015 and made returnable by my predecessor (Learned Registrar Charlene Scott) for 22 September 2015.

10. By letter dated 22 September 2015 the Petitioner's former Counsel, Honor Desmond-Tetlow of MJM Limited, advised the Court that the parties would file a Consent Order on directions. A Consent Order was accordingly filed setting out directions for the filing of affidavit evidence and the making of Rule 77(4) requests.

11. The matter was then listed for mention to 17 November 2015 at 10:30am. However, on the joint request of the parties the November mention was delisted by Registrar Scott and relisted to 8 December 2015.

12. Mr. Desmond-Tetlow then wrote to the Court on 4 December 2015 requesting for the delisting of the 8 December 2015 fixture. The matter was then relisted to 15 December 2015 at the request of the parties.

13. On 15 December 2015 Registrar Scott ordered, on the agreement of both parties, for the Respondent to continue to provide health insurance coverage for the Petitioner at the same standard which had previously been provided.

14. By Order of the Court further directions were issued on 29 December 2015 and the matter was listed for mention to 19 January 2016.

15. By agreed request of the parties, the matter was then relisted from 19 January 2016 to 16 February 2016.

16. On 16 February 2016 a request to 'adjourn' (delist) for two weeks to 1 March 2016 was sent to the Court with notice that a Consent Order was pending.

17. The anticipated Consent Order was filed and dated 25 February 2017. Therein, a return date for mention before the Registrar was agreed for 1 March 2016. The terms of the Consent Order were expressly contingent on the Respondent's agreement to provide a written response, by close of business on 19 February 2016, to the Petitioner's 27 January 2016 letter. (The said letter sought an agreement on the appointment of valuers for all real estate owned jointly or solely by the parties). The Consent Order also recorded the parties' agreement that Counsel for the Respondent would respond in writing on or before 1 March 2016 to the Rule 77(4) requests sent on behalf of the Petitioner on 14 January 2016.

18. The matter was relisted from 1 March 2016 to 8 March 2016 and relisted again to 22 March 2016 at the request of the parties.

19. On 22 March 2016, the parties requested a four week adjournment to 19 April 2016 and the matter was relisted again.

20. On 14 April 2016 the parties requested a further adjournment from 19 April 2016 to 10 May 2016 and this was accommodated by the Court.

21. By letter dated 9 May 2016 the parties requested that the 10 May 2016 fixture be moved to 21 June 2016 and the Court relisted as requested.

22. On 17 May 2016 Jai Pachai of Wakefield Quin filed a Notice of Change of Attorney on behalf of the Petitioner, thereby replacing Mr. Desmond-Tetlow.

23. By letter dated 3 June 2016, Mr. Pachai with the agreement of the other side, requested for the 21 June 2016 fixture to be relisted to 28 June 2016.

24. By letter dated 27 June 2016, Counsel requested a relisting of the June fixture to 12 July 2016 and the matter was relisted to that date.

25. On 12 July 2016, Mr. Pachai and his Client and Mrs. Marshall appeared before me and an Order for Directions was made. At the conclusion of the hearing which lasted 1 hour and 12 minutes, the matter was adjourned to 11 August 2016 which was the only proposed return date in order to accommodate Counsel's pending travel arrangements in the interim period.

26. On 11 August the parties reappeared before me for a one hour hearing which was adjourned for continuation in September 2016. While Mr. Pachai was keen to return in mid-September, Mrs. Marshall's other trial commitments pushed her next availability to the end of September 2016. Accordingly, I adjourned to 29 September 2016.

27. On 29 September 2016 the parties appeared before me for hearing. Mr. Pachai, having been served with various documents on the day prior, requested an adjournment of the hearing. Mr. Pachai stated that while he understood Mrs. Marshall's reasons for the belated disclosure, he would need an opportunity to review the new material with the Petitioner. Counsel also agreed that Mrs. Marshall herself would need further time to review the affidavit evidence of Mr. Matthew Clingerman which had been filed on 14 September 2016.

28. Mr. Pachai proposed a return date for Thursday 13 October 2016, failing which he advised that the only alternative mutual availability for Counsel would be during and after the week of 14 November 2016. (Matrimonial matters before the Registrar are traditionally and routinely heard on Tuesdays.) Although I previously allowed this matter to be heard on alternative days to accommodate Counsel's limited availability, the Court calendar did not allow for the matter to continue on Thursday 13 October 2016. As such, I listed the matter to continue on the only other alternative proposed, Tuesday15 November 2016.

29. The matter did not proceed on 15 November 2016. While the Court record does not report the reasons, it is entirely plausible that the delisting of the hearing was related to the emergency relocation of the Supreme Court Registry from 113 Front Street due to environmental mold contamination.

30. A hearing date was subsequently fixed for 8 December 2016 but later delisted at the email request of Mr. Pachai dated 6 December 2016.

31. Thereafter the matter was fully heard by me on 10, 19 and 31 January 2017.

The Contentious Disclosure Requests

32. Mr. Pachai complained that the Respondent had not adequately complied with the Rule 77(4) requests issued through various letters of correspondence by his hand and that of the Petitioner's former attorney. Principally, the requests arise out of the Respondent's affidavit sworn and filed on 22 December 2015.

33. Mr. Pachai stated that his Client is not particularly concerned with the valuations of jointly owned properties or the personally owned properties of the Respondent in Bermuda and other jurisdictions. The focal point for the Petitioner is on the direct and indirect ownership of the Respondent's corporate assets.

Request for Audited Financial Statements on the Companies

34. Mr. Pachai referred me to Mr. Desmond-Tetlow's letter[3] to Mrs. Marshall dated 14 January 2016. Mr. Pachai highlighted paragraph 8 of that letter which read:

> "*Please provide audited financial statements for all companies in which the Respondent is a shareholder or holds any interest including any subsidiaries, for the 5 year period immediately preceding the date of this letter or in the event that any such statements are*

[3] Tab 2 of the 12 July 2016 hearing bundle

incomplete, management accounts for any unaudited recent period together with all balance sheets, income statements, cash flow statements and footnotes."

35. Mr. Pachai expressed his concern with paragraph 8 of Mrs. Marshall's reply letter of 16 March 2016 which read:

"*There are no audited financial statements in existence for any of the ... group of companies. We have written to ... group financial director, seeking company management accounts for the period which you have requested. Please see the attached letter ....*"

36. The request for audited financial statements was recited in party correspondence in the following terms: '*audited financial statements for all of the companies in which the Respondent is a shareholder or holds any interest including any subsidiaries, for the 5 year period immediately preceding the date of this letter of (sic) in the event that any such statements are incomplete, management accounts for any unaudited recent period together with all balance sheets, income statements, cash flow statements and footnotes*.'

37. In correspondence shown to the Court, the CEO of the Companies wrote:

"*The other principals are vehemently opposed to providing detailed financial information to outsiders in this current economic climate. ... are under tremendous financial pressure…. Production of any information (and for the record none of the Group's companies are audited) would place significant data on the Group's activities into the public realm, visible to secretaries, clerks, etc and inadvertently readily available. In a small island confidentiality is almost impossible. The risk of some information dripping into the hands of a competitor is there. That risk could impact one or many of the locations at the time when some are extremely vulnerable. Neither (other principal) nor I are prepared to take that risk and we feel strongly over this matter, it has been a source of discord with (Respondent) that the request for this information has even been made. And it should be noted, in the event that a (company) were to be impacted by inappropriate dissemination of information, it would be the value of of (sic) not just (Respondent's) assets which would be impacted but our own and those of the minority shareholders*…"

38. Mr. Pachai submitted that the Respondent, being one of the three major shareholders in the group of companies, had more decision-making power than the numerous other minority shareholders whose positions would carry less weight. It was Mr. Pachai's argument that the Respondent is not entitled to refuse discovery, notwithstanding the reasons stated by the CEO, as he has a legal obligation to give full and frank disclosure of his financial position to the Petitioner in these proceedings.

39. Mr. Pachai directed me to Mr. Desmond-Tetlow's (the Petitioner's former attorney) letter[4] to Mrs. Marshall dated 6 May 2016 wherein he responded to the concerns raised by the company CEO in the following way:

"*No tenable reason has been given for the refusal to provide copies of the companies' financial information as requested. There is no risk that providing this information will lead to it entering into the public domain. We would remind you that Deloitte have reviewed such information in order to prepare valuations of the companies. All the employees at our chambers are fully aware of their obligations regarding confidentiality. Likewise the Petitioner is prepared to give an undertaking, if necessary, confirming that she will treat any such information as private and confidential in the commercial interests of the companies*."

40. Mrs. Marshall, in labeling this head of the disclosure requests as 'oppressive', submitted that the terms of the request went far beyond that which is necessary to simply determine the value of the Respondent's assets. She emphasized that each of the companies had a different composition of shareholding. She also argued that the Respondent should not be considered as the alter ego of any of these companies as he was neither the only nor primary shareholder.

41. Having stated that there are no audited financial statements for the companies in existence, Mrs. Marshall submitted that there is no legal obligation on a party to create documents which do not exist for the purpose of discovery.

42. However, where it related to the other company documents requested, Mrs. Marshall sought leave, which I granted, to file additional affidavit evidence from the other two principals of the companies on the basis that the relevant principles of law (see *B v B (matrimonial proceedings: discovery) 1978 Fam D 801*) call for affidavit evidence of the other shareholder's objections to be before the Court, if such objections are to be considered.

Request for Valuation Reports

43. The company CEO, through correspondence to Mrs. Marshall, stated that all of the companies in which the Respondent had a share interest were listed on a valuation report prepared in June 2015. At the 12 July 2016 hearing before me, Mr. Pachai requested a copy of the said valuation, stating that it was his understanding that the valuation had been prepared by Deloitte.

44. Mrs. Marshall responded that she had not previously been asked to provide a copy of the June valuation report. She explained that without the benefit of instruction, she could only go

[4] See paragraph 8 of letter at Tab 5 of the 12 July 2016 Hearing Bundle

so far as to state that she did not find the request objectionable and that she would share her views with her Client.

45. Mrs. Marshall went on to explain that as the companies are not publicly traded companies, the process for valuing the shares is done according to the companies' own methodology. This, on her submission, rendered the June 2015 report the only relevant valuation because the shares are not available to the open market.

46. The company CEO, in her letter before the Court, recommended that a request be made of Deloitte who had previously acted as independent valuers in the past for incoming and outgoing shareholders to review the valuations in order to provide an independent opinion. The CEO suggested, "*This would retain the Group's confidentiality and satisfy the need for an opinion provided from outside the Group*."

47. On 12 July 2016 I ordered the disclosure of the June 2015 report and for the Respondent to advise within a 14 day period on the availability of an updated valuation report.

48. In the 11 August 2016 hearing Mr. Pachai complained that the Respondent had neither complied with my July order for the production of the June report nor confirmed the availability of an updated report.

49. Mr. Pachai complained that instead being served with the June 2015 Deloitte report which he had expected, he was served with a 31 December 2014 valuation report[5] prepared by the company CEO. He pointed to Mrs. Marshall's 10 August 2016 letter to him to show that such a report was in fact in existence:

"*Please see the Valuation provided by our client in his affidavit of the 22nd December 2015 Pages 1-5 prepared on June 8th 2015 in accordance with the formula set up by Deloittes. (sic) Which is the basis for valuation of shares for buy-ins or sales of shares within this closely held corporate structure. I am instructed that Deloitte will have an updated valuation by the end of August. We shall provide you with the said Report as soon as it is to hand*."

50. Mrs. Marshall, in reply, referred me to paragraph 34 of her Client's 22 December 2015 which reads:

"*In 1992 we engaged the services of Deloittes (sic) to prepare a framework for evaluating the businesses. The result was a formula which is now incorporated in our Shareholders Agreement. I attach herewith at Tab 1 page 4 the relevant part of the Shareholders*

[5] Tab 2 of the 11 August 2016 hearing bundle

Agreement relating to the valuation of the businesses. We have, since then, always used this formula for valuation purposes."

51. Mrs. Marshall, in demonstration that Mr. Pachai had already been served with the requested updated June report, directed the Court to the accompanying exhibit which contained a valuation report from the CEO dated 8 June 2015. This June report is described on its face to be *as at 31 December 2014* (ie the same report served). The report discloses the total value of the companies to be $2,571,945.00 (excluding a class of subsidiaries).

52. In the August hearing Mrs. Marshall disputed that the reference in her correspondence to a June valuation report was reference to a Deloitte report. Notably, this clarification was not offered at the July 2016 hearing when Mr. Pachai expressly stated his understanding that the said June report had been prepared by Deloitte. Mrs. Marshall, however, explained that the valuation report exhibited to the affidavit was the shorter version of what she understood Mr. Pachai to be requesting. Mrs. Marshall stated that the fuller version, outlining what the notes and assumptions related to, was now in Mr. Pachai's possession and that any further valuations for request would be in respect of documents which do not exist.

53. Mrs. Marshall then reminded the Court of the CEO's recommendation that a request be made of Deloitte to review the valuations provided. Mrs. Marshall argued that Deloitte's creation of the framework for evaluating the businesses would make it an ideal selection for reviewing and updating the valuation reports. The commission of a review from Deloitte was followed through. In the 29 September 2016 hearing before me, Mr. Pachai confirmed his receipt of the updated Deloitte report entitled "Limited Critique".

54. Dissatisfied with the substance of Deloitte's "Limited Critique", the Petitioner filed affidavit evidence from Matthew Clingerman on 14 September 2016. Mr. Clingerman in his affidavit describes himself as a Managing Director of KRyS Global, "*a firm offering specialist litigation support services in offshore jurisdictions including business valuation and damage quantification*." Mr. Clingerman effectively criticized the CEO's valuation calculations and the "Limited Critique" for its lack of fullness and apparent accuracy.

55. Mrs. Marshall, short of objecting to its admission, complained that Mr. Clingerman's affidavit was filed without leave. By way of resolve, she requested for me to make further directions to allow her to file reply affidavit evidence.

56. I pause here to only to note another complaint made by Mrs. Marshall in the 19 January 2017 hearing regarding Mr. Pachai's retention of Mr. Clingerman for an expert opinion. Mrs. Marshall strongly criticized Mr. Pachai's omission to first consult with her before engaging Mr. Clingerman on his expert opinion on the reports before the Court. Mrs. Marshall accused

Mr. Pachai and the Petitioner of breach of confidentiality for having engaged Mr. Clingerman in this way.

57. Mr. Clingerman's second affidavit (para 6) filed 17 October 2017 addresses the subject of confidentiality as follows:

"*The issues of confidentiality surrounding the business interests of a Respondent or Petitioner in a divorce case is (sic) not uncommon. Those risks are typically managed though the sealed nature of the case and by using professionals that are subject to confidentiality obligations. KRyS Global is no different than Deloitte when it comes to professional discreetness and confidentiality. We are frequently engaged in matters dealing with highly sensitive information and bound by confidentiality obligations. There is nothing so unusual about the present case which I would expect the Petitioner and the professionals retained by her to be prohibited from receiving access to relevant information*."

58. However, I am nonetheless reminded of the CEO's 29 February 2016 letter to Mrs. Marshall wherein she expressly outlined her level of concern on the issue of confidentiality in addition to her recommendation for an appropriate independent expert. In my view, Mr. Pachai ought to have at least liaised with Mrs. Marshall to ascertain the potential for an agreement, failing which the Court's leave should have been sought.

59. In the end, I granted Mr. Pachai retroactive leave and gave the Respondent leave to file reply affidavit evidence. No reply evidence to Mr. Clingerman's affidavit was filed, however.

60. Turning to Mr. Clingerman's first affidavit sworn on 13 September 2016, I simply note that he was asked to consider the following:

(a) Whether two schedules of values with notes provided through Mrs. Marshall's 31 August 2016 correspondence ("the Calculations") and Deloitte's Limited Critique of 30 August 2016 expressed the fair market value of the Companies;

(b) The nature and extent of deficiencies identified by Deloitte;

(c) The extent to which the recommendations made by Deloitte were incorporated and adjusted;

(d) The extent of limitations and restrictions to the scope of work carried out by Deloitte and;

(e) What further work would be required to determine the fair market-value.

Request for Intercompany Receivables and Payables

61. In response to the request for intercompany receivables and payables or loans for the past five (5) years together with supporting documentation, the CEO wrote that this information was not kept or available.

62. Mr. Pachai directed me to paragraph 9 of Mr. Desmond-Tetlow's 6 May 2016 letter which reads:

> *"No good reason has been provided for refusing to provide details of all intercompany receivables/payables or loans for past 5 years together with supporting documents. The Petitioner is not concerned with sales of bottles of wine from one location to another but is requesting information about payables / receivables between companies associated with the (companies)."*

Request for Disclosure of Dividends Earned

63. At paragraph 24 of Mr. Desmond-Tetlow's 6 May 2016 letter he requested:

> "*With regard to dividends, please answer the following: what dividend was declared for … in 2013 (not necessarily paid)? Were any dividends declared by (the companies) in the last 5 years (not necessarily paid)?*
> *The dividend slips provided for …. are inconsistent with the previous information provided in relation to this company. Please clarify.*
>
> *In our previous correspondence, you state that the Respondent uses the account … to deposit the dividends paid to him, however, this account has been used as a savings account for … Please confirm the position.*"

64. The Petitioner now requests information on the company dividends for 2016.

Request for Further Information on the Company Trust

65. At the 12 July 2016 hearing, Mr. Pachai explained that it was his understanding that this company trust owned three or four residential properties occupied by staff members. In Mr. Desmond-Tetlow's 6 May 2016 letter[6] a request is made for copies of the trust documents including trust accounts for the past 3 years. Mr. Pachai reinforced the request on the basis that the Respondent is a beneficiary of the trust, a fact agreed between the parties.

[6] See paragraph 20 of the letter

Request for Bank Statements

66. Mr. Desmond-Tetlow's 6 May 2016 letter[7] stated that the Respondent had not yet forwarded to the Petitioner bank statements which the Respondent requested from the bank on 4 March 2016.

67. Mrs. Marshall's reply letter[8] of 16 March 2016 expressed the Respondent's ongoing efforts to obtain his Butterfield Bank account statements for the preceding three (3) years. At the 12 July 2016 hearing Mr. Pachai complained that these efforts should have been fruitful in light of the request for disclosure having been made nearly seven (7) months prior.

68. As the proceedings of the 12 July 2016 came to a close, Mrs. Marshall explained that her Client had recently provided her with only his HSBC statements. She undertook to chase her Client to provide his BNTB statements, affirming that no issue of contention arose under this part of the discovery requests.

69. Over the course of the subsequent hearings before me, the parties were able to eventually resolve the outstanding disclosure requests for bank statements save in respect of the statements listed further above as part of the outstanding disclosure sought. This pertains to Bermuda accounts and overseas accounts.

70. Notably, no suggestion was made that, as a matter of legal principle, the requested bank statements for the Respondent's personal accounts ought not to be disclosed.

Applicable Principles of Law

Duty to make full and frank disclosure

71. The Petitioner cited the judgment of the learned Justice Stephen Hellman in *Vernetta Mae Shelley Howe v Douglas Colby Howe (SC) No. 55 of 2012 (14 March 2016) at para. 30*:

> "*Both parties have a duty to give full, frank and clear disclosure of their financial affairs. If one party fails to do so, this may give rise to adverse inferences against that party. See J-P C v J-A F [1965] P 215 at first instance, per Sachs J at 227 and 228-229*[9]*, which passages were approved in Baker v Baker [1996] 1 FCR 567, EWCA:*

[7] See Tab 5 of the 12 July 2016 Hearing Bundle
[8] See Tab 3 of the 12 July 2016 Hearing Bundle
[9] Footnote 4 in Ruling Para 30: "*The order made by Sachs J was varied in part on appeal, but on another point*."

'In cases of this kind, where the duty of disclosure comes to lie on a husband; where a husband has- and his wife has not- detailed knowledge of his complex affairs; where a husband is full capable of explaining, and has had opportunity to explain, those affairs, and where he seeks to minimize the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. *On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference- especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative.*

...the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings- in so far as such inferences can properly be drawn.' "

72. Mrs. Marshall, in addressing me on the law on discovery of company documents, relied on a single-paged extract from *Rayden & Jackson on Divorce and Family Matters*[10]. The case, referred to as the leading authority for the considerations which apply to family cases where discovery of company documents is sought, is *B v B (matrimonial proceedings: discovery) 1978 Fam D 801*.

73. I carefully considered *B v B* as both parties relied on the authority to support their respective submissions.

74. *B v B* was a case involving a husband who was one of six directors in a private company with a controlling interest. (Mr. Pachai later paralleled this with the Respondent's role in being one of three major shareholders in the companies.) In *B v B*, members of the husband's family held the remaining shares in the holding company. In the course of divorce proceedings, the wife applied for financial provisions for herself and the children of the marriage and for a transfer of property order.

75. The dispute in that case came down to the wife's challenge of the fullness and accuracy of audited accounts of the company. This led to a request for her to see company documents relating to the husband's expenditure on entertainment and travel. This was followed by an order of the Registrar against the husband for the production of, inter alia, of company account books, ledgers, cheque books, records of all monies received over a specified period of time.

76. The husband appealed the Registrar's order on two reported alternate grounds:

[10] (Volume 1/ Chapter 17 / Section 2)

(i) The Registrar had no jurisdiction to make the order because it involved discovery and production of documents of the company, which was not party to the proceedings between the husband and wife; or

(ii) The Registrar should have exercised his discretion against making the order.

77. In the holding of the case it reads:

"*(i) …the court had a discretion to order disclosure of particular documents specified or described in the application of the party seeking discovery which were in possession, custody or power of the other party to the suit. Accordingly, company documents which were relevant to the matters in issue in the litigation, although in the legal possession of the company, might be required to be disclosed by a director of the company who was party to the suit if they were or had been in his actual physical possession, even though he held them merely as servant or agent of the company, since in that circumstance they were or had been in his custody.*

Furthermore, even where the relevant company documents had never been in his custody, he might be required to disclose them because they were within his power, in the sense that he had an enforceable right to inspect them or to obtain possession or control of them. Whether company documents were within a director's power was a question of fact depending on his shareholding, whether the minority shareholders were adverse to him, the constitution of the board of directors and whether they objected to the disclosure of the documents. Documents would not be within his power merely because he had a right under the Companies Act 1976 to inspect them; but where the company was the director's alter ego, so that he had unfettered control of its affairs, company documents would be within his power.

(ii) Where disclosure was ordered of relevant company documents in the custody or power of a husband who was a director of the company, the court's discretion under RSC Ord 24 whether to order production of them should be exercised by balancing the relevance and importance of the documents and the hardship likely to be caused to the wife by their non-production against any prejudice likely to be caused to the husband or to third parties, such as other directors and shareholders, if an order for production was made. However, it was not the court's practice to order production of company documents where the board of directors of the company objected on affidavit to production, provided that the objection was not contrived to frustrate the court's powers…"

78. Paragraphs (i)-(ii) above is where Mrs. Marshall placed her emphasis.

79. The following remainder portion of the holding was highlighted in Mr. Pachai's submissions:

"*(iii) Although, in an application by a wife for financial provision, disclosure of the audited accounts of a company of which the husband was a shareholder would in most cases be sufficient disclosure, together with full disclosure of the husband's financial records, there were cases where the court would go behind the company accounts and order discovery of specific company documents. The documents relating to the husband's entertainment and travel expenses and his expenditure on his family were relevant to the applications which were before the court, and since those documents had been in the husband's custody, they should be disclosed and, subject to any objection to the production, produced for inspection. However, the documents specified in cl 17 of the order did not appear to be relevant to the matters in issue, nor could it be said that the company was the husband's alter ego so as to confer power on him to produce those documents. Accordingly cl 17, save for certain provisions, would be deleted from the order*."

80. Mr. Pachai referred me to page 809 of the judgment at para f:

"*The third requirement before an order for discovery can be made is that the documents should be relevant to the matters in issue between the parties. It is a feature of financial proceedings in the Family Division that very wide ranging issues are involved. In O'Donnell v O'Donnell [1975] 2 All ER 993 at 996-997, [1976] Fam 83 at 90 Ormrod LJ said this:*

'In approaching a case like the present, the first stage should be to make as reliable an estimate as possible of the husband's current financial position and future prospects. In making this assessment the court is concerned with the reality of the husband's resources, using that word in a broad sense to include not only what he is shown to have but also what could reasonably be made available to him if he so wished. Much will depend on the interpretation of accounts, balance sheets and so on, which will require in many cases the expert guidance of accountants. It will rarely be possible to arrive at arithmetically exact figures. The court must penetrate through the balance sheets and profit and loss accounts to the underlying realities, bearing in mind that prudent financial management and skilled presentation of accounts are unlikely to overstate the husband's real resources, and, on the other side, that there may be a great difference between wealth on paper and true wealth. Valuations may overstate or understate the results of realization of assets, many of which may not be realizable within the immediate or foreseeable future.'

It is another feature of such proceedings that one party, usually the wife, is in a situation quite different from that of ordinary litigants. In general terms, she may know more than anyone else about the husband's financial position; she will know at first hand of the standard of living of the family during the marriage; she will know about the furnishings and

equipment of the matrimonial home, and of the physical possessions of the husband, and perhaps the approximate amount of cash kept in the house. She may also know, from conversations with the husband in the privacy of the matrimonial home, the general sources of his wealth and how he is able to maintain the standard of living that he does. But she is unlikely to know the details of such sources or precise figures, and it is for this reason that the discovery now plays such an important part in financial proceedings in the Family Division.

Applications for such discovery cannot be described as 'fishing' for information, as they might be in other divisions. The wife is entitled to go 'fishing' in the Family Division within the limits of the law and practice

It is said on behalf of the husband, and this is indeed the fact, that if the court decides that the husband has not made a full disclosure of all relevant documents the court will accept the evidence of the wife and draw adverse inferences against the husband. It is true that this has been the practice ever since the days of the ecclesiastical courts, but it may result in injustice to one or both parties and it is no substitute for full discover of all documents relating to financial resources of the parties. The wife normally puts the husband to proof of his financial resources, and it is then for the husband to make full disclosure, including disclosure of all documents relating thereto. If his initial discovery is manifestly incomplete the wife may apply for further discovery. In many, perhaps most, case audited accounts of companies of which the husband is a shareholder will be sufficient, together with full disclosure of all the husband's personal financial records. But there are cases when the court will go behind company accounts and order discovery of company books and documents, if it has the power within the law and within the rules to do so. It is not usual, however, for the court to take this course unless there is evidence before it from accountants or other experts that the published accounts of the company cannot be relied on."

81. Mrs. Marshall outlined the Registrar's discretion exercise by reference to page 810 para f of *B v B*:

"*I turn now to consider the question of the discretion of the court. Assuming that the court has jurisdiction to order discovery and decides to do so, then it is a matter for discretion whether or not to order production. If there is no jurisdiction to order discovery no question of discretion can arise. The various meanings of 'discretion' are set out by Sir Jocelyn Simon P in Povey v Povey [1970] 3 ALL ER 612 at 617- 618, [1972] Fam 40 at 48.. So far as the discretion to order production of company documents is concerned, the court will have regard to all the circumstances. The discretion must be exercised judicially, holding the balance evenly between the parties and any third person affected by discovery. The court will not have discretion to order production unless the documents are either in the custody*

of the husband or in his power, in the sense which I have already described; and, in considering whether company documents are in the power of the husband, the court will already have considered any objections by the board of directors to their production. In considering the exercise of discretion the court will balance the relevance and importance of the documents, and the hardship to the wife likely to be caused by non-production, against any prejudice likely to be caused to the husband and any other directors or shareholders of the company if an order for production is made; and the court will not order production unless it is of (the) opinion that the order is necessary either for fairly disposing of the matter or for saving costs."

82. Mr. Pachai referred to page 810 para h of *B v B*:

"*The confidentiality of documents is of itself no ground for refusing production. It may be relevant to the existence of one of the accepted heads of privilege… In that context there is an implied undertaking by a party who obtains production of documents against any improper disclosure*."

83. At page 811 para c – page 812:

"*I will conclude this part of my judgment by summarizing my conclusions as to the law. (1) A party to a suit must disclose all of the documents in his possession, custody or power which are relevant to the matters in issue. The court has a discretion whether or not to order him to make such disclosure, and also has a discretion whether or not to order him to produce the documents for inspection by the other party or the court. (2) The documents of a company are in the legal possession of the company. If they are or have been in the actual physical possession of a director who is a party to litigation they must be disclosed by that director, if relevant to the litigation, even though he holds them as a servant or agent of the company in his capacity as an officer of the company. (3) Whether or not documents of a company are in the power of a director who is a party to the litigation is the question of fact in each case. 'Power' in this context means 'the enforceable right to inspect or obtain possession or control of the document'. If the company is the alter ego of such a director so that he has unfettered control of the company's affairs, he must disclose and produce all relevant documents in the possession of the company. (4) Where relevant documents in the possession of a company are disclosed by a director as being in his custody or power, the court has a discretion whether or not to order production of them. (5) The discretion is a judicial discretion, and in exercising it the court will have regard to all the circumstances. The court will balance the relevance and importance of the documents and the hardship likely to be caused to the wife by non-production against any prejudice to the husband and third parties likely to be caused by production. It has not hitherto been the practice of the court to order production of company documents to which the board of directors object on*

affidavit, provided that the court is satisfied that the objection is not contrived for the purpose of frustrating the powers of the court. The court will not in the exercise of its discretion order parties to do that which they have no power to do. The court will not order production unless it is satisfied that production is necessary either for disposing fairly of the issues between the parties or for saving costs.

…It is said that by reason of discrepancies in the company's accounts the wife does not accept the audited accounts of the companies, and does not trust the auditors to produce certified figures of the husband's expenditure. It is said, in these circumstances, that it is necessary for accountants on her behalf to see not only the receipts and any other documents relating to the expenditure but also to see the company's books in order to ascertain to who the various items of expenditure were charged.

It is said on behalf of the husband that the books and documents of the company would neither confirm nor deny the wife's allegations, especially in regard to the large sums of cash, because, if they had been improperly obtained, they would not have passed through the books.

I am not satisfied that at this stage the documents the documents referred to in cl 17 are relevant to the matters in dispute. I think that having regard to the allegations by the wife the court at the hearing is likely to be more interested in the actual standard of living and expenditure of the husband over the years than in books and records of the company which may well not show cash expenditure. But I accept that the documents referred to in cll3,4 and 11 are relevant to the matters in issue. All those documents are in the possession of the company; they are not in the possession of the husband in the sense that I have used it in this judgment. The husband has, however, given some evidence as to how those documents were dealt with. He said this in his affidavit of 22nd April 1977: 'The mechanics of the financing of my expenditure is that the restaurant or nightclub will send the bill to the office, where it will be scrutinized by me, and I will give instructions to have it paid.' I take it that the procedure refers to all documents relating to the expenditure and payments referred to in cll 3, 4 and 11 of the order. Those documents are documents, in my judgment, which are or have been in the custody of the husband and, therefore, he must disclose them. The company have (sic) offered limited disclosure of those documents, but they have taken the position that they shall be the judges of which documents are or are not relevant. The registrar refused to accept that position. I deal with it in this way, which I believe the law requires it to be dealt with, namely that the documents must be disclosed; and if any objection is made to their production that objection can be made on affidavit after the documents have been properly disclosed. The registrar will then be able to consider the objections to production as they are made in respect of the individual classes of documents, and will also have the power to order their production, or the production of some of them, to the court, so that he

can make up his mind whether or not they are documents which are relevant and which therefore should be produced, or not. In deciding whether the document is to be produced for inspection by the wife, he will of course have regard to the various matters of discretion to which I have referred earlier in this judgment. If that course if adopted, then the production of the documents to the wife will be regulated by the court and not by the company; but the documents must be disclosed as being in the custody of the husband.
So far as cl 17 is concerned, I have already expressed the view that at this stage I am not satisfied that those documents are relevant, save in so far as they include documents under cll 3, 4 and 11 which I already dealt with. I would add this: considering all the evidence in the case and applying to it the principles which I have enunciated, I cannot say that the operating company is the alter ego of the husband, so that he can control it to the extent that he can require production of those. Clause 17 must therefore be deleted from the order, save for the provision relating to the Swiss bank accounts. So far as the Swiss bank accounts are concerned, it seems to me that documents relating to any Swiss bank account which the husband has a mandate to operate alone or jointly with any other person or persons are documents which are in his custody or power, and they must therefore be disclosed. If there is any objection to production of any of those documents, then that objection must be made on affidavit by any person who claims to have a joint interest in the document. That also is a matter which will be dealt with by the registrar in the discretion of the court.

The documents referred to in cl 12 of the order, namely the documents in the action between the holding company and the public company, are not in my judgment documents within the custody or power of the husband; cl 12 must therefore be deleted from the order.

Finally, I deal with the second part of the order, which is an order requiring the husband to file an affidavit setting out particulars of visits abroad, and particulars of motor cars owned by the company. These matters do not fall within the considerations affecting discovery, to which I have referred at some length, and I see no reason why the husband should not file a further affidavit in the terms ordered by the registrar..."

84. In *B v B* the starting point was that the husband in that case had produced audited reports which were already in existence. The litigious battle followed the pursuits of the wife, having received the audited reports served. However, in this case, no such audited reports exist. The issue for determination is thus whether there is a duty on the Respondent in the context of a discovery application to commission documents or reports not (yet) in existence.

85. (I also considered the case of *Livesey (Formerly Jenkins) v Jenkins [1985] 2 W.L.R. 47* on the principles of full and frank disclosure.)

Nemodat Quod Non Habet

86. Mrs. Marshall relied on the rule *nemodat quod non habet*, a doctrine which effectively translates to: *no one can give that which he does not have*. This doctrine is used in the context of the transfer of all kinds of property rights.

87. Unsurprisingly, this is Mrs. Marshall's argued defence to her Client's refusal to have audited reports prepared for disclosure to the Petitioner.

Use of Expert Evidence in Ancillary Relief Proceedings

88. In a ruling delivered by the Learned Justice Norma Wade-Miller on 1 July 2015 in *Samson v Samson (Sct) No: 16 of 2014* the Court, having heard the husband's application seeking the Court's permission for the parties to present expert evidence in ancillary relief proceedings, disallowed the admission of such evidence seeking to value pre-marital assets and their future growth.

89. Wade-Miller J held at para 23 of her judgment:

> "*A party to a proceeding is not entitled to an expert simply for the asking: the applicant must show that this evidence is reasonably required. This is the test applied by this Court. However, the Court notes that the UK has introduced a new test of 'what is necessary' which is stricter than our test of 'what is reasonably required'. Given the circumstances of this case, the information to be offered by proposed experts will not assist the Court in the crucial matters to which the Court must have regard*…"

90. In the closing remarks of the judgment:

> "27. *In the Court's view, it will gain no particular assistance from the evidence the husband seeks to instruct an expert to provide.*
> *28. Even if the financial affairs are complicated, once the parties make full disclosures and provide clear and understandable presentations the Court will be able to carry out its statutory discretion.*
> *29. The Court is not persuaded that if the purported expert evidence were not allowed, the absence of such evidence would lead to unfairness. Additionally, although Counsel for the husband has not given any indication of the possible costs of this exercise, the Court entertains no doubt that the likely benefit would not justify the costs of instructing experts in the financial matters of this case.*
> *30. Given all these factors this application fails.*
> *31. The Petitioner, the wife, shall have her costs of this application*."

91. The case of *Evans v Evans [1990] 1 FLR 320* was cited by Mrs. Marshall who trumpeted loudly on the following passage in the holding of Booth J: "*While it may be necessary to obtain a broad assessment of a value of the shareholding in a private company, it is inappropriate to undertake an expensive and meaningless exercise to achieve a precise valuation of a private company which will not be sold*…"

Sources of Income and Liquidity

92. Mrs. Marshall placed before me *P v P (Financial Provision) [1989] 2 FLR* to support the proposition that the Courts look to liquidity of funds when sourcing income for assets to be shared post-divorce.

93. In that case the husband was a founding director of a company aided by his wife's encouragement and assistance. Over the years, the business expanded and the wife was allotted shares in the company. After the break-down of the marriage, the wife sought an order for her shares to be valued and bought out. Lincoln J held that all that was required was '*the broadest evaluation of the company's worth in order to enable the court to decide the wife's reasonable requirements. If there was liquidity in the company which could be realized to meet her requirements, then the final order would take that liquidity into account. If there was none, in the sense that the company (the source of the breadwinner's income) would be damaged, then the court should look elsewhere*.'

94. The wife's arguments in *P v P* supra were summarized on page 244 of the judgment:

> "*It is contended for the wife that the court ought to embark on an evaluation of the company, such that a reasonably precise price can be put on her shareholding as a proposition of the company's value. She seeks to have her share 'bought out'. Moreover, on such a purchase, capital gains tax would become payable and the amount must depend on the value. The approach of her advisors was that this holding constituted 'an entitlement' which should be converted by the court into cash producing hundreds of thousands of pounds (see the wife's affidavit where she says: 'I am advised that unless the husband is able to demonstrate good grounds for invoking the discretionary jurisdiction of the court upon the hearing of his application, then there is no reason, in principle, why I should receive less than full value for what is my property')*.

95. It is notable that in *P v P* the Court was not persuaded to make an order for the sale of the wife's shares. In the case before me, the wife does not possess any shareholding of the companies. It is against this background that I have considered Lincoln J's judgment that the

approach '*calls for a general consideration of the husband's capital and particular consideration of his liquidity*.'

Sharing Principles of Matrimonial Assets
('Financial Needs' / 'Reasonable Requirements' / 'Contribution Allowances')

96. I have also been moved to consider *White v White [2000] UKHL 54* and *Jones v Jones [2011] EWCA Civ 41*, both of which were cited by Wade-Miller J in *Samson* supra, when looking at the sharing principle of matrimonial assets which are to be distinguished from non-matrimonial assets.

97. Mr. Pachai contended that *White* supra overruled *P v P*, a submission fiercely rebutted by Mrs. Marshall. In the case of *White v White*, the wife had actively partnered with her husband of thirty years plus in a farming business in addition to assuming the role and responsibilities of being a wife and mother of the three children of the marriage. The contentious issues at first instance was whether or not the partition of the share assets in the business should have weighted more heavily in favour of the husband on the basis that his father awarded financial assistance for the start-up of the business. After trial, it was ordered that the wife would receive slightly more than one-fifth of the total of the couple's assets. The wife's pursuit of funds sufficient to purchase a farm of her own was held to be unreasonable. Mrs. White successfully appealed to the Court of Appeal and her award was increased to a sum commensurate to two-fifths of the total assets.

98. At Court of Appeal level it was found that there was inadequate evidence to establish the value of the wife's interest in the farming business. This left the Court with the view that it would be unfair to make a transfer of property order in favour of Mr. White.

99. Mr. White appealed to the House of Lords seeking the restoration of the one-fifth order made at first instance. Mrs. White then cross-appealed in prosecution of an order giving her an equal share in all the assets.

100. In dismissing both of the appeals, the Court through the unanimous judgments delivered, commented that in search of a fair result it had to be said that: "*…But everyone's life is different. Features which are important when assessing fairness differ in each case. And, sometimes, different minds can reach different conclusions on what fairness requires. Then fairness, like beauty, lies in the eye of the beholder.*[11]"

[11] Page 2 of 11 of Lord Nicholls of Birkenhead

101. Guided by the UK Matrimonial Causes Act 1973 ("the 1973 Act"), their lordships had regard to the wide discretionary powers on the Court over all of the property of the husband and wife. Lord Nicholls of Birkenhead observed that this case was '*the first occasion when broad questions about the application of these powers have been considered by this House. The House considered the statutory provisions recently, in Piglowska v Piglowski [1999] 1 WLR 1360. But there the main issue concerned how appellate courts should approach appeals from trial judges' decisions, rather than the principles trial judges should apply when hearing applications for financial relief in this type of case. It goes without saying that these principles should be identified and spelled out as clearly as possible. This is important, so as to promote consistency in court decisions and in order to assist parties and their advisers and mediators in resolving disputes by agreement as quickly and inexpensively as possible. The present case is an unhappy, if extreme, example of how the parties' resources can be eroded significantly by legal and other costs*.'

102. Their lordships looked to section 25(1) of the 1973 Act which provides the Court with the duty to have regard to all circumstances of the case starting with the welfare of any child of the family under the age of eighteen. Under section 25(2) the Court shall in particular have regard to the following matters:

(i) 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, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;

(ii) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(iii) The standard of living enjoyed by the family before the breakdown of the marriage;

(iv) The age of each party to the marriage and the duration of the marriage;

(v) Any physical or mental disability of either of the parties to the marriage;

(vi) The contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;

(vii) The Conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it; and

(viii) In the case of proceedings for divorce or nullity of marriage, the value of each of the parties to the marriage of any benefit…which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

103. Section 29(1) of the Matrimonial Causes Act 1974 in Bermuda is, for the most part, a reflection of section 25(2) in the UK. The only drafting variance between the two provisions is found by comparing section 29(1)(a) and section 25(2)(a). For present purposes, the distinction is insignificant.

104. Mr. Pachai drew my attention to Lord Nicholls following remarks in his judgment:

"*I turn next to a point where the current state of the law is not altogether satisfactory. That this is so emerges clearly from the decision of the Court of Appeal in Dart v Dart [1996] 2 FLR 286. The point concerns the relationship of paragraph (a) and paragraph (b) in big money cases. Paragraph (a) concerns the available financial resources of each of the parties. Paragraph (b) is concerned with the 'financial needs', obligations and responsibilities of each of the parties. In practice, paragraph (b) seems to have become largely subsumed into a wider, judicially-developed concept of 'reasonable requirements'. This wider concept appears, in turn, to have displaced consideration of the parties' available resources as a factor in its own right.*

This development had its origins in a decision of the Court of Appeal in O'D v O'D [Fam 83 where the alluring phrase 'reasonable requirements' was coined. In that case Ormrod LJ considered the wife's position, 'not from the narrow point of "need", but to ascertain her reasonable requirements. A similar approach was adopted a few years later in Page v Page (1981) 2 FLR 198, 201. This was a case where there was enough capital to provide adequately for both husband and wife. Not surprisingly, the court held that when considering the needs and obligations of the parties a broad view could be taken. Ormrod LJ, whose judgments are a valuable source of much of the jurisprudence in this area of the law, said:

'In a case such as this "needs" can be regarded as equivalent to "reasonable requirements", taking into account the other factors such as age, health, length of marriage and standard of living.'

The third case in this trilogy of cases where resources exceeded financial needs is Preston v Preston [1982] Fam 17. Ormrod LJ set out a list of general positions. His second proposition was as follows:

'…the word "needs" in section 25(1)(b) in relation to the other provisions in the subsection is equivalent to "reasonable requirements", having regard to the other factors and the objective set by the concluding words of the subsection…'

Rightly or wrongly, these passages have been understood as saying that reasonable requirements is (sic) a more extensive concept than financial need. This seems to have led to a practice whereby the court's appraisal of a claimant's wife's reasonable requirements has been treated as a determinative, and limiting, factor on the amount of the award which should be made in her favour.

The soundness of this approach was considered by the Court of Appeal in Dart v Dart [1996] 2 FLR 286. Thorpe LJ, who has much experience in this field, gave the leading judgment. He sought to reconcile the existing practice with the statutory provisions: see page 296f-h. Reasonable requirements are more extensive than needs. What a person requires is likely to be greater than what that person needs. The objective appraisal of what the applicant requires must have regard to the other criteria of the section, including what is available, the parties' accustomed standard of living, their age and state of health and 'perhaps less obviously' the duration of the marriage, contributions and pension rights. Thorpe LJ said:

'…in a big money case where the wife has played an equal part in creating the family fortune it would not be unreasonable for her to require what might be even an equal share.'(My emphasis)
This conclusions, I have to say, seems to me worlds away from any ordinary meaning of financial needs. Moreover, this conclusion gives an artificially strained meaning to reasonable requirements, the more especially as this phrase was adopted originally as a synonym for financial needs.

The other two members of the Court of Appeal were more doubtful. Peter Gibson LJ, at page 302, questioned the correctness of an approach which determines the quantum of an award by reference only to the reasonable requirements of the applicant. Butler-Sloss LJ, with her immense experience of family work, shared Peter Gibson LJ's doubts: see page 305. She wondered whether the courts may not have imposed too restrictive an interpretation upon the words of section 25 and given too great weight to reasonable requirements over other criteria set out in the section. She considered that if spouses are in business together, the traditional 'requirements' approach to a wife's application for ancillary relief is not the most appropriate method to arrive at the post-divorce adjustment of family finances.

Subsequently this question arose again, in Conran v Conran [1997] 2 FLR 615. Wilson J was of the view that, notwithstanding the observations of Thorpe LJ in the Dart case, one

could not sensibly fit an allowance for contribution into an analysis of a wife's needs. That would do violence to language and to section 25(2), where contribution and needs are set out as different matters to which the court is required to have regard…

…Another factor to which the court is bidden to have particular regard is the available resources of each party. As my noble and learned friend Lord Hoffman observed in Piglowska v Piglowski [1999] 1 WLR 1360, 1379, section 25(2) does not rank the matters listed in that subsection in any kind of hierarchy. The weight, or importance, to be attached to these matters depends upon the facts of the particular case. But I can see nothing, either in the statutory provisions or in the underlying objective of securing fair financial arrangements, to lead me to suppose that the available assets of the respondent became immaterial once the claimant wife's financial needs are satisfied. Why ever should they? If a husband and wife by their joint efforts over many years, his directly in his business and hers directly at home, have built up a valuable business from scratch, why should the claimant wife be confined to the court's assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently, in such a case where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case, there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, discrimination would be creeping in by the back door. In these cases, it should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division.

There is much to be said for returning to the language of the statute. Confusion might be avoided if courts were to stop using the expression 'reasonable requirements' in these cases, burdened as it is now with the difficulties above. This would not deprive the court of the necessary degree of flexibility. Financial needs are relative. Standards of living vary. In assessing financial needs, a court will have regard to a person's age, health and accustomed standard of living. The court may also have regard to the available pool of resources. Clearly, and this is well recognised, there is some overlap between the factors listed in section 25(2). In a particular case there may be other matters to be taken into account as well. But the end product of this assessment of financial needs should be seen, and treated by the court, for what is: only one of the several factors to which the court is to have particular regard. This is so, whether the end product is labelled financial needs or reasonable requirements. In deciding what would be a fair outcome the court must also have regard to other factors such as available resources and the parties' contributions. In following this approach the court will be doing no more than giving effect to the statutory scheme."

The Duxbury Paradox

105. Lord Nicholls in *White* supra described the Duxbury paradox as follows:

> "*This approach also furnishes a solution to the so-called Duxbury paradox in this type of case. In the present case Holman J referred to 'the well-known paradox that the longer the marriage and hence the older the wife, the less the capital sum required for a Duxbury type fund.' A Duxbury calculation is, no doubt, useful as a guide in assessing the amount of money required to provide for a person's financial needs. It is a means of capitalizing an income requirement. But that is all. As I have been at pains to emphasize, financial needs are only one of the factors to be taken into account in arriving at the amount of an award. The amount of capital required to provide for an older wife's financial needs may well be less than the amount required to provide for a younger wife's financial needs. It by no means follows that, in a case where resources exceed the parties' financial needs, the older wife's award will be less than the younger wife's. Indeed, the older wife's award may be substantially larger*."

Distinction between Matrimonial and Non-Matrimonial Assets

106. The parties agreed that the companies in question do not form part of the matrimonial assets. The wife in this case has no shareholding in the companies.

107. In citing *McFarlane [2006] 2 AC 618*, paras 22 and 23, the Privy Council in *Scatliffe v Scatliffe [2017] 2 WLR 106* described matrimonial property as meaning "*property acquired during the marriage otherwise than by inheritance or gift*." Non-matrimonial property was defined as "*property owned by one or other of the parties, just as the phrase "matrimonial property" refers to property owned by one or both of the parties*."

108. Mr. Pacahi, urging me to recognize that the Courts would nonetheless take non-matrimonial property into account when dividing assets in ancillary relief proceedings, relied on the following remarks made by Lord Nicholls in *White* supra:

> "…*This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property whenever acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than she or he may have regarding matrimonial property.*

Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without ordinary recourse to this property."

109. Mrs. Marshall relied on the Privy Council's outline in *Scatliffe v Scatliffe [2017] 2 WLR 106*. This was an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (BVI). In *Scatliffe* the marriage lasted some 38 years. In addition to the number of properties owned by the couple, there were two non-matrimonial properties: one which they held on trust for their son and the other which the husband inherited from his parents.

110. The Privy Council, in addressing the proper treatment of "non-matrimonial" property looked at section 26(I)(a) of the BVI Matrimonial Proceedings and Property Act 1995 which obliges the Court to have regard to the "*property and other financial resources which each of the parties…has or is likely to have in the foreseeable future*." The Privy Council held "it is contrary to section 26(I)(a) of the 1995 Act for a court to fail to have regard to "non-matrimonial property".

111. The Board referred to Lord Nicholls' suggestion in *McFarlane* supra that "*following a short marriage, a sharing of non-matrimonial property might well not be fair*" and Baroness Hale of Richmond observed analogously that the significance of its non-matrimonial character would diminish over time. Equally, it was noted, as stressed by Lord Nicholls in *White* supra that a spouse's non-matrimonial property "*might certainly be transferred in order to meet the other's needs*."

112. Mrs. Marshall sought to emphasize that it was noted in *K v L [2012] 1 WLR 306* that there had not before then been a reported decision in which a party's non-matrimonial property had been transferred to the other party otherwise than by reference to the latter's needs. Turning to the key phrase under the sharing principle of non- matrimonial property, Mostyn J suggested that "*the application to non-matrimonial property of the sharing principle (as opposed to the needs principle) remained as rare as a white leopard*."

113. In search for the nail to the coffin, Mrs. Marshall referred to the Bermuda Court of Appeal decision in *Grayken v Grayken Civ. Appeal No. 14 of 2010 (18 March 2011) para 18* to support her submission, described as trite law, that Privy Council decisions are binding on Bermuda whether or not the appeal emanated from Bermuda.

Decision on Various Disclosure Requests

A. *Decision on Request for Audited Statements and Intercompany Receivables and Payables*

114. Having carefully considered the competing arguments under this head of request I refuse the request for a Court order compelling the production of audited financial statements for the companies. My decision is based principally on the following reasons:

(i) I am satisfied that no such documents are already in existence and that the doctrine of *nemodat quod non habet* (*no one can give that which he does not have*) applies.

(ii) The companies in question all fall under the category of non-matrimonial assets. The likelihood of the companies or shares in the companies being divided or transferred under a Court order to satisfy the sharing principle (as opposed to the needs principle) is remote. In my view, a judge is likely to confine consideration of the company assets only under the needs principle, if at all.

(iii) I am also reminded of Mrs. Marshall's argument that the company bye-laws prohibited the sale of company shares to parties external to the member shareholders. The company byelaws were produced under the cover of a letter from Marshall Diel & Myers Ltd dated 5 December 2016. Paragraphs 44 and 45 of the Byelaws reads as follows:

"*Transmission of Shares:*
In the case of the death of a Member, the survivor or survivors where the deceased was a joint holder, and the legal personal representative(s) of the deceased where he was a sole holder, shall be the only person(s) recognized by the Company as having any title to his interest in the shares; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons…
Any person becoming entitled to a share in consequence of a death or bankruptcy of any Member may be registered as a Member upon such evidence as the Board may deem sufficient….but the Board shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that Member before his death or bankruptcy…"

In my view, the Bye-Laws do not preclude the transfer of shares at the level of rigidity suggested by Mrs. Marshall. However, I do accept that there is room for strong argument that the terms for share transfer registration make it unlikely that the Petitioner will find herself a registered shareholder member in any of the companies at the conclusion of these proceedings.

(iv) In this case, it seems to me that a broad assessment of the share values is sufficient for the Court's purposes. I agree that there is already an existing basis before the Court for such broad valuations of the group of companies to be made known. A valuation of the companies, at the level of precision sought by a request for audited financial statements, will not, in my view, assist the Court any further than the broad valuations already before the Court.

(v) The preparation and production of audited financial statements for each of these companies, which collectively form a complex structure, will require significant unwarranted additional expense financially and time-wise.

(vi) The other two principal shareholders of the companies, through affidavit evidence, strenuously objected to the release of such detailed information out of expressed concerns for a breach of confidentiality and the consequential damage it would levy against the businesses if such delicate and detailed information found its way into the public domain.

B. *Decision on Valuation Report*

115. The Respondent agreed to the preparation and disclosure of the "Limited Critique" report produced by Deloitte. In my view, this (together with the CEO's valuations and the affidavit evidence before the Court) is sufficient for the Court's purposes in determining a broad value of the companies concerned.

116. However, I think it only fair that any further / pending (annual) valuation reports prepared or anticipated during the lifespan of this litigation should be disclosed and served on the Petitioner, subject to any subsequent orders made by a judge of the Supreme Court.

117. For that reason together with the basis for my refusal in ordering audited statements and other like company documents, I decline to order the preparation of a further independent valuation report in the scope and manner proposed in Mathew Clingerman's affidavit evidence.

C. *Decision on Request for Share Dividends*

118. The request for the share dividends is reasonable in my view only to the extent to which it concerns the Respondent's annual share dividends. This goes to the *P v P* supra liquidity principle and I hold that the Respondent is to disclose to the Petitioner all dividends declared for him in 2016 as requested by the Petitioner.

D. *Decision on Request for Meal Allowances*

119. The Respondent is to provide proof of his company meal allowances.

E. *Decision on Request for Bank Statements*

120. Given the longevity of the marriage and the likely extent to which the needs principle will be applied in this case, I order to the following to be disclosed:

(i) Bank statements for two overseas accounts held in the Respondent's name:
- Banka Fideuram (January-June 2014 and January- June 2015) and
- Banca Popolared de Bergamo: the entirety of the year 2014 except the month of December and the entirety of the year of 2015 except the month of December.

(ii) Bank statements for Bermuda accounts held in the Respondent's name:
- Bank of Butterfield MasterCard debit card (for the past 3 years) and
- Bank of Butterfield British Airways credit card for the whole of 2013 save July and for the months of February and July 2014
- Details identifying the recipient of $150,000 transferred from the Respondent's HSBC account A/C#010-****23-511 to A/C#010-****29-511;
- HSBC account … 001-566 covering a one (1) year period from 1 January to 31 December 2013

121. The request for the corporate card statements is refused for the same reasons I refused an order for the production of the other additional company documents.

F. *Decision on Request for BF&M Annuity Statement*

122. The Petitioner requested service of the Respondent's BF&M annuity statement. I see no valid reason for this to be withheld and no objection to its production was made. Such being the case, I find that it should be disclosed.

G. *Decision on Request for Source of Payment for Mortgage of Jointly owned Apartment*

123. The Respondent is ordered to provide this information to the Petitioner as requested. Again, no real argument was made against the production of this information.

H. *Decision on Request for Ledger on Upkeep of Overseas Properties*

124. The Respondent requested the existing ledger of the incoming and outgoing funds for the upkeep of the overseas properties. There is no real controversy under this head of disclosure and so I order the production of the requested ledger.

I. *Decision on Request for Further Information on the Company Trust*

125. The Respondent is a beneficiary of this particular company trust. On the basis that this forms part of the Respondent's personal net worth, I agree that the financial statements and accounts for the company trust for the past three years should be disclosed. Additionally, the Respondent is to serve his Letter of Wishes as requested by the Petitioner.

Conclusion

126. I refused the requests made by the Petitioner for an order disclosing the following:

(i) audited statements on the companies and intercompany receivables and payables; and
(ii) additional valuation report on the companies;

127. However, I have allowed the Respondent's request for an order for the disclosure of the following materials/information:

(i) bank statements for Bermuda and overseas accounts for the periods specified in the Petitioner's Rule 77(4) request;
(ii) company share dividends declared for the Respondent's individual benefit;
(iii) company meal allowances available to the Respondent;
(iv) BF&M annuity statement;
(v) the source of payment for mortgage of the jointly owned apartment;
(vi) ledger on upkeep of the overseas properties; and
(vii) the company trust which owns the real estate housing company employees (to which the Respondent is a beneficiary)

128. Unless either party applies within 14 days by letter filed in the Registry to be heard as to costs, I make no order as to costs of the present application.

129. I leave it to the parties to draw up any Order needed to give full effect to this Ruling.

Dated this 21st day of March 2017

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SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT