IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 2

THOMAS VIDRINE — Appellant

AND

SARI VIDRINE — Respondent

BEFORE:

The Hon. Mr. Justice Mottley	-	President
The Hon. Mr. Justice Sosa	-	Justice of Appeal
The Hon. Mr. Justice Barrow	-	Justice of Appeal

Ms. Magali Marin Young for the appellant.
Mr. Michael Young SC for the respondent.

7, 8 October 2010 and 27 January 2011.

MOTTLEY P

[1] I have read the judgment in draft of Barrow JA. I concur in the judgment.

MOTTLEY P

SOSA JA

[2] I concur in the reasons for judgment and orders proposed in the judgment of Barrow JA, which I have had the benefit of reading, in draft, and to which I am unable usefully to add anything.

SOSA JA

BARROW JA

[3] This appeal called for consideration by this court for the first time of the amended jurisdiction of the Supreme Court, effected by section 148 A of the **Supreme Court of Judicature (Amendment) Act (No. 8 of 2001)**, which newly empowered that court to alter property rights on an application made by a husband or wife during divorce proceedings. There are features of the local legislation that are unusual if not unique.

Particulars of the parties and the properties

[4] The marriage that gave rise to the application was celebrated on 29th July 1996, broke down in October 2000 when the Respondent went to live separately and ended with a decree absolute of divorce on 2nd September 2004. When they married the Appellant (hereafter the husband) and the Respondent (hereafter the wife) were 44 and 37 years old respectively. About a year after marrying the parties left their home in Ville Platte, Louisiana, one of the United States of America and began to live in San Pedro, Ambergris Caye, Belize. The husband had been previously married and has four children from that marriage.

The wife had not been married before.

[5] The husband had had a successful career in banking and was a bank president before he retired to Belize and he had inherited some assets. The wife had been a financial services provider earning over US$100,000.00 annually and had other professional occupations.

The Blue Dolphin Property

[6] When the husband and wife came to live in Belize they moved into the husband's home called "The Blue Dolphin," situate on the coast of San Pedro and this remained their matrimonial home up until they separated. This property was acquired by the husband in 1994 and he and his family vacationed there. The husband had paid $150,000.00 for the 1.6 acres on which stood a two-storey house and had spent $75,000.00 more on contents. The husband contended all significant improvements to the property were made before he met the wife. Those improvements were the building of a pier in front of the property, and the building of a palapa on the roof.

[7] As to other improvements made during the marriage, which included the remodeling of the kitchen, repainting the interior of the house, putting doors to the closets, and purchasing appliances for the home, the husband said these were made from monies he had remitted to Belize. The husband also said during the marriage they redid the caretaker's house with monies remitted by him and that the wife contributed US$5,000.00 of her funds to the redecoration. For her part the wife contended she helped to improve the property and spent about US$18,000.00 of her own money for this purpose and joined in the building of a guest house on the property.

[8] The husband claimed that after Hurricane Keith struck San Pedro in October 2000, and after the wife had left, he repaired the damage the hurricane had done to this property sold it in 2001 for US$458,000.00.

Monies in banks

[9] In 1997 when he and his wife retired to Belize, the husband opened several accounts in the local banks in Belize. He opened a joint account with the wife at The Belize Bank Limited, several savings accounts at The Belize Bank Limited, and had a pre-existing account at Atlantic Bank Limited. Most, if not all, monies deposited into these accounts came from the husband's savings, from a family trust account in the United States, and from his retirement fund. The monies were the proceeds of the liquidation of assets he had acquired before meeting the wife. This has never been denied by the wife, the husband argued on appeal.

[10] During the husband's first 8 years in Belize, he claimed, he remitted over $3,000,000.00 to Belize, which he invested in companies named The Boatyard Limited, the Sunset Bar, the Island Ferry, and in acquiring the properties from which a boatyard and a restaurant and bar business were operated. All of the $3,000,000.00 remitted was acquired and accrued by the husband before he met the wife. From the evidence, the husband argued, the wife invested at most US$30,000.00 of her own funds.

The Boatyard Property

[11] Whilst married, the husband purchased between 1998 and 1999 certain lots collectively referred to as "The Boatyard Property." Two adjacent parcels being Parcels 3884 and 3885 Block 7 San Pedro Registration Section were acquired in December, 2000, when the Respondent had already left the matrimonial home. Another parcel, Parcel 1815 Block 7 San Pedro Registration Section was acquired on the 23rd day of May, 2001, again after the parties were living separate and apart.

[12] After purchasing The Boatyard Property the husband incorporated two companies for the purpose of conducting business on the properties: The Boatyard Limited and Sunset Harbour Limited. The ownership of The Boatyard Property was kept separate and apart from the businesses to be operated on it.

[13] The Boatyard Limited was a company incorporated to operate a boatyard and marina on the properties. The husband allotted 10 shares to the wife and 9,990 shares or 99.9% to himself. The husband asserted he had added the wife as a shareholder purely because the law requires a company to have a minimum of two shareholders and his 99.9% share ownership was intended to reflect he was solely funding this business, from his retirement fund, and this business was intended to be his.

[14] In addition to providing all the finance to purchase The Boatyard Property and to build the structures thereon, the husband also personally laboured to build the structures on The Boatyard Property.

Island Ferry

[15] The husband also acquired boats that he used as taxis to ferry customers to locations along the coast of Ambergris Caye. This unincorporated business was known as the "Island Ferry" and was owned by The Boatyard Limited. This corporation was never profitable and remains indebted to the husband for US$350,000.00 borrowed from his trust and retirement funds.

[16] Hurricane Keith destroyed several of the "Island Ferry" boats and seriously damaged others. The husband said he alone tried to repair the damaged boats with additional funds he remitted (an additional US$75,000.00) from his trust and retirement funds, but in 2002 a water spout struck the marina and again destroyed and damaged most of the boats.

[17] In 2002 the husband sold the "Island Ferry" business at a loss of BZ$100,000.00. The husband maintained he alone had invested a total of US$425,000.00 in this business, with no direct financial investment by the wife. All monies put into each of these businesses were recorded in their respective balance sheets as loans from the husband.

Sunset Bar & Grill

[18] "Sunset Harbour Limited" was incorporated to operate a restaurant and bar called "Sunset Bar & Grill" on The Boatyard Property. When this company was incorporated the husband paid for its incorporation and allotted one-half the shares of this company to himself and the other half to the wife. The husband said this company was intended to be their first joint venture as a couple. The husband oversaw "The Boatyard" businesses, including the "Island Ferry" and the wife managed the "Sunset Bar".

[19] The Sunset Bar & Grill was conceived by and begun by the husband and his daughter, Elizabeth Vidrine Storey (a Belizean citizen), who did the vast majority of the work setting up operations of the Sunset Bar & Grill, and she was the operator and manager of this facility during its first year of operation. Neither of the spouses at this time was a Belizean citizen and neither had a work permit to be able to work and operate the businesses. All business entities rented buildings and space on The Boatyard Property from the husband and each had a paid full time manager who actually operated the business.

[20] After one year of operation the wife took over the management and operation of "Sunset Bar & Grill" and the husband concedes that the wife invested US$10,000.00 on the furnishing of this bar and grill, but maintains most of the investment for this business came from the his funds that he remitted from the United States of America. He loaned this business a total of BZ$96,540.00 which has not been repaid to date.

[21] In October, 2000 Hurricane Keith damaged the glassware, kitchen utensil, furniture and electronic equipment for this business, and totally destroyed the cabana under which this business operated. The husband therefore lost all his money on this investment. The husband claimed the wife removed all salvageable assets from the cabana that was destroyed where "Sunset Bar & Grill" was operated, and has still not accounted for them, even though he owns 50% of the said company.

[22] The husband said he was forced to sell his remaining assets in the United States of America in order to finance the repair and replacement of the structures of The Boatyard Property and The Blue Dolphin property. The husband wired in excess of US$400,000.00 to Belize to repair the damage caused by hurricane Keith. Though hurricane Keith caused over US$1,000,000.00 worth of damage to the assets owned by the husband, he said he rebuilt and repaired the structures to the best of his ability from the monies derived from the sale of his assets and properties in the United States, which he had acquired long before meeting the wife.

Boca del Rio Property

[23] After he had been living separate and apart from the wife for almost two years, in April 2002 the husband acquired other property on Ambergris Caye, known as "Boca Del Rio" for a price of US$550,000. The husband argued there was no connection of this property to the marriage, as it was acquired two years after the parties had separated. The husband has sold most of the Boca del Rio and lives on the remainder.

[24] The husband represented it was only after the wife had been living separate and apart from him for two years that news spread that he had purchased the property known as "Boca Del Rio" and only after he had repaired and restored the structures on The Blue Dolphin Property

and The Boatyard Property that the wife made a claim for an interest in these properties in June 2002.

The application and the orders made

[25] It was by originating summons dated 16th June 2002 that the wife made application for the several orders, the granting of which have given rise to this appeal. The originating summons pre-dated the divorce petition by some three weeks. Curiously, the petition for divorce dated 7th July 2002 was abandoned and it was a fresh divorce petition dated 15th June 2004 that was granted, resulting in a decree absolute on 2nd September 2004. Among other things the wife applied in her originating summons for:

1. A declaration under s. 148A of the **Supreme Court of Judicature (Amendment) Act** and/or under s. 16 of the **Married Women's Property Act** that she owned a one half share or beneficial interest in The Boat Yard Property and The Boca del Rio Property. The wife also asked for an order for the sale of these properties and the division of the net proceeds of sale.
2. An order that one half of the proceeds from the sale of the Blue Dolphin Property should belong to and be paid to the wife.
3. An order that personal property being a tractor, eight speed boats with engines and all other property used to carry on the Island Ferry business and/or The Boat Yard Ltd businesses were owned in equal shares by the spouses.
4. An order that the husband pay the wife such monthly or weekly sum in respect of maintenance as may be just.

[26] Chief Justice Conteh made orders in favour of the wife in respect of all the properties in which she claimed an interest. A great deal turns on the nature of the orders the judge made and it is important to be accurate as to the jurisdictional bases upon which the various orders

were made. His Lordship declared the husband holds 50% of the sum of US$485,000.00, being the price for which the Blue Dolphin Property had been sold, for the Respondent as her beneficial interest in this property and ordered payment of that sum together with interest at 6% until payment. The declaration was expressly stated to have been made pursuant to subsection (2) of section 148A of the amendment Act. As will be seen, that provision of the **Supreme Court of Judicature Act** (the Act), which became section 148:01 in the 2003 revision of the Laws of Belize, authorizes the Supreme Court to declare existing rights in property. (For the sake of consistency the numbering used in the older edition of the Laws (which were in force when the application was made) will continue to be used in this judgment but, no doubt, future applications will bear the current section number.)

[27] Further, the Chief Justice declared and ordered that the Respondent is entitled to 40% of the value of the Boat Yard Property as her total beneficial interest therein and the personal properties associated therewith, namely a tractor and eight speed boats with engines. He ordered that a sum representing 40% of the valuation that had been done be paid by the husband to the wife or the property be sold to realize this 40%. His Lordship stated he was making the order pursuant to subsection (3) of section 148A, which is the provision empowering the court to alter property rights.

[28] Finally, the Chief Justice ordered the husband to pay the wife the sum of $250,000.00 in settlement of her claims to any interest in the Boca Del Rio Property (para 100). Earlier in the judgment his Lordship had stated he was making an order pursuant to subsection (3)(b) of section 148A requiring the husband to make a settlement in that sum in favour of the wife in respect of this property (para 96). As mentioned, subsection (3) empowers the court to alter rights in property and para. (b) empowers the court to order a spouse to transfer or settle property; apparently the Chief Justice regarded this provision as empowering the court to order the husband to "settle" a lump sum on the wife.

[29] All the orders the Supreme Court made were therefore made pursuant to various provisions of section 148A. Costs of the proceedings were awarded to the wife in the sum of $25,000.00.

The legislation

[30] Two statutory provisions were expressly invoked in the wife's application as the foundation for the orders she sought. One of these was section 16 (1) of the **Married Women's Property Act** which provides that in any question between a husband and wife as to the title to or possession of property, either party, or any bank, corporation, company, public body or society in whose books any stocks, funds or shares of either party are standing, may apply by summons in a summary way to a judge of the court who may make such order with respect to the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he thinks fit.

[31] None of the orders made in favour of the wife was made in the exercise of the jurisdiction conferred by this provision and indeed the Chief Justice decided early in his judgment (at para 57) that this provision "may be fraught with difficulties and inconsistencies for a conclusive determination of property rights and distribution between couples on divorce." His Lordship therefore gave no further consideration to section 16 of the Married Women's Property Act. Accordingly this appeal calls for no consideration of this Act.

[32] As indicated, the orders in favour of the wife were made pursuant to the second of the two legislative provisions on which the wife founded her application, which was section 148A of the **Supreme Court of Judicature Act**. This provides, in the parts material to this appeal, as follows:

148A (1) Notwithstanding anything contained in this Part or in any other law, a husband or wife may during divorce proceedings make an application to the court for a declaration of his or her title or rights in respect of property acquired by the husband and wife jointly during the subsistence of the marriage, or acquired by either of them during the subsistence of the marriage.

(2) In any proceedings under subsection (1) above, the court may declare the title or rights, if any, that the husband or the wife has in respect of the property.

(3) In addition to making a declaration under subsection (2) above, the court may also in such proceedings make such order as it thinks fit altering the interests and rights of either the husband or the wife in the property, including-

(a) an order for a settlement of some other property in substitution for any interest or right in the property; and

(b) an order requiring either the husband or the wife or both of them to make, for the benefit of one of them, such settlement or transfer of property as the court determines.

(4) The Court shall not make an order under subsection (3) above unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(5) In considering whether it is just and equitable to make an order under subsection (3) above, the court shall take into account the following:-

(a) the financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or

improvement of the property, or otherwise in relation to the property;

(b) the non-financial contribution made directly or indirectly by or on behalf of either the husband or the wife in the acquisition, conservation or improvement of the property, including any contribution made in the capacity of housewife, homemaker or parent,

(c) the effect of any proposed order against the earning capacity of either the husband or the wife;

(d) the age and state of health of both the husband and the wife, and the children born from the marriage (if any);

(e) the non-financial contribution made by the wife in the role of wife and/or mother and in raising any children born from the marriage (if any);

(f) the eligibility of either the husband or the wife to a pension, allowance, gratuity or some other benefit under any law, or under any superannuation scheme, and where applicable, the rate of such pension, allowance, gratuity or benefit as aforesaid;

(g) the period when the parties were married and the extent to which such marriage has affected the education, training and development of either of them in whose favour the order will be made;

(h) the need to protect the position of a woman, especially a woman who wishes to continue in her role as a mother;

(i) any other fact or circumstances that in the opinion of the court, the Justice of the case requires to be taken into account.

An overview of the property jurisdiction in Belize in matrimonial causes

[33] The new jurisdiction conferred by s. 148A of the Act needs to be properly understood. The starting point is stated in the opening words of s. 148A at sub-s. (1): "a husband or wife may during divorce proceedings make an application to the court" (emphasis added). This condition is incorporated by reference in sub-s. (2) which states that "In any proceedings under subsection (1) ..." the court may declare the title or rights, if any, that the spouse has in respect of the property. (emphasis added) In sub-s. (3) the condition is indirectly expressed: "... the court may also in such proceedings make such order ... altering the interests and rights of either the husband or the wife in the property ...".(emphasis added)

[34] Appreciation of the legislative intent that this jurisdiction may be exercised only during divorce proceedings is sharpened by contrasting those provisions in s. 148A with the provisions in s. 16 of the **Married Women's Property Act**. Section 16 of the MWPA provides that in any question between a husband and wife as to the title to or possession of property, either spouse, or a bank, corporation, company, public body or society in whose books any stocks, funds or shares of either party are standing, may apply by summons in a summary way to a judge of the court who may make such order with respect to the application as he thinks fit. Thus, not only the spouses but also certain third parties may apply, in a summary way, for a determination. This comparison highlights the difference between a section 16 of the Married Women's Property Act application, which is not in the nature of a matrimonial proceeding, and a section 148A of the Supreme Court of Judicature Act application, which is a permitted step in matrimonial proceedings.

[35] An apparently unique condition of the new jurisdiction is stated also in the opening words of s. 148A and this is that the application may be made "in respect of property acquired by the husband and wife jointly during the subsistence of the marriage or acquired by either of them

during the subsistence of the marriage." (emphasis added). It is clear from this very specific delimitation that it is only in respect of property acquired during the marriage that the court may exercise the newly conferred jurisdiction. There was no doubting the tenor of this condition although there was dispute as to its ambit.

[36] The jurisdiction conferred by s. 148A on the Supreme Court in divorce proceedings is to make two different types of orders:

> (1) under sub-s. (2) to declare the existing title or rights, if any, that a spouse already has in property acquired during the subsistence of the marriage and
>
> (2) under sub-s.(3) to make an order altering the interests or rights of either spouse in such property.

Thus, the Supreme Court, during divorce proceedings, may both declare and alter rights in respect of property acquired during the subsistence of the marriage. In this case the Supreme Court did both.

[37] Ownership of private property is protected as a fundamental right in section 17 of the **Belize Constitution** and the distinct purpose of the amendment to the Act was to erode that right, even though only in the sphere of matrimonial (and quasi-matrimonial) relationships. It is hardly surprising, therefore, that the power to alter rights in property -- basically to take property from the ownership of one person and give it to another -- should not have been given to the Supreme Court as a matter of open discretion but was given subject to specified limits. In addition to the limitation and condition already mentioned, section 148A (4) provides that the power to alter property rights should not be exercised unless the court is first satisfied that in all the circumstances it is just and equitable to make such an order. And then in subsection (5) it is stated that in considering whether it is just and equitable to make a property alteration order the court shall take into account the 9 matters listed in that subsection.

[38] Because the wife claimed maintenance in her originating summons it is appropriate to review the court's jurisdiction to award maintenance in the proceeding in which she claimed it. It is recognized that the Supreme Court did not, in terms, make an order for maintenance but, as will be shown, a raft of maintenance considerations went into the court's exercise of its section 148A (3) jurisdiction and the exercise of the court's maintenance jurisdiction needs to be clarified.

[39] In Civil Appeal No 31 of 2008 **Tilvan King v Linda Aguilar King** (unreported; judgment delivered 19 June 2009) this court reversed a decision of the Supreme Court purporting to award maintenance to a wife in proceedings brought by way of originating summons, pursuant to s. 16 of the Married Women's Property Act, when no proceedings for divorce had been commenced. The court decided that the Supreme Court had no inherent jurisdiction to award maintenance but could do so only pursuant to section 152 of the Act and that the **Law Reform (Miscellaneous Provisions) Act 1949** in England, which conferred power on the High Court to exercise maintenance jurisdiction otherwise than in matrimonial proceedings, did not extend to Belize.

[40] As was discussed in **King v King**, the maintenance jurisdiction of the Supreme Court is contained in s. 152 of the **Supreme Court of Judicature Act.** In subsection (1) it is provided:

> "(1) The Court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall ... secure to the wife such gross sum of money or annual sum ... for any term, not exceeding her natural life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the Court may think to be reasonable ..."

Sub.-s. (2) extends the power of the court to order a husband to pay a wife such monthly or weekly sum for her maintenance and support as the court may think reasonable. This is the maintenance jurisdiction of the Supreme Court.

[41] Lord Nicholls of Birkenhead in **White v White** [2000] 3 WLR 1571 at 1576 described the English property adjustment legislation, before the major English reforms of the second half of the past century, as outdated and inadequate and reflective of male dominated Victorian society. Regrettably, the legislation in Belize governing maintenance is unreformed and remains open to that characterisation. The consequence of that backward state of the law is that the Supreme Court can award maintenance to a wife only in divorce proceedings and the considerations for awarding maintenance are those stated in s. 152 above.

[42] Further, the **Matrimonial Causes Rules** Ch. 91 of the Subsidiary Laws of Belize 2000 make specific provisions for how a maintenance claim is to be brought. Rule 65 states that an application for maintenance on a decree for dissolution of marriage shall be made in a separate petition which may be filed at any time after decree nisi but not later than one calendar month after decree absolute, except by leave to be applied for by summons to a judge.

[43] Rule 69 of those Rules describes the exercise to be conducted by the court on a petition for maintenance as an investigation. The investigation is as to the matters specified in section 152 of the **Supreme Court of Judicature Act**, which are the fortune of the wife, the ability of the husband and the conduct of the parties (see para [40], above). As objectionable as it may be to present day thinking in our society it is the fact that the law in Belize is still at the stage that it was in England when the rule of thumb was "maintenance is generally awarded on the basis of one-third of the joint incomes of the parties, less the wife's income" and the objective was not to establish a clean break between husband and wife by making appropriate financial provision for the wife but was to "supply ...[the] former wife with the necessaries, comforts and advantages incidental to her social position"; *D. Tolstoy The Law and Practice of Divorce and Matrimonial Causes*, sixth edition (1967) at p. 144. In **Wachtel v Wachtel** [1973] 1

All ER 829 at 839 Lord Denning M.R. explained the utility of the one-third 'rule' and relied on it even after the enactment of the legislative reforms that very shortly thereafter were incorporated in the **Matrimonial Causes Act 1973**. The conduct of the parties, to which the court must have regard (s. 152 of the Supreme Court of Judicature Act), was then, in England, and remains now, in Belize, a factor that could affect the amount of maintenance which would otherwise be awarded; (see Tolstoy at p. 145). And, it should be mentioned, the Supreme Court Act confers no power on the court to make an order for the payment of a lump sum to the wife, but confers power only to order payment of a weekly or monthly sum or to settle property on the wife to secure payment of those periodic sums; see Civil Appeal No 10 of 1992 **Genus v Genus** (unreported; judgment delivered 12th February 1993).

[44] In this case conduct was treated as irrelevant both on the hearing of the originating summons (see Record of Appeal vol 3, p 700 lines 12 to 21) and in the judgment, as reflected by his Lordship feeling no need to resolve the issue whether the wife left home or was forced to leave (see para. 19) On the hearing of this appeal the issue of maintenance was simply not addressed by either counsel; and this court, therefore, also treated the conduct of both parties as irrelevant. If the Supreme Court had been considering a petition for maintenance it would have been obliged to consider the conduct of both the husband and the wife.

[45] No doubt it was because an order for maintenance may be made only in divorce proceedings that in creating the new property alteration jurisdiction the legislature chose to specify in s. 148A that that jurisdiction should similarly be confined to divorce proceedings. The jurisdiction to alter property rights is a logical extension of the jurisdiction to make financial provision for the wife and it was rational for the amendment to confine the exercise of the property jurisdiction to divorce proceedings in the same way the maintenance jurisdiction is

confined to such proceedings. Thus, applications for both orders are required to be made and considered in the same proceedings.

[46] Because there were no divorce proceedings in existence at the time it was brought it was wrong for the wife's claim to have been brought when it was brought. Simply put, the Supreme Court had no jurisdiction to entertain the claims under s. 148A, whether for a declaration of rights in property or an order altering property rights, at the time when those proceedings were filed. The court also had no jurisdiction to order maintenance, for which the wife asked in her application, and it may well be that the wife missed the opportunity to petition for maintenance as a step in the divorce proceedings because she thought she had a pending application for maintenance in her originating summons. With no apparent advertence to the difference between what was permissible under the legislation in Belize and the legislation in England, the hearing and determination of the originating summons proceeded, although only after excessive delay.

Reliance upon leading English cases

[47] As an aid to understanding and applying the guidelines stated in section 148A (5) of the Act the Chief Justice relied, in a treatment comprising virtually one third of the judgment, on leading English cases that considered the provisions of section 25(2) of the English **Matrimonial Causes Act 1973** (reproduced in material parts in Appendix 1 of this judgment, following paragraph [109]).These cases on the English MCA 1973, the Chief Justice thought, were 'much in point' and "although [the provisions in the English statute were] not exactly *ipsissima verba* as the provisions of Belize's statute, [they] however, bear close similarity. The provisions in both statutes provide a list of matters to which a court must have regard to in deciding how to exercise its broad discretionary powers regarding the division of assets on the breakdown of a marriage"; (para. 74).

[48] From the opinion of Lord Nicholls of Birkenhead in **White v White** [2000] 3 WLR 1571 at para 23 the Chief Justice derived the view that "Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make fair financial arrangements on or after divorce in the absence of agreement between the former spouses ..." After quoting a passage in which it was declared that in seeking to achieve fairness there could be no place for discrimination between husband and wife and their respective roles and that if, in their different spheres, each contributed equally to the family, then in principle it mattered not which of them earned the money to build up the assets, his Lordship reproduced a passage that expresses the crux of the English approach. At paragraph 25 of his opinion Lord Nicholls stated:

> "Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. . **Before reaching a firm conclusion and making an order along these lines, a judge should always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing do. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.** (Emphasis added by the Chief Justice).

[49] His Lordship also quoted from the opinion of Lord Cooke of Thorndon, at paragraph 61 of the judgment in **White v White**, that

> "The most important point, in my opinion, in the speech of my noble and learned friend Lord Nicholls **is his proposition that, as a general guide, equality should be departed from, only if, and to the extent that, there is good reason for doing so. I would gratefully adopt and underline it**. Widespread opinion within the Commonwealth would appear to accept that this approach is almost inevitable, whether the regime be

broad or detailed in its statutory provisions." (Emphasis added by the Chief Justice).

[50] Fortified by statements in **White v White** the Chief Justice declared (at para 78) that

> "... although the words **fairness**, **equality** and **non-discrimination** are not expressly used in any of the statutory provisions, a court is required to have regard to in exercising its discretionary powers in deciding on the distribution of assets on the breakdown of a marriage, it is undoubted that these considerations form the desiderta that Parliament must have had in mind when enacting these provisions to empower the courts to make the necessary orders regarding the distribution of assets on divorce. " (Original emphasis)

[51] His Lordship also quoted from **Miller v Miller**; **McFarlane v McFarlane** (2006) UKHL 24; [2006] 3 All ER 1 to the same effect. After quoting passages from the opinions of Lord Birkenhead and Baroness Hale dealing with fairness, compensation, financial needs, sharing, matrimonial and non-matrimonial property, flexibility and contribution, among other considerations, the Chief Justice once more emphasized, from the latter opinion, the proposition that "The ultimate objective is to give each party an equal start on the road to independent living" (para 86). The Chief Justice ended his references to leading English cases with the pronouncement by Baroness Hale in **Miller v Miller; McFarlane v McFarlane** at paragraphs 145 to 152 that the factor of contribution was generally no good reason to depart from the yardstick of equality, expressed as follows:

> "More difficult are business or investment assets which have been generated solely or mainly by the efforts of one party. The other party has often made some contribution to the business, at least in its early days, and has continued with her agreed contribution to the welfare of the family. But in these non-business-partnership, non-family asset cases, the bulk of the property has been generated by one party. Does this provide a reason for

> departing from the yardstick of equality? On the one hand is the view, already expressed, that commercial and domestic contributions are intrinsically incommensurable. It is easy to count the money or the property which one has acquired. It is impossible to count the value which the other has added to their lives together. **One is counted in money or moneys worth. The other is counted in domestic comfort and happiness. If the law is to avoid discrimination between the gender roles, it should regard all the assets generated either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to otherwise ...**" (Emphasis added by the Chief Justice)

[52] After reproducing that passage the Chief Justice proceeded to make his determination of the wife's application, stating: "It is with these considerations firmly in mind that I now turn to a determination of Sari's application in these proceedings in the light of the several factors listed in subsection (5) of section 148 A of Chapter 91." Having made his determination as to the shares to give the wife, his Lordship left no room for doubt, as to the basis for his determination when he explained (at para. 97):

> "97. Overall, in this case, the only reason for departing from equality is the undoubted contribution by Tom of what Lord Nichols called in **White** at paras. 41-45, *inherited property* under the rubric **"Inherited Money and property"**. This was the financial primer for both Tom's and Sari's resources, derivable largely from Tom's pre-marriage investment and high-earning capacity as president of his family-owned bank and his interest under his father's trust. All these, I have no doubt contributed to the parties' lifestyle, including the purchase of most of the assets in this case, and subsequently enabled Tom to plough back resources to rehabilitate the properties wrecked by Hurricane Keith. For this and only this reason, I am constrained by the facts of this case to depart from the equal sharing consideration. But I am satisfied that the justice of the case requires *some* sharing of the assets. I am satisfied that Sari's financial needs

cannot be met without some recourse to all the assets in this case. " (Additional emphasis supplied).

Similarity of Australian rather than English legislation

[53] The foundation of the Appellant's case before this court was that the Chief Justice misled himself in arriving at an understanding and application of the Belize legislation by following the approach laid down in the English cases because the Belize legislation follows the Australian **Family Law Act 1983** and the Barbadian **Family Law Act** (reproduced in its material parts in Appendix 2, following paragraph [109] below), and the provisions of these are distinctly different from the English **Matrimonial Causes Act 1973**. Decisions from both these countries are emphatic that the English yardstick of equality of division, so heavily relied on in the judgment, as the starting point under the English legislation is different from the starting point under the Australian and Barbadian legislation, both of which require an evaluation of the contributions made by the parties, among other things.

[54] **Mallett v Mallett** (1983) 156 CLR 605 is the leading decision of the High Court of Australia which exploded the equality yardstick. Gibbs CJ expressed himself on that notion as follows:

> "However, the Parliament has not provided, expressly or by implication, that the contribution of one party as homemaker or parent and the financial contribution made by the other party are deemed equal, or that there should, on divorce, either generally or in certain circumstances, be an equal division of property, or that equality of division should be the normal or proper starting point for the exercise of the court's discretion. Even to say that in some circumstances equality should be the normal starting point is to require the court to act on a presumption which is unauthorized by the legislation. The respective values of the contributions made by the parties must depend entirely on the

facts of the case and the nature of the final order made by the court must result from a proper exercise of the wide discretionary power ... unfettered [by] the application of supposed rules for which ... [the Act] provides no warrant"; (at 610)

[55] Earlier, Gibbs CJ had identified the circumstances the court is specifically required to take into account as falling within two main classes. First, the court must consider the extent to which either party has in the past contributed to the acquisition, conservation or improvement of the property, whether financially or in the capacity of a homemaker or parent. Secondly, the court must consider all those circumstances which relate to the present and future needs, and to the means, resources and earning capacity, actual and potential, of the parties. These circumstances include "the need to protect the position of a woman who wishes to continue her role as a wife and mother" (s. 75(2)(1) and "the effect of any proposed order upon the earning capacity of either party": s. 79(4)(c). Under the Australian legislation the court may also take into account "any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account; s. 75(2) and s. 79(4)(d). It should be noted here that the Australian legislation was far from faithfully reproduced in the Belizean amendment and some of these differences will subsequently be addressed.

[56] The opinion of Mason J in **Mallet v Mallet**, who dissented as to the details of the alteration of property rights that should be made in that case but agreed with the majority as to the approach the court should take in applying the specified factors, also provides a helpful elucidation. He said, at page 625:

> "This exposition of the proposition that equality is a convenient starting point proceeds upon a misconception of s 79. The section contemplates that an order will not be made unless the court is satisfied that it is just and equitable to make the order (s.

79(2)), after taking into account the factors mentioned in (a) to (e) of s. 79(4). The requirement that the court shall take into account these factors imposes a duty on the court to evaluate them. Thus, the court must in a given case evaluate the respective contributions of husband and wife under pars. (a) and (b) of sub-s. (4), difficult though that may be in some cases. In undertaking this task it is open to the court to conclude on the materials before it that the indirect contribution of one party as homemaker or parent is equal to the financial contribution made to the acquisition of the matrimonial home on the footing that that party's efforts as homemaker and parent have enabled the other to earn an income by means of which the home was acquired and financed during the marriage. To sustain this conclusion the materials before the court will need to show am equality of contribution – that the efforts of the wife in her role were the equal of the husband in his."

[57] In **Proverbs v Proverbs** (2002) 61 WIR 91 Barbadian Chief Justice Sir David Simmons endorsed the views of his distinguished predecessors that in applications under their equivalent of the Australian property altering provisions, English decisions under the **MCA 1973** were to be treated as largely irrelevant (at [93]). It is apparent this was so not simply because the Barbadian Act closely followed the Australian Act as regards the specific factors a court was required to consider but, more particularly, the approach required by s. 25 of the **MCA 1973** was to consider the needs of the parties as the primary concern in contrast to the approach required under the Australian and Barbadian Acts which, as seen from **Mallet v Mallet**, begins with an evaluation of past contributions.

[58] Like Barbados, Belize follows the Australian rather than the English model and an evaluation of the respective contributions of the parties to the acquisition of assets is a mandatory requirement of a Belizean court in its determination whether to make an alteration order. In

Belize, therefore, there is no justification for relying upon equality of division as a yardstick, as was expressly done in this case.

[59] Not only does the Belize legislation differ from the English legislation and follow the Australian and Barbadian legislation; it also departs from the legislation in those jurisdictions in that while it broadens the property alteration guidelines by including a number of maintenance factors it omits the great majority of maintenance factors that are incorporated by reference in the legislation of the other jurisdictions. Even if the provision at sub-s. (5)(i), which permits the court to look at other facts or circumstances, can be regarded as permitting consideration of maintenance factors – a matter to be discussed below -- the outdated maintenance guidelines that exist under Belize law (s. 152 of the Act) are vastly different in substance and objective from those that exist in the other jurisdictions. In reviewing these differences below it must be remembered that the Supreme Court has jurisdiction to consider maintenance for a wife only upon presentation of a separate petition for maintenance filed after decree nisi; rule 65

Matrimonial Causes Rules.

Coupling of maintenance and alteration factors

[60] In England sections 23 and 24 of the **Matrimonial Causes Act 1973** empower the court to make orders for maintenance (which is one form of 'a financial provision order') and for adjustment of property rights and the close inter-relationship of these orders is reflected by the common application to them of section 25 (1) and (2). Subsection (1) of section 25 mandates that it is the duty of the court in deciding whether to exercise its power to make either order to have regard to all the circumstances of the case. Subsection (2) provides that as regards the exercise of its power to make either order in relation to a spouse, the court shall in particular have regard to the factors that it lists; (see Appendix 1). Even under the earlier legislation dealing with financial

provision and property adjustment orders for spouses courts in England would not ordinarily look at the various reliefs in isolation from one another; **Button v Button** [1968] 1 All ER 1064 at 1067. The observation earlier made is again apposite: the jurisdiction to make a property alteration order is an extension of the court's jurisdiction to make financial provision for a wife.

[61] In Australia and Barbados the interrelationship between maintenance and property alteration orders is differently but as distinctly achieved. Taking the Barbados Family Law Act as the example, the method employed to establish inter-relationship is to empower the court to make a maintenance order (s 52) and then to list the only matters the court may take into account in determining the amount of maintenance, if any (s. 53 (2); see Appendix 2). Next, in s. 57 (1) of the FLA the court is empowered to make an order altering interests in property of parties to a marriage or union and in sub-s. (3) there are listed the matters the court must take into account in considering what order should be made. The list identifies four specific matters but also states that the court shall consider, as well, the matters referred to in section 53(2) – the maintenance matters -- in so far as they are relevant. The scheme of the Barbados legislation, therefore, is to incorporate into the list of matters to be considered on a property altering application the list of matters to be considered on a maintenance application.

[62] In Belize, unlike the case in England, there is no common list of matters to be considered both for maintenance and property adjustment applications. Further, in Belize, unlike the case in Australia and Barbados, there is no list of matters to be considered on maintenance applications that is incorporated into the list of matters to be considered on a property alteration application. No list of matters exists for maintenance applications. The closest the Act comes to making a list is to identify in s. 152 the three factors to be considered, being the fortune of the wife, the ability of the husband and the conduct of the parties.

[63] On a property alteration application the court is required by s. 148A (5) to take into account a list of nine matters and some of these are reproductions of some of the maintenance matters found on the list in s. 53(2) of the FLA of Barbados. But many of the Barbados maintenance matters were omitted from the Belize legislation. In oral argument Mr. Young SC, counsel for the wife, argued that the last of the nine factors listed in sub-s. (5) allows great flexibility to the court by providing that the court shall additionally take into account "any other fact or circumstances that in the opinion of the court the justice of the case requires to be taken into account (sub-s. (5)(i)". On that argument the court would be permitted to consider, among other things, the facts and circumstances encapsulated in the omitted matters. The maintenance matters contained in the Barbados s. 53(2) of the FLA that were omitted from the Belize s. 148A (5) are:

> *(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;*
> *(c) whether either party has the care or control of a child of the marriage or union other than a marriage, who has not attained the age of eighteen years;*
> *(d) the financial needs and obligations of each of the parties;*
> *(e) the responsibilities of either party to support any other person;*
> ...
> *(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;*
> *(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;*
> ...
> *(l) if the party whose maintenance is under consideration is cohabiting with another person, the financial circumstances relating to the cohabitation;*

[64] The omitted matters are undoubtedly cogent ones. But they were obviously deliberately omitted from inclusion in the list contained in s.

148A (5). This prevents any getting around the fact that the omitted maintenance matters do not form part of the legislation of Belize. As has been repeatedly stated above, the maintenance matters that a court in Belize may consider are those contained in s. 152 of the Act. And as also has been stated above, there was no petition for maintenance before the Supreme Court and the court had no jurisdiction on the originating summons to consider an award of maintenance and therefore the maintenance matters. From this it follows that the 'any other fact or circumstances" provision in s. 148A (5)(i) does not enable the court to rely on the omitted maintenance matters to broaden the range of the matters it must take into account. I will return to section 148A (5)(i) in due course.

Fresh exercise of discretion

[65] It must, therefore, be concluded that the decision in the court below was arrived at based on a number of errors in law. There is no justification in s. 148A of the Act to use equality as a yardstick or departure point or general reference when considering an application. Mr. Young SC argued that the emphasis in the judgment on equality was ultimately of no effect and may readily be ignored because the orders made, overall, did not result in an equal division of property. It is, of course, true that the order was not for an equal division of property but equality was undoubtedly heavily relied on in the judgment as a yardstick from which to reluctantly depart; (see judgment para. 97 cited at [50] above). As the observations from the Australian and Barbadian cases have established, it is wrong to begin from a presumption or departure point of equality, or to tailor conclusions reached after an evaluation of relevant matters according to a yardstick of equality, because s. 148A (4) prescribes as the departure point that no order is to be made unless it is just and equitable to make one and it can only be so if, as a first step, the contributions of the claiming party are evaluated along with the other factors and this exercise leads to the conclusion that an order should be made.

[66] It was also wrong in law to rely, on this application, on the English approach which looks at the needs of the party as the primary concern and, according to the following quotation from **G v G** (financial provision: equal division) [2002] EWHC 1339 at [34] contained in the speech of Baroness Hale in **Miller v Miller** at [146], dismisses measuring the respective contributions of the parties as a sterile exercise:

> **"What is 'contribution' but a species of conduct ... Both concepts are compendious descriptions of the way in which one party conducted him/herself towards the other and/or the family during marriage**. And both carry with them the same undesirable consequences. First they call for a detailed retrospective at the end of a broken marriage just at a time when parties should be looking forward, not back ...But then, the facts having been established, they call for a value judgment of the worth of each side's behaviour and translation of that worth into actual money. But by what measure and using what criteria? ... Is there such a concept as an exceptional/special domestic contribution or can only the wealth creditor earn the bonus ... It is much the same as comparing apples with pears and the debate is about as sterile or useful." (Emphasis added by the Chief Justice).

This view, quoted in para 87 of the judgment of the Chief Justice, is directly contrary to the approach mandated by s. 148A (5) (a), (b) and (e) of evaluating the contributions of the parties in a number of different areas.

[67] Indeed, the overall consideration the Chief Justice gave to the exercise of the powers conferred by section 148A was erroneously founded on the objectives of the relevant provisions of the English MCA 1973 as stated by Lord Nicholls in **White v White**. The Chief Justice quoted at para. 76 of his judgment the statement of Lord Nicholls that the purpose of the powers in the relevant sections of the MCA 1973 is to make fair financial arrangements. As I have attempted to show, the

interrelated jurisdiction in England is to make an order for financial provision as well as to declare and to adjust rights in property, and that composite jurisdiction is to be exercised by reference to a common list of matters contained in section 25 of the MCA, which requires the court to make fair financial arrangements. That jurisdiction far exceeds the jurisdiction in Belize under section 148A of the Act, which is only to declare and alter property rights and not to grant maintenance or consider a list of maintenance matters. To repeat, the jurisdiction of the Supreme Court to award maintenance is contained in section 152 of the Act and is to be exercised according to rule 65 of the MCR only after the grant of a decree nisi and upon the filing of a separate petition for maintenance.

[68] The consequence that flows from the conclusion that the decision appealed was based on a wrong principle, a wrong approach and a mistaken view as to the extent of the jurisdiction is that the appellate court is required to exercise discretion afresh; see **Mallet v Mallet** at 622, per Mason J. That the way is then open to the appellate court to interfere in such a situation was famously stated by Asquith LJ in **Bellenden (Formerly Satterthwaite) v Satterthwaite** [1948] 1 All ER 343 at 345:

> "We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

The process to follow in applications for property orders

[69] In **Proverbs v Proverbs** (2002) 61 WIR 91 at [31] Simmons CJ suggested a three step process should be followed in considering a property alteration application: (i) the net property of the parties had to

be identified and valued by the court; (ii) next, the respective contributions of the parties within the terms of s. 57(3) had to be considered and evaluated; and (iii) finally, the s. 53(2) factors, so far as relevant, had to be considered.

[70] In Belize, because all the factors to be taken into account are listed in s. 148A (5) and there is no incorporation of a separate list of other matters to be considered, it is a two step process that should be followed on a property alteration application. Those steps would be to (i) identify and value the property acquired during the subsistence of the marriage, and (ii) consider and evaluate the matters listed in sub-s. (5) that it is stated the court shall take into account in considering whether it is just and equitable to make an alteration order. It will often be the case that a single application will be made pursuant to section 148A for both a property declaration order, under sub-s. (2), and a property alteration order, under sub-s. (3). In such a situation it would be appropriate after following step (i) to determine beneficial interest in the relevant property before proceeding to step (ii) since that determination of beneficial interest may affect the evaluation under the second step. Further, this approach would avoid confusion since the matters required to be considered in deciding whether to make an order altering property rights are not matters required or appropriate to be considered in deciding whether a spouse is to be declared to have a beneficial interest in property.

Step (i): Identifying and valuing the property

[71] It will be recalled that the jurisdiction conferred on the Supreme Court by s. 148A of the Act is "in respect of property acquired ... during the subsistence of the marriage." The power to declare title or rights is in respect of such property (sub-s. (2)), and the power to alter the interests and rights of either spouse is in respect of such property (sub-s. (3)).

[72] One of the Appellant's grounds of appeal is that the court below had no jurisdiction to make any order in relation to the Blue Dolphin Property because this property was not acquired during the subsistence of the marriage. The order made by the Supreme Court was to declare the wife had a 50% beneficial interest in this property; it was not a property alteration order. Counsel for the wife sought to get around the fact that this property was not acquired during the subsistence of the marriage by arguing that both parties contributed to making improvements to this property during the subsistence of the marriage and, further, that the Appellant had sold this property in 2001, for US$485,000.00, and obtained the proceeds of sale during the subsistence of the marriage, even though after the parties had separated. Counsel submitted that the enhancement of the property was itself the acquisition of property and also that property is defined in the **Interpretation Act** as including money and therefore the court had jurisdiction in respect of this property.

[73] If the constructions suggested by counsel are technically available they are, with respect, undoubtedly strained. As regards the submissions that pre-marriage property that has been converted to cash during the marriage becomes, by virtue of such conversion, property acquired during the subsistence of the marriage, I see no reason why such a construction should be available in the context of the statutory exercise. Given the deliberate exclusion in s. 148A of pre-marriage property from the court's jurisdiction to declare and alter property rights it is difficult to see why what is really the conversion of such property into money should instead be regarded as an acquisition of property. There is more to the concept of acquisition of property during the subsistence of the marriage than the bare fact of when property was acquired; the underlying interest of section 148A is in the fact that such property was acquired as a fruit of the marriage or was part of the marital acquest, as it has been called; per Lord Birkenhead in **Miller v Miller** at [22]. In no sense could it accord with the legislative intent for a court to treat the proceeds of sale of this property, acquired before the

marriage and sold after the spouses had separated, as property acquired during the subsistence of the marriage.

[74] Counsel's other submission to the effect that the Blue Dolphin Property fell within the jurisdiction created by s. 148A rested on the argument that the wife contributed to the improvement of this property and thus to a substantial enhancement of its value and this entitled her to an interest in this property. Implicit in that argument is the notion that improvements, especially physical improvement such as the construction of a new building (the guest house), should be treated as the acquisition of property. There was much evidence from both sides as to the wife's contributions to the enhancement of this property but it conflicted sharply. The court below did not address this conflict in any real way so as to give a sense of the degree to which the wife's contribution physically or financially improved the property, perhaps because the focus at the hearing was on the contribution the wife made to enhancement rather than on identifying what was created and came into existence during the subsistence of the marriage. The declaration in favour of the wife in respect of this property was founded on her contribution as wife and hardly, if at all, focused on identifying physical improvements to this property during the subsistence of the marriage. It seems to me there is not a sufficient basis on either of counsel's arguments to treat the Blue Dolphin Property as property acquired during the subsistence of the marriage and therefore amenable to the court's declaratory jurisdiction under s. 148A (2) of the Act.

[75] The Boca del Rio Property, which was acquired after the parties separated, raises the comparable issue whether this property should be treated as having been acquired during the subsistence of the marriage. In the sense that the marriage was not legally at an end when it was acquired, because there had not been a decree of divorce, the strict answer to the question is that this property fell into the description of property acquired during the subsistence of the marriage. No authority was cited by counsel to say property acquired after a

break up is thereby to be excluded from the court's jurisdiction and though the timing of its acquisition may call for it to be treated differently, in the context of the relevant factors, from other property acquired while the marriage was functional, such property nonetheless falls within the ambit of the court's jurisdiction. The order in favour of the wife was based on an unknown value but on information that the value was something in excess of US$1,545,000.00 (see judgment, paras. 41 and 96).

[76] There is no issue that the Boatyard Property was acquired during the subsistence of the marriage. The agreed valuation of this property presented values at three different points; just after Hurricane Keith in October 2000, in July 2004 and in December 2008. The order in favour of the wife used the value as at December 2008 of US$1,129,000.00. There was no submission from counsel that a different value should be used and I simply note the point.

Step (ii): consider and evaluate the specified matters

[77] Three of the nine matters to be taken into account listed in subsection (5) are concerned with the respective contributions of the parties and for this reason, and not to give them primacy, it is rational to treat them together. A primary submission made by Mr. Young SC was that even if the husband made a financial contribution of over 90% to the acquisition, conservation or improvement of relevant property, this factor is to be given no more weight than the others. This submission, I think, misstates the position. It is true that the factors listed in sub-s. 5 of s. 148A are not listed hierarchically, as has been said, and therefore none is given greater emphasis or importance in the legislation than the others. But the observation of Mason J in **Mallet v Mallet** (see [54] above) bears repeating in this context: it is the duty of the court to evaluate the factors according to their presence in a given case and to measure the respective contributions of husband and wife in their respective roles. It may be open to a court to conclude on the material

before it that the indirect contribution of one party is equal to the financial contribution made by the other party to the acquisition of property but for the court to so conclude the material before it must show an equality of contribution

[78] In performing its evaluation it is helpful for the court to remember that care must be taken not to allow the measurable and obvious financial contributions to the acquisition of the properties made by the husband, precisely because they are obvious and mathematically certain, to overshadow the non-financial contributions made by the wife which, even when obvious, are not arithmetically certain. The conclusion of Baroness Hale in **Miller v Miller**, based on her Ladyship's view of the relevant provisions of the MCA 1973, was that to measure financial against non-financial contribution was to engage in a sterile exercise; see [66], above. The Australian view, (see paragraph [56], above) of the factors listed in their equivalent to our s. 148A (5) is that this measuring, though it may be difficult in some cases, is what the legislation mandates. With its listing of three areas of contribution to be taken into account section 148A (5) calls even more strongly than the Australian legislation for a measuring of the respective contributions of the parties.

[79] *Financial contributions.* Although the Chief Justice accepted the wife's statements that she made actual cash contributions, for example to stocking the business conducted from the Boatyard Property (at para. 29), he was content to leave the wife's financial contributions unquantified and to treat the matter simply on the overall basis that the relative financial contributions of the husband and wife were unequal (at para. 30). In the summary the Chief Justice gave of his reasons for making the orders he did not, at any point, even mention far less ascribe any weight to financial contributions by the wife. I would therefore conclude that the matter of financial contributions by the wife played, or should have played, no part in his Lordship's decision to make the orders he made. Because of that conclusion there is really no

need to do more than mention, and only because it was raised as a ground of appeal, an apparent inclination by the Chief Justice to see some significance to the fact that the funds the husband used to buy properties had been brought in from abroad and placed in joint bank accounts.

[80] Thus, earlier in his statement of the facts the Chief Justice had specifically found (at paras. 13 to 17) that the spouses had operated joint bank accounts and pooled their resources. However his Lordship stopped short of concluding that the monies placed in the joint accounts became jointly owned. Instead of making that finding and quantifying the shares in which the spouses owned these funds, his Lordship went on to observe that the lion's share if not all the monies that went into the accounts came from the husband but that this fact "would not disentitle Sari to a share in these funds" (para 16).

[81] His Lordship made no finding as to what was the object of the spouses in pooling resources and, therefore, why the wife would have been "not disentitled' to a share. Yet, in the section of his judgment in which he made his determination, his Lordship persisted in the idea that the wife had a beneficial interest in the funds after they went into the joint bank accounts because his Lordship stated that one reason for making the order he went on to make was the fact that the husband had failed to account for funds that had been placed in the joint accounts (para. 96). As Ms. Marin Young submitted on behalf of the husband, the purpose for establishing joint accounts could have been nothing more than a matter of convenience in operating bank accounts as opposed to conferring a beneficial interest in the funds on the wife; see **Heseltine v Heseltine** [1971] 1 WLR 342 at 347G. For the factor of joint accounts properly to have affected his determination his Lordship would have had to find that there was a common intention, actual or presumed, that the wife should have a beneficial interest in the funds and he made no such finding. His Lordship also mentioned (at para. 17), in a single sentence and therefore did not develop the thought, that "there is as

well ... the presumption of advancement in [Sari's] favour as the wife of [Tom]; see **Snell's Equity** 31st ed. at para. 23-13". Having given no reason for finding, and in fact having made no finding, that the wife had acquired a beneficial interest in the funds the husband had placed in joint accounts and then used to buy properties, it is clear the use of these funds should not have been regarded as a financial contribution made by the wife and I do not propose to regard them as such.

[82] *Non-financial contributions.* There are two areas of non-financial contribution made by the wife that need to be considered. First, under sub-s. 5 (b) the court must consider the non-financial contribution made by the wife in the acquisition, conservation or improvement of the property, including any contribution made in the capacity of housewife, homemaker or parent. Second, under sub-s. 5 (e) the court must consider the non-financial contribution made by the wife in the role of wife and/or mother and in raising any children born from the marriage (if any). A major difference between these two provisions is that the contribution to be considered under paragraph (b) is in relation to the property while the contribution to be considered under paragraph (e) is not in relation to the property but in the performance of the role of wife.

[83] *Contributions in relation to the properties*: There is no suggestion the wife contributed to the acquisition of the Blue Dolphin Property or the Boca del Rio Property, the former having been acquired before the marriage and the latter after they separated. The finding of the court as regards contribution to the Blue Dolphin property was that "given the role of Sari as a wife and her contributions in that role and her non-financial contributions towards the improvements (of refurbishing and decorating) of this property ..." she was entitled to a half share. In fact there was no examination in the judgment of the evidence of what were the contributions to the Blue Dolphin by the wife in the role of wife although there was undoubtedly much conflicting testimony from the parties on this point. Her contributions to improvements by helping to refurbish and decorate the property are mentioned as a separate

matter from her contribution as wife. As noted at the outset, at [7], the wife claimed to have spent US$18,000.00 of her own funds in improving this property and in the building of a guest house. It may be best to treat all of these contributions to or in relation to the Blue Dolphin Property in the round: financial, non-financial and simply as a wife, whose presence and active interest in improving what became the matrimonial home was itself a meaningful contribution to this property and this space. And though, because this was pre-marriage property, the wife's contribution in relation to this property can yield her no interest in the property itself, nothing prevents the court from taking this contribution into account as a general, non-property-specific contribution as a wife, under subsection (5)(e).

[84] In relation to the Boca del Rio Property the Chief Justice expressly found, at para. 96, that the wife made no contribution financial or non-financial to the acquisition of this property.

[85] The written submissions on behalf of the wife state that the husband acquired the lands that became known as the Boatyard Property. There is no suggestion the wife contributed financially to its acquisition, conservation or improvement. The finding in the Supreme Court was this property was purchased to establish a marina, nightclub, restaurant and bar (at 25). From the valuation report a three storey structure stood on the land at the time of Hurricane Keith. As noted earlier (paragraphs [11] to [22] above) three businesses were conducted from this property: the Boat Yard Ltd, Island Ferry and Sunset Harbour Ltd. The husband owned virtually all shares in the first named company. The wife was said to have conceived the idea for and marketed the ferry business that was operated by the husband and owned by the first named company; and she owned equal shares in the second named company and actually operated its business along with the husband.

[86] To be accurate, the contribution the wife made in relation to the Boatyard Property was to the businesses that operated from that property, rather than to the acquisition, conservation or improvement of the land and structure. The wife claimed she made a substantial non-financial contribution to this property by helping to conceive the idea of acquiring the lands for the purpose of conducting the proposed businesses on them, thereby contributing the benefit of her own professional expertise and experience. No finding was made as regards this assertion. A clear finding made by the Chief Justice was that none of the businesses was profitable; (para. 97 at p. 50 of the judgment). The statement made by Ms. Marin Young, in the written submissions on behalf of the husband, that the businesses were sold at a loss and without having satisfied the debts they owed to the husband personally, were not disputed. It is therefore the stark fact that so far as the property comprising the three businesses is concerned both parties lost the benefit of the contributions they each made to this property. Confining my observations, for the moment, strictly to the matter of contributions to property and the effect such contributions should have in considering making an order altering property rights, I do not see how it could be just and equitable to ignore the reality and treat the Boatyard businesses and the land and buildings from which these businesses were conducted as all one. That would require ignoring the very deliberate business structures the spouses decided upon and the discriminate allotment of shares, and artificially treat contributions made to the businesses as contributions made to the acquisition, improvement or conservation of the property itself.

[87] *Contributions made in the role of wife*: The third area of contribution to be considered is under sub-s. 5 (e), that is, the non-financial contribution made by the wife in the role of wife and/or mother and in raising any children born from the marriage. This was a childless union and there is no finding in the judgment that the wife acted as a mother to the husband's children from his previous marriage. The contribution that remains to be considered is as wife. No specific finding was made

in the judgment as to the wife's performance in this role. The broad finding is that the wife contributed in a meaningful way as a business partner in the Boat Yard businesses (at 27 and 30). There is no finding the wife contributed in the role of wife to the welfare of the family, so as to enable the husband to attend or better attend to acquiring properties during the marriage or otherwise attend to the properties; (see the passage from Mason J in **Mallet v Mallet** reproduced at para. [56], above). It may well be that some sense of the wife's performance in that role was meant to be expressed in the determination that "given the role of Sari as a wife and her contribution in that role and her non-financial contributions towards the improvements (of refurbishing and decorating) of this property" (meaning the Blue Dolphin Property; see paras. 90 and 91) the wife was entitled to a half share of the proceeds of sale of this property. But, if that was so it is puzzling why the determination was so carefully made as a declaration pursuant to sub-s. (2) of section 148A. That subsection is not the alteration of property provision; it is the provision for declaring rights or interests in property, which exist. It confers no power to alter property rights and neither calls for nor permits consideration of the factors prescribed in sub-s. (5). I am nevertheless of the view, as stated at [83] above, that the contributions made as wife and identified by the Chief Justice with the Blue Dolphin Property may fairly be considered as part of the contributions made by the wife generally under para (5)(e) of s. 148A.

[88] Mr. Young naturally sought to highlight the contribution the wife made as wife by giving up her job and business interests in the United States at the request of the husband, joining in improving the Blue Dolphin Property, pooling her financial and other resources with those of the husband, operating joint bank accounts and performing the role of wife when the husband was acquiring some properties. Counsel also remarked that the wife was devoted to her husband, marriage and their partnership during the marriage and worked hard in their various businesses not only as a business partner but as a wife. To support this impression of the wife counsel relied upon a letter written by the

husband just after Hurricane Keith lauding the heroic conduct of the wife during the storm (which hit Ambergris Caye when the husband was abroad) and her courageous coping with the privations of the aftermath. Even if the dramatic content is toned down and regarded as speaking to one moment in time the letter does serve to support the image of the wife as a good and supportive wife and it was never really argued for the husband that she was otherwise. Again, I remind myself of the need to give due regard to the value of a contribution in this role, not mere token regard, and to be alert to the possibility that performance in that role, without reference to any property, is capable of amounting to a contribution equal to a financial or other contribution made by the husband to property.

[89] It is permissible, I think, purely as a matter of perspective and comparison and not as a matter of principle or precedent to look at the example provided in **Mallet v Mallet** at p. 613 of how the superior courts of Australia, at three levels, treated a wife's contribution as a wife in relation to property. (It is recognized this was the application of the equivalent of the Belize sub-s. (5) (b) and not our sub-s. (5)(e) but the treatment was hardly property-specific). At first instance Bell J stated in relation to the husband's solely-owned property as follows:

> "I am clearly of the opinion that the acquisition of these properties was brought about as a result of the husband's association with the family companies and the properties were acquired through his own efforts in the management of the companies and in an endeavour to increase the profitability of the companies. Notwithstanding this, I consider that the wife is entitled to a reasonable percentage of the value of such properties. She has throughout her [30 years of] married life acted as a hostess, reared children and generally assisted the husband by allowing him to have more time to devote his obvious energetic endeavours in the management of the companies. I do not think however that I should find she is

entitled to anything more than 20 per cent of the value of these amounts ..."

[90] The Full Court of the Family Court disagreed with the trial judge's conclusion and increased the award to the wife to 50 per cent, prompted as the High Court found, by the notion that an equal division of assets was a convenient starting point. The High Court reversed the decision of the Full Court to order 50 per cent to the wife and restored the order of 20 per cent made by the trial judge on the ground that the trial judge acted within the bounds of his discretion to make the order he did, having considered all the factors he was required to consider (see 615). That decision, it may be thought, reflects the difference in result when considering the weight to be given to contributions without importing a presumption or departure point of equality of division.

Continued Step (ii): consideration of the other factors

[91] Three of the nine factors listed in s. 148A (5) having been considered (being the contribution factors) and two of the six remaining factors having attracted no mention and appearing not to be relevant in this case (being the factor in para. (c) dealing with the effect of any proposed order against the earning capacity of either the husband or the wife and the factor in para. (f) dealing with the eligibility of either spouse to a pension, allowance, gratuity or some other benefit under any law) it remains to consider the following four matters .

[92] *Age and health (para (d)*: No real weight was placed on this factor, either by the parties or by the judge. As regards the wife's age his Lordship mentioned that the wife's biological clock was ticking. The husband was said to be diabetic and suffering from arteriosclerosis. It was not suggested that the husband's health condition, while generally relevant, should directly impact any order.

[93] *Period when married and extent marriage has affected education* etc *(para. (g)*: The parties married when they were in early middle age; the wife at age 37 years and the husband at age 44 years. There was no suggestion that the marriage has affected the education, training or development of the wife. Her educational and professional achievements, to which the Chief Justice referred (at para. 5), indicate these were not affected. The wife is said to have given up her business and career but the factor under consideration seems more directed to the condition of a spouse who married at a period in her life which caused her to forgo education and development rather than one who had completed her education, training and development before marrying but who has abandoned a career and business (which normally would be, and has been in this judgment, considered in evaluating contributions).

[94] Reference in para. (g) to the period when the parties were married also raises consideration of the duration of the marriage. It may be that no particular consideration needs to be given to this aspect of this factor, because a marriage that functioned for only 4 years, chronologically would generally not provide as much scope for contributions by a wife in whose favour an order may be made as one that may be considered a long marriage. Further, if period or duration is considered by reference to sacrifice of career opportunity, business and personal development then again it is not a long period of sacrifice and, in any event, care must be taken not to double count that sacrifice when it has already been counted as part of the contributions the wife made as wife. On the other hand, as noted, the point in time or stage or period in a wife's life when she married and devoted herself to her marriage and gave up her independent life may be a further aspect of contribution to consider and I add that factor to my consideration.

[95] *Need to protect the position of a woman Para. (h)*: This is a gender specific factor that Mr. Young submitted speaks to the weaker position of a woman in a marriage. I bear it in mind and will give it appropriate

weight in the context of this case while being careful not to give it any great weight since this was not a case of a wife who confined herself to the historical, traditional role of women in our society of the stay-at-home wife and mother. This wife was obviously a mature and accomplished professional whose position calls for no protection.

[96] *Any other fact or circumstance justice requires para. (i)* No other fact or circumstance was identified in the judgment that it was thought the justice of the case required to be taken into account. On appeal counsel did not point to any but relied on a general submission that this paragraph enables the court to be flexible in the exercise it is required to conduct.

[97] Counsel argued that the omitted matrimonial matters, such as the future financial needs of the wife, for instance, could still be considered by the court using as its authority the terms of sub-s. (5)(i). On this argument facts or circumstances such as the legitimate expectations of a wife, her future financial needs, a significant disparity in financial resources of husband and wife, the state of the employment market, gender roles, and economic and social inequality between men and women, and even the existence of pre-marriage property may fairly be taken into account to achieve a just result.

[98] It is an attractive argument not least because it would enlarge the court's power to do justice between the parties. The danger of yielding to that attraction is that the result would be to extend the court's power to precisely the ambit that the legislature deliberately did not legislate. The result would be almost exactly as if the legislature had included rather than omitted the omitted factors; it would undo the legislature's deliberate decision. There must be a limit to the extent to which reliance can be placed on para. (i) to take account of facts and circumstances that a party wishes to pray in aid otherwise every judge will be at liberty to produce a result in every case that accords with his individual sense of what is fair and just. That cannot be what the

legislation intended. The legislation intended that individual ownership of property must continue to be respected and must not be altered unless it is determined to be just and equitable to alter that ownership and only after mandatorily considering particular matters specified in a list as well as, restrictively, other facts or circumstances. The restriction is that other facts or circumstances may not be taken into account unless, as a matter of judicial opinion, the justice of the instant case requires a fact or circumstance to be taken into account.

[99] That seems the application of the para. (i) catch-all provision that most fairly reflects what the legislature intended: to regard it as permitting the court to consider, in a particular case, any fact or circumstance, when the justice of the case, in the opinion of the court, requires that fact or circumstance to be taken into account. It was earlier accepted that there is no hierarchy among the matters listed in s. 148A (5) and that each of them, if present in a given case, must be given equal consideration (though not equal weight). The court is mandated to consider each listed matter, if it is present in a given case. In relation to any other fact or circumstance the court is not required to consider any. It is only if, in the opinion of the court, the justice of the case requires any such fact or circumstance to be taken into account, that the court is then required to take it into account. Such a fact or circumstance, therefore, does not form part of the list of mandatory factors and would need to emerge rather than be automatically considered.

[100] The effect of this approach is to determine what calls for consideration as an additional fact or circumstance. It is not open to a party to say that a certain fact or circumstance, for instance gender inequality in the society, is generally a relevant consideration in matrimonial cases and, therefore, should be taken into account in the instant case and lead to affirmative action by the court. The provision would seem to require a party who wishes to rely on an additional fact or circumstance to show that the justice of the particular case requires the stated factor to be

taken into account. It is the duty of a party, both to himself or herself and to the court, to point to a particular fact or circumstance as present in the case and show that the justice of the case requires it to be taken into account. This is the difference between the factors listed in sub-s. (5) and additional facts or circumstances that a party asserts. In the case of the former the court is required to take them into account; the premise of the legislation is that the justice of the case requires them to be taken into account. In the case of the latter -- additional facts or circumstances -- the court must be persuaded to consider them by being persuaded that the justice of the case requires the fact or circumstance to be considered. There is no legislated premise.

[101] A further limit on the additional fact or circumstances that the court may consider is that these must be confined to what may be relevant to the exercise the court is considering, which is to say, the alteration of rights in property and not an award of maintenance.

Determination

[102] On the facts of this case there is no room for taking an overall approach in dealing with the properties because the dates of their acquisition relative to the subsistence of the marriage require separate consideration to be given to each.

[103] In relation to the Blue Dolphin Property there is no getting around the fact that the wording on s. 148A (1) excludes this property from the jurisdiction of the court because this property was not acquired during the subsistence of the marriage. For that reason I would make no order in respect of this property.

[104] The Chief Justice apparently sought to surmount this jurisdictional hurdle by resisting making an order under s. 148A (3), altering the rights of the husband in this property, and instead he made an order under s. 148A (2), declaring the wife owned a half share in this

property. Unfortunately, the jurisdiction to make such an order is circumscribed by exactly the same temporal consideration as affects the jurisdiction to make an order altering property rights: the court can make a declaration under the Act only in respect of property acquired during the subsistence of the marriage.

[105] I consider it just and equitable to make an order under sub-s. (3) in relation to the Boat Yard Property almost entirely because of the contribution factors. I evaluate two matters as carrying the most weight. On the one hand, the contributions the wife made in relation to this property were very largely to the businesses that were conducted on the property rather than in respect of the property itself. The failure of those businesses has already been noted. In addition, it is relevant to repeat the finding of the Chief Justice (at para. 33) that "The Boatyard Property and associated businesses were largely destroyed by Hurricane Keith in October 2000". On the other hand, the contributions made by the wife as wife, housewife and homemaker (and I here combine paras. 5(b) and (e)), even if not fully elaborated in the judgment would have significantly benefited and positively impacted the husband, the home and the family unit in a general way at a time when the husband was engaged in the acquisition, conservation and improvement of the Boatyard Property. To the limited extent that the other matters, which are relevant in this case, have been assessed as carrying some weight and in the manner indicated I have taken them into account.

[106] Bound by the factors listed in sub-s. (5) and bearing in mind that the court's maintenance jurisdiction was not exercisable in this case, I do not consider it just and equitable to make an order under sub-s. (3) in relation to the Boca del Rio Property. The wife made no contribution in any respect to this property and that disposes of the need to further consider factors (a), (b) and (e). I rely on the finding of the Chief Justice in this respect and do not rely simply on the fact that the parties had been separated for about two years when the husband bought this

property (since a contribution as wife, made when the parties were still together, could redound to impact the acquisition of a property after separation).

[107] None of factors (c), (d), (f) or (g) is shown to have any application when considering this property. That leaves only factors (h) and (i) to take into account and I have already stated that neither of them carries any real weight on the facts of this case.

[108] Having determined it is just and equitable to make no order altering the rights and interests of the husband in relation to the Blue Dolphin and the Boca del Rio properties but to make an order altering the rights and interests of the husband in the Boatyard Property, it remains to decide what alteration of rights it would be just and equitable to order. Guided by the evaluation performed above it appears just and equitable to order, pursuant to section 148A (3) that the wife shall have a thirty (30) per cent interest in the Boatyard Property and I would so order. This property has been valued at Bz$2,258,000.00. The husband has already paid a substantial sum of money to the wife. In the premises I would order that the property be sold and the wife be paid her 30 per cent share of the net proceeds of sale unless the husband shall sooner pay (or has already paid) the wife 30 per cent of the agreed value of $2,258,000.00.

[109] I would award the costs of this appeal and in the court below to the husband to be taxed and assessed, respectively, if not agreed within 21 days of the date of this judgment.

BARROW JA

Appendix 1

(Extracts from the un-amended English)

Matrimonial Causes Act 1973:

24.-(1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say-.

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them ;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage ;

(d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement ;

subject, however, in the case of an order under paragraph (a) above, to the restrictions imposed by section 29(1) and (3) below on the making of orders for a transfer of property in favour of children who have attained the age of eighteen.

(2) ...

(3) ...

25.-(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(a), (b) or (c) or 24 above in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say-

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

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

and so to exercise those powers as to place the parties, so far as it is 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.

(2) ...

Appendix 2

(Extracts from the Barbadian)

Family Law Act

53 (1) In determining the amount of maintenance, if any, under section 52, the court shall take into account only the matters set out in subsection (2).

(2) The matters to be taken into account for the purposes of this section are as follows:

- *(a) the age and state of health of each of the parties;*
- *(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;*
- *(c) whether either party has the care or control of a child of the marriage or union other than a marriage, who has not attained the age of eighteen years;*
- *(d) the financial needs and obligations of each of the parties;*
- *(e) the responsibilities of either party to support any other person;*
- *(f) the eligibility of either party for a pension, allowance, or benefit under any Act or rule, or under any superannuation fund or scheme, or the rate of any such pension, allowance, or benefit being paid to either party;*
- *(g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;*
- *(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;*

(i) *the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;*

(j) *the duration of the marriage or union other than a marriage, and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;*

(k) *the need to protect the position of a woman who wishes only to continue her role as a wife and mother;*

(l) *if the party whose maintenance is under consideration is cohabiting with another person, the financial circumstances relating to the cohabitation;*

(m) *the terms of any order made or proposed to be made under section 57 in relation to the property of the parties; and*

(n) *any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.'*

57(1) In proceedings in respect of the property of the parties to a marriage or union, or of either of them, the court may make such order as it thinks fit altering the interests of the parties in the property, including –

(a) *an order for a settlement of property in substitution for any interest in the property; and*

(b) *an order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage or union, such settlement or transfer of property as the court determines.*

'(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
'(3) In considering what order should be made under this section, the court shall take into account the following:

(a) *the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;*

(b) *the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of home-maker or parent;*

(c) *the effect of any proposed order upon the earning capacity of either party;*

(d) *the matters referred to in section 53(2) in so far as they are relevant; and*

(e) *any other order that has been made under this Act in respect of a party.*