



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2011 No. 22

BETWEEN:

JC

Petitioner

-AND-

BC

Respondent

Date of Hearing: April 17 and April 18 2012; May 17 and May 30 2012; July 2, July 3 and July 4 2012; August 22 and August 23 2012 and October 10, October 11 and October 12 2012.

Date Judgement Circulated: April 26, 2013

Cox Hallett Wilkinson – David Kessaram for the Petitioner
Marshall Diel & Myers – Georgia Marshall for the Respondent

JUDGMENT

1. The parties in this case are JC, the wife, Petitioner and BC the husband, Respondent. For convenience the Court shall refer to the parties as the wife and the husband.
2. The applications before the Court is the final hearing of the parties cross applications for Ancillary Relief.

3. The husband filed his application on the 12th May 2011. He seeks an order that the wife be ordered to pay him such lump sum or sums provisions as may be just and such further or other relief as may be just.
4. The wife filed her application on the 19th May 2011. She seeks:-
 - a) An order that the husband pay maintenance pending suit to her, for herself and for the child of the family.
 - b) An order that the husband make periodical payments and/or secured periodical payments for herself and the child of the family;
 - c) An order that the husband make a lump sum payment or payments and/or secured lump sum payments for herself and the child of the family;
 - d) A transfer of property order; and/or
 - e) An avoidance of disposition order in respect of the assets and undertaking of Rev Automotive pursuant to s 41 of the Matrimonial Causes Act 1974 (MCA)
5. On 3rd May 2011, the wife filed a Specially Endorsed Writ which commenced Civil Proceedings Action 2011 No. 151 against the husband, Justin Bento and Rev Automotive Ltd. seeking:-
 - a) Damages in the amount of \$135,101;
 - b) Damages for fraudulent conversion appropriation and undertaking of the sole proprietorship of Rev Automotive belonging to JC;
 - c) A mandatory injunction for the transfer of the assets and undertaking to JC of the shares in Rev Automotive Limited (RAL);
 - d) An account of profits, dividends or other payments or other property derived directly or indirectly from the income of the business or representing the assets and undertaking of Rev Automotive.
 - e) An order for payment to JC of all amounts found due on the taking of such accounts and inquiries;
 - f) Interest; and
 - g) Costs.
6. Counsel for JC, the wife, explained that part of the relief claimed by JC in the civil proceedings overlap with the claim under s 41 Matrimonial Causes Act 1974 (MCA) in that the transfer to and appropriation of the business ostensibly by RAL (but in reality by BC) is sought to be set aside thereby re-vesting the business of Rev Automotive in JC.
7. Ultimately there are three principal issues in these proceedings:-

- a) Where does the ownership of Rev Automotive lie?
- b) What is the value of the business?
- c) How are the matrimonial claims to be resolved?

Evidence

8. The evidence consists of four extensive affidavits filed by the parties – two by the wife and two by the husband – including numerous exhibits in eleven lever arch binders, their oral evidence and the evidence of one expert witness. The trial occupied 8 days.
9. The Court does not propose to repeat the evidence which is now a matter of record. However, the Court has considered all the evidence and, even if a piece of evidence is not directly referred to, the Court has taken all the evidence into account in arriving at the final decision.
10. This has been a hard fought case. There were several matters raised where disputed facts led to credibility issues. In my judgment, neither the husband nor the wife was an impressive witness. Counsels obviously have to take their clients instructions and advance their client's case which invariably involves attacks on the credibility of the opposing side. A client may even reject their counsel's advice, but when emotions are running high advisers have to be extra vigilant to stand back from the hostility and direct their focus on resolving the matter in a cost-effective, fair and reasonable way.

Background

11. The husband (BC) is 40 years old and the wife (JC) is 39 years old. They met in Bermuda and started a romantic relationship in or about April 2004. From January 2008 they started living together at the wife's residence in Paget (which is owned by the "DE" Trust settled by the wife's father). They married on the 4th February 2006. It was the wife's second marriage. After the marriage they continued to live in the Paget property until the breakdown of the marriage. The wife vacated the premises in January 2011 and the husband vacated two months later. After the husband vacated the wife re-entered the premises and she continues to reside there with her two daughters. They have one child together who was born on the 14th November 2007. The wife also has a daughter from her first marriage; this child resided with the parties when they commenced cohabitation until the marriage ended.
12. In February 2011 the wife filed her petition for dissolution of the marriage. Decree Nisi of divorce was made Absolute on 24 June 2011. So the marriage lasted 5 years and 4 months. The Court must and has regard to the period of premarital cohabitation. The parties have joint custody of their child with the issue of her care and control adjourned to chambers. It was agreed that the husband should contribute \$3,000 towards the divorce costs.

13. The wife who is Bermudian has always worked. When the parties first met she was employed as an office manager at HSBC Bank of Bermuda. After she left HSBC she worked with JPM Administrator Services Bermuda Ltd. On 1st August 2011 she commenced working for GAM Limited. From this employment she earns \$115,000 per annum. In addition she participates in a discretionary bonus scheme operated by her employer. During cross-examination the wife admitted that she did not disclose the fact that she was negotiating this contract of employment with GAM Limited as she did not consider this relevant. In my judgment the wife made a deliberate decision to withhold this information that a process was underway whereby her earnings would be increased.

Rev Automotive

14. There is a major dispute as to where the ownership of Rev Automotive lies.
15. In 2004, when they first met, the husband, who is a Canadian, was employed by Holmes William & Purvey (HWP) on a work permit basis as a car mechanic servicing Skoda and VW vehicles. While working for HWP he was importing and selling car parts and accessories on the side. The Court states at the outset that he was breaking the law as he did not have the Department of Immigration's permission to do this work.
16. Mr Kessaram, Counsel for the wife, submits that in 2004 the husband's side job was properly organized and run legitimately as a business by the wife. It was given a name which the wife chose and was registered with the Social Insurance Department on the 10th August 2004 as a sole proprietorship and, from that date was run out of the wife's home until the parties separated in 2011. The wife dealt with all of the administrative responsibilities associated with the business. In 2005 the husband moved into the wife's home and continued to run the business from the wife's home. The parties married in February 2006 and continued living together as man and wife, until they separated in 2011. After the marriage the business was expanded and provided car repair and maintenance services. The husband rented premises for this purpose. The wife remained fully involved and continued to carry out the administrative duties. The husband did not take a regular salary. The wife did not receive a salary for her services. The company provided the income which supported the lifestyle of the parties during the marriage.
17. Based on the evidence that the Court heard it is satisfied that together the parties agreed to start up the business Rev Automotive. This Court views the start up of this business against the backdrop of the husband being non-Bermudian who was employed by HWP and whose work permit did not authorize him to engage in any other activity. In my view the wife could not put the husband's name forward at the Social Insurance Department as they would be openly breaking the law. The Court accepts the evidence that the business operated from the wife's residence and she carried out the clerical and administrative (duties) associated with the running of the business. After the parties started living together in January 2005, the business continued to operate out of the wife's home.

18. The parties planned to marry at the end of 2006. However, the husband's employment with HWP ended in early 2006. The parties brought forward their wedding date and married on the 4th February 2006 so that the husband could enjoy the benefits of the Spouses Employment Rights which enabled him to work without Bermuda Immigration restrictions.
19. A garage to carry out repairs and maintenance was established in 2006. Premises were located at Industrial Park Road, Southampton and the lease was for three years, with an option to renew. The wife paid out of her own bank account the rent to secure the premises.
20. The Court is satisfied that all decisions were jointly taken by the parties and how their business affairs were arranged did not trouble them at the time.
21. After the parties separated the husband lost his Spousal Employment Rights. He was advised to incorporate a local company under the provisions of the Companies Act 1981, transfer the business to the company and thereafter have the company apply for a work permit for him. On the 15th February 2011 the husband's then lawyer wrote to the wife asking if she would agree to the incorporation of Rev Automotive and become the 60% shareholder to comply with the Companies Act 1981. The wife was given 7 days to reply, after the expiration of the 7 days the husband, receiving no reply from the wife, proceeded to incorporate the company. The husband became a 40% shareholder and he obtained the consent of a Bermudian friend to become the 60% shareholder and a Director of the company which is a matter of record.
22. Mr Kessaram submits that the husband has stated in evidence that Rev Automotive was his business and he could make whatever arrangements he considers appropriate without regard to the wife. He alleges that the business was established in the Petitioner's sole name for immigration purposes. Further, an examination of the banking records of Rev Automotive Limited (RAL) and the husband's personal account in the period following the incorporation of the company in February 2011 show that Rev Automotive money earned during this period was deposited in the company's HSBC account and at times into the husband's personal accounts without any accountability to any of the other Directors. On these facts, submits Mr Kessaram, the Court would be bound to conclude, having applied the relevant legal principles, that prior to the incorporation of Rev Automotive Limited the business of Rev Automotive was in law a sole proprietorship of the wife and that the husband appropriated the business of Rev Automotive through the use of a corporate vehicle (RAL). However, Counsel urges, the Court upon expressing its satisfaction that the facts of the case justify the Court in making an avoidance of disposition/setting aside order, the Court should adopt a practical approach and find that the wife's share of the matrimonial assets consists of half of the net proceeds of the sale of "Alderley" and \$380,000 representing half of the value of Rev Automotive at the date of separation.
23. On the other hand, Mrs Marshall, counsel for the husband, submits that the husband has always accepted that the business is a matrimonial asset. The wife's position shifted

continually throughout the proceedings. She characterized the business as a sole proprietorship and herself as the sole proprietor. At paragraph 9 of her affidavit dated 9th June, 2011 she says: "I met the Respondent in or around April 2004. At the time the Respondent was working for HWP as a car mechanic. Together we decided to form a new business, Rev Automotive ... bringing in car parts and accessories for resale. On 10 August 2004, the business was registered as a sole proprietorship in my name (as the Respondent is non-Bermudian)."

24. Mrs Marshall submits that a copy of the Employer Registration Form completed by the wife dated 10th August 2004 shows that she characterizes herself as the "Employer" and the "Sole Proprietor" and that there is only one employee. Following the separation the husband ceased enjoying Spousal Rights and sought to incorporate a company. His position is that the business commenced after they married. It was his business in which she assisted with back office support.
25. Mrs Marshall continues that as the matter progresses the wife is adhering to the position that the business belongs entirely to her and the husband dispossessed her of her business when he incorporated Rev Automotive Limited. However, during cross-examination the wife conceded that it was a joint venture.
26. Mrs Marshall argues that by characterizing the business as a sole proprietorship and herself as the sole proprietor and that there was only one employee, given that she says she registered the business as a sole proprietorship because the then boyfriend was a "non-Bermudian", she was saying something that she knew to be false and intending to deceive.
27. On its face by doing as she did the wife committed an offence under section 30 (1) of the Contributory Pension Act when for the purpose of obtaining a benefit under the Act she knowingly made a false statement or false representation and produced documents or information which she knew to be false in a material particular. Section 30 (1) of the Contributory Pension Act reads:-

"Any person commits an offence who, for the purpose of obtaining any benefit or other payment under this Act, whether for himself or for some other person, or for any purpose connected with this Act -

a) knowingly makes any false statement or false representation; or

b) produces or furnishes, or causes or knowingly allows to be produced or furnished, any document or information which he knows to be false in a material particular:

Punishment on summary conviction: a fine not exceeding \$1,000."

28. Mrs. Marshall maintains that whether the wife was engaging in a local business with her then boyfriend, a non-Bermudian, or whether she was a sole proprietorship employing him she committed offences under section 60 (1) of the Immigration Act as read with section 27 of the Criminal Code. Section 60 (1) stipulates that

“no person (a) other than a person who for the time being possesses Bermudian status ...(b) other than a person who for the time being has spouses employment rights ... Shall while in Bermuda, engage in any gainful occupation without the specific permission ... by or on behalf of the Minister.”

29. In the Immigration Act sections 57 (2) and (4) state that to “engage in gainful occupation” includes to “engage in local business” and to “engage in local business” means generally to “engage in any business for reward, profit, or gain...” and “includes...engaging in any business in Bermuda as a partner (whether or not an active partner)...”. Section 141 provides for punishments for offences against the Act. Consequently, the conclusion to be drawn from the wife’s own evidence is that she was fully aware that her boyfriend could not engage in business without the Minister’s approval. She knowingly participated in the commission of offences under the Immigration Act and knowingly committed offences against the Social Security Act in order to establish and run an illegal business to obtain benefits for her boyfriend for whom it was illegal at the time to work.
30. Counsel submits that based on the “Forfeiture Rule” the Court should not take the wife’s evidence regarding the state of affairs in relation to the business prior to the marriage into account nor allow it to influence its finding in any way. In support of this position, Mrs Marshall cited and examined a number of authorities which show the effect of illegality on civil claims. For example, in *Nelson Enonchong, Illegal Transactions, LLP 1998*, pages 14 to 15 the author stated *inter alia*:-

“When a transaction is found to be illegal, the effect of the illegality on any civil law claims connected with the transaction is often expressed in Latin maxims, the most common of which include ex turpi causa non oritur action (no one can found a cause of action on an illegal cause), in pari delicto potior est conditio defendantis (where both parties are equally guilty the position of the defendant is the stronger), or nemo allegare suam turpitudinem est audiendus (no one would be heard to plead his own turpitude)...if we fillet out the Latin tags it will be seen from the authorities that the effect of illegality on civil claims flow from two general propositions; (a) that “no court will lend its aid to a plaintiff who founds his cause of action upon an illegal transaction”, (b) that “no one should be allowed to profit from his own wrong doing” [Emphasis added]

31. After reviewing the relevant statutory provisions and authorities Mrs Marshall said Rev Automotive should be treated like any other asset created during a marriage primarily through the sole efforts of one of the parties. The husband has never sought to suggest otherwise. The issue is not whether Rev Automotive is a matrimonial asset created during the marriage, because clearly it is. The issues are what value should be ascribed to it and how should that value, if any, be divided fairly between the parties. The forfeiture rule does not prevent the Court from having regard to all the surrounding circumstances.

32. Mrs Marshall submits that the wife's position in relation to the business prior to the marriage is based upon assertions involving commission of serious crime by her, and given that she is seeking to influence the Court to her benefit, either by way of an increased award or otherwise, the forfeiture rule applies and as a matter of public policy, the Court ought not give her position in relation to this matter any credence. The wife's civil claim is founded on her own illegality and should be dismissed *in limine*. The wife only gets to the judgment seat by relying on her own serious illegality and she should not be able to get any further.

Court's View

33. In the Court's judgment this case is subject to public policy principles. The Court is satisfied that the parties were involved in a grave deception which enabled the wife to perpetuate a sham sole proprietorship. They breached section 30 (1) of the Contributory Pension Act and the section 60 (1) of the Immigration Act.
34. It is not necessary, nor would it be useful, to rehash every detail of this relationship. The choices the wife and husband made in the way in which they ran their life together should not be assessed in formal legal terms
35. Suffice to say that the Court does not accept the wife's reasoning that having registered the Company as the sole proprietorship it is her Company and the husband a mere employee. After the business was registered by the wife, if one looks at the subsequent conduct of the parties, it is clear that it was a sham sole proprietorship. On the evidence, the Court is satisfied and finds as a fact that the wife, then girlfriend, registered the business so that the husband, then boyfriend, could carry on his side job. After the parties were married, the husband devoted over 40 hours per week giving full concentration and hard work to the development of the business. Section 27A of the Bermuda Immigration and Protection Act 1956 allow "the husband of a wife who possesses Bermudian status (a "special status husband") to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status if certain conditions are met:

"Special provisions relating to landing etc of husbands of Bermudians

27A (1) Notwithstanding anything in section 25 and without prejudice to anything in section 60, but subject to subsection (4), the husband of a wife who possesses Bermudian status (a "special status husband") shall be allowed to land and to remain or reside in Bermuda as if he were deemed to possess Bermudian status, if the conditions specified in sub section (2) are fulfilled in relation to him.

(2) The conditions to be fulfilled in relation to a special status husband are as follows

(a) his wife must be ordinarily resident, or be domiciled, in Bermuda;

- (b) he must not contravene any provision of Part V;*
- (c) he must not have a relevant conviction recorded against him;*
- (d) the Minister must be satisfied that the special status husband is a person of good character and previous good conduct;*
- (e) the Minister must be satisfied that the special status husband and his wife are not estranged.*

(3) In relation to a special status husband “relevant conviction” in subsection (2)(c) means a conviction, whether in Bermuda or else where, of an offence which, in the Minister’s opinion, shows moral turpitude on the special status husband’s part.

(4) If a condition specified in subsection (2) is not fulfilled in relation to a special status husband, his landing or remaining or residing in Bermuda shall be deemed to be, or, as the case may require, to be come, unlawful except with the specific permission of the Minister.”

36. Counsel was not given an opportunity to address the Court on the provision of Section 27A but the Court is satisfied that after the parties married, the husband, who was deemed to possess Bermudian status, was legally able to set up his own garage business.
37. Both parties worked very hard in building a life together with a view to having a successful business and a good standard of living. The wife said in a manner of speaking she put her “blood, sweat and tears” into the establishment of the business. The Court disagrees with Counsel for the wife that the business Rev Automotive was the wife’s only, and that the husband appropriated the business at the time when the parties separated. The agreement to register the business was a sham sole proprietorship so the parties were *in pari delicto*, which means that they were equally guilty. They are both fortunate that this was not discovered at the time they entered the agreement and breached the regulation which is in place for the public benefit.
38. Given all the facts the Court dismisses the wife’s Civil Claim Action 2011 No. 151 and the claim pursuant to section 41 (MCA) for an avoidance of disposition.

Valuation

39. The parties jointly appointed Mr Kumi Bradshaw (Asgill Post) to value the business Rev Automotive. Neither party is bound to accept the report of the joint valuation. In his report at paragraph 1.2 Mr Bradshaw stated that the use of the appraisal is to provide an opinion of value to assist with proceedings pertaining to the client’s marital dissolution. The effective date of the valuation is January 6, 2011. The valuation is based on financial statements for the calendar years 2008–2012, inclusive. Prior to the valuation no financial statements existed and had to be created by Windcrest Management Limited (Mr Bill Carr) using the HSBC and BNTB bank statements of Rev Automotive for the

three year period prior to the separation of the parties and the incorporation of the business.

40. Initially Mr Bradshaw valued the business at \$380,000. However, during the trial it was discovered that a portion of the income of Rev Automotive was deposited directly into the personal bank accounts of the wife and the husband and consequently was not counted by Mr Carr in determining the income of the business.
41. Mr Bradshaw was provided with the details of the amounts deposited directly into the personal bank accounts of the wife and the husband for the same period 2008–2010. Based on this additional information and using the same methodology, Mr Bradshaw recalculated the value of the business at \$760,000. The wife asserts that this was the value of the business on the date of the separation at which time the business was owned by her.
42. The husband testified that he does not accept the valuation of Rev Automotive and the forecast proposed by Mr Bradshaw. The husband testified that a number of people are holding onto their money and using alternate forms of transportation consequently the volume of cars he services has been reduced. He is not very busy at all and has lost a lot of clients. The business has been up and down and he did not hit the high he attained in 2011. Over the last three to four months he has been working about 20 hours per week.
43. The Court accepts the amount of \$760,000 as the valuation of the business. This is detailed by Mr Bradshaw in the addendum to the valuation. Mr Bradshaw was cross-examined vigorously by Counsel for the husband. He impressed me as a dispassionate witness. If Mr Bradshaw were not provided with the additional information he would have been under-informed and the true position of the business' worth would have been a guess. Mrs. Marshall made a persuasive point that the addendum only valued the business on the basis of full tills. Making an allowance for this, the Court adjusted the value to \$570,000–\$600,000 to reflect any uncertainties caused by this position.
44. Mrs. Marshall maintains that the husband's position has not changed throughout the proceedings. He maintains that he has always been a sole trader. The assets of Rev Automotive have always been modest and have been valued at \$25,000. Many of the tools were owned by him prior to the marriage and were used by him when he worked at HWP. Insofar as he is a sole trader the perceived goodwill is personal to him and no other person, his ability to garner a living and to earn money is similar to the special skill and personal goodwill developed over many years of experience and client confidence of a lawyer or other service provider who is sought out by clients for his specific skill and ability. Without the husband there is no Rev Automotive.
45. Further, Mrs Marshall submits that Mr Bradshaw said that in order to secure the market value stated in the valuation the husband would be required to enter into a "non compete" the effect of which would be to prohibit him from engaging in the very trade by which he earns his livelihood. A willing buyer would not be prepared to pay the valuation sum for the business if the husband was going to compete with the business. Also Mr Bradshaw contended that the lease would have to be surrendered although the

leasehold interest in the premises out of which Rev Automotive operated was owned by the husband personally. Mrs Marshall stressed that these assumptions were not included in the valuation nor was any account taken of them. Mrs Marshall pointed out that the original valuation which determined the value of Rev Automotive on a blended approach included in the value an assumption that the business would be sold with “full tills”. In the original valuation of the business, Mr Bradshaw stated that if the business did not have “full tills” in his opinion its value would be decreased from \$380,000 to \$236,000. He did not include an empty till valuation in the addendum valuation.

46. In her written submission, Mrs Marshall relied *inter alia* on the cases Ellison and Ellison – Civil Appeal 1 of 1985, Duncan and Duncan – Divorce Jurisdiction 2003 No. 35, and Araujo – Divorce Jurisdiction 2006 No. 19 which cumulatively set out the approach that a court should take when considering the value to be placed on what is essentially the tools of the trade of the husband, a sole trader. In *Ellison*, the husband was a lawyer and partner with CD&P, in *Duncan* the husband was a lawyer and a partner with T&D, and in *Araujo* the husband was a sole trader selling marine products and boats. In all these cases the court applied significant discounts to the value of the husband’s business interests.
47. Mrs Marshall developed the husband’s position as follows:- in *Ellison* the discount was 100%. The Court of Appeal heard argument from Mr Hargun supporting the 100% discounting of the husband’s interest in CD&P who was not likely to retire for the next 12–14 years. Therefore the CD&P and Harrington Heights assets would not be realized for at least 12–14 years. At the end of that period, what the equity in CD&P would be, consisting as it does to a large extent in receivables i.e. work billed but not paid and work in progress is doubtful. A lot depends on what would be the volume of international company work and one cannot assume that the volume of such work would remain at the current level. Factors such as political stability, the cost of doing business here as against the cost of doing such business elsewhere have to be taken into consideration. There would never be any income from receivables; these assets call for a heavy discount. The judge chose to discount them 100%, and he did so on the evidence before him. It is a matter of degree. It was clearly a matter within the ambit of the discretion of the judge; and, bearing in mind the principles enumerated in the Bellenden case, there is no reason to interfere with the exercise of the judge’s discretion. Taking these submissions into consideration Sir Alastair Blair-Kerr P. said:

“In my view (and I think I speak for my Brothers), the learned judge erred in excluding the investments in Harrington Heights Ltd. when ascertaining the assets of the Respondent for the purposes of distribution. On the other hand, in my view, he did not err in discounting 100% the present value of the Respondent’s capital in CD&P. It is impossible to say what this asset will be worth in 12–14 years time.”

48. Mrs. Marshall submits that the case before the Court is similar to the Ellison case. The business has no assets to speak of. The future prospects and success of the business depends on the volume of work available given the sharp downturn in the economy, the

exodus of foreign guest workers, the reduction in the number of vehicles on the roads and the increased competition among garages for available work. The husband is not going to retire nor is he going to enter into a non-compete agreement with any would-be purchaser, which is an underlying premise for a price at the level suggested by Mr Bradshaw to be achieved. The only “value” which this Court should take into account in relation to Rev Automotive is the money that was in the bank account on the date of separation and the value of the tools and equipment (making allowance for those tools belonging to and being the personal property of the husband).

49. As regards the Duncan case, Mrs Marshall referred to a helpful part of that judgment. In Duncan, the judge did not take a final view of what the discount should be but stated that a discount of 100% was not necessarily consistent with the concept of fairness although he commented that a very substantial discount was appropriate and suggested that it would have to be greater than 50% and more realistically approaching the 75% mark.
50. Finally, Mrs Marshall submits that the case is parallel to the Ellison and Duncan cases and should result in a 100% discounting of the value attributed to the business. The business represents the husband’s tool of his trade and for all these reasons the Court should apply a 100% discount to the value of the business as assessed (on an empty till basis) by Mr Bradshaw.

Court’s Conclusion

51. On the evidence before the Court regarding the pre-marital co-habitation and the activities of the husband and wife in relation to the business Rev Automotive an action was done which was prohibited by law for the public’s benefit. Mr Kessaram submits that in 2004 the husband’s side job was “transformed and legitimized” by the wife. She gave the business the name Rev Automotive and registered it at the Social Insurance Department as a sole proprietor. In my judgment the result of the provision of section 30 (1) of the Contributory Pensions Act is that any person who knowingly makes any false statement or gives false information commits a breach of the Act. Additionally, the wife was in breach of section 60 (1) of the Immigration Act as well as section 27 of the Criminal Code.
52. The Court agrees with the submission of Counsel for the husband that whether the wife was engaging in a local business with her then boyfriend, a non-Bermudian, or whether she was a sole proprietor employing him she committed offences under section 60 (1) of the Immigration Act. The wife deceived the authorities by making a deliberately false statement. Infringement of either Act constitutes an offence and therefore punishable by a court of Summary Jurisdiction. Clearly these actions by the parties are prohibited by the sections. By registering the business and herself as the sole proprietor the wife contemplated that her then boyfriend would continue to be involved in a business in a manner which the law prohibits.

53. There is no doubt that establishing the business was the husband's brain child. Its success depended on his specialist skills. The wife contributed by carrying out the clerical and administrative duties of the business. The Court accepts as a fact that the clerical and administrative side of the business continued to be run out of the wife's home until the marriage broke down and the parties separated in January 2011.

Alderley

54. It can be seen from the accounts that Rev Automotive had become a highly lucrative business. By September 2007, they were able to save enough funds together with their personal savings to assist with a significant (\$237,000) down payment and completion of the purchase on a two-unit property (main house and one apartment) known as "Alderley" which was to eventually become the matrimonial home. The purchase price of Alderley was \$1,295,000. At the time of the purchase the parties paid \$237,080. They received a mortgage loan of \$1,095,000 from HSBC. Over time, the husband was able to reduce the mortgage by a further \$415,500 from the profitability of Rev Automotive except that \$24,000 of this amount was from the parties' wedding gifts. The house was purchased in the wife's sole name as the husband was non-Bermudian and he had not secured a license to hold a joint interest in the property. As the wife was an employee of HSBC the mortgage was obtained on preferential terms (that is the rates of interest was 4% per annum instead of 7.25%). After the purchase, the property Alderley was renovated with the assistance of the husband and his friend, the wife and her father. There is a dispute as to the cost of the renovations and as to who did what work.
55. What the evidence shows the Court is that the property Alderley is a family asset. The Court is satisfied and finds as a fact that the husband and the wife made a joint decision to purchase Alderley, to renovate it and to rent it. Their combined income allowed them to make this decision which benefited the family.
56. Since the parties separated, the wife has collected all rental income totaling \$7,500 monthly from Alderley. The main unit was rented for \$5,100 monthly from February 2008 and the apartment was rented for \$2,400 monthly from May 2008. The wife made all the initial repayments of the mortgage totaling \$20,211.76 until Alderley was fully rented. From the rental income of \$7,500, the wife pays the amortized mortgage at the rate of \$3,561 monthly as well as the land tax, water and Belco bills. Additionally, the rental income covered the child nursery fees of \$1,000 monthly as well as a portion of the concessionary rent of \$1,650 for the property, which formed the matrimonial home. Any surplus from the rental income is retained by the wife.

How are the matrimonial claims to be resolved?

57. The Court is guided by the provision of section 29 (1) of the Matrimonial Clauses Act 1974 (MCA) and by precedent.

58. The wife is fully employed and no longer seeks any maintenance for herself. There is really no evidence to suggest that the husband will not be able to earn enough from the business to meet his needs and his portion of the child's maintenance. The Court accepts Counsel for the wife's submission that based on the volume of cash generated by the business pre-separation the husband has not given his true financial worth to the Court. The evidence in this case support the position that 60% the earnings of Rev Automotive was in cash. He pleaded privilege against self-incrimination when during cross-examination he was asked to disclose the income of Rev Automotive in the period following the breakup of the marriage.
59. Insofar as a home for the wife and child is concerned, the Court is satisfied that her housing needs are met. The wife's father created a trust – the "DE" Trust – in respect of his estate. The wife is a trustee as well as a beneficiary of the trust. She has lived at her current address at a concessionary rent from before she met the husband so she makes no claim in this respect; the Court accepts that she has adequate housing to meet hers and their child's needs.
60. The wife's position is that she should be given one half of the net equity upon the sale of Alderley and a lump sum of \$380,000 that represents one half of the equity of Rev Automotive.
61. At paragraph 45 of his written submission Mr Kessaram outlines the husband's assets. He wrote that the husband's statement of assets is contained in paragraph 19, 72, and 73 of his second affidavit, and in those paragraphs he alleges the following assets: two Mutual Fund Accounts CD\$19,082.99 and US\$79,332.69, and a VW gold motor car with a value of \$25,000. The husband stated he had significant premarital savings of approximately \$400,000 that he had accumulated from working in Bermuda. From these funds, \$250,000 was used to pay the deposit on Alderley and approximately \$98,000 was used to fund an investment account. However, during cross-examination the husband retracted his evidence that he had saved \$400,000 from his employment at HWP. He has failed to provide any documents in support of debts he says he owes to family members in Canada. Analysis of the amounts transferred abroad shows that \$96,701.96 was transferred to a family member and \$316,165.87 to unknown recipients.
62. Mr Kessaram stressed that if, as the husband alleges, the \$98,000 in the investments account are to be treated as pre-marital assets only the original subscriptions amount of US\$50,000 and CD\$12,008.95 should be so treated as the documentary evidence shows that his US\$ investment was commenced (prior to the marriage) with a deposit of US\$50,000 to which was added US\$16,107.71 in June 2007 (after the marriage). The Canadian dollar account was started with a subscription of CD\$12,008.97 in May 2004 (prior to the marriage) to which was added CD\$5,000 in January 2006 (just prior to the marriage but after the parties started living together and were operating the business of Rev Automotive).
63. The husband's lack of frankness and full disclosure from the outset has cast tremendous doubt on his testimony regarding his financial circumstances and his current earnings.

Additionally, the husband's own evidence has left this Court in doubt as to the real purpose of the funds he sent to Canada.

64. Paragraphs 47 to 50 repeat part of Mrs. Marshall's argument in support of her proposition that the Court should apply a 100% discount when considering the value to be placed on what is essentially the "tools of the trade" of the husband, a sole trader, to the extent that the husband seeks a 100% discount of the value of her Rev Auto, the Court rejects it.

65. The concluding words of MCA 1974 Section 29 (1) requires the Court "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 property discharged his or her financial obligation and responsibilities toward the other". Mr Justice Bell comments in the Duncan case that:

"I do not think that a 100% percent discount is invariably appropriate in the post-White era, but at the same time the discount to be applied in this case would need to be more than on half, and more realistically approaching three quarters of the value of the asset... In departing from the authority of Ellison, I do so only on the basis that in my view the Court of Appeal would now look at matters differently on account of White v White. This reflects the view of Coleridge in N v N [2001] 2FLR 69."

66. Mr Kessaram in the end submits that the wife should receive 50% of the net proceeds from the sale of Alderley. Additionally, the wife should immediately receive a lump sum and the husband retains his interest in the business subject, according to Mr Kessaram, to the wife receiving 50% of its value being \$350,000.

67. Mrs Marshall submits that the only funds that should be included from the bank balances of the Rev Automotive account on the date of separation should be \$141,891. The husband should be reimbursed his pre-marital savings of \$78,000 that was used at the time of purchase of the Adlerley. This would leave a balance of \$63,891 to be divided between the parties. Counsel maintains that upon the sale of Alderley the net equity allowed should be divided as to 1/3 to the wife and 2/3 to the husband. The parties should have joint conduct of the sale with liberty to apply should they be unable to agree on any matter pertaining to the sale.

68. Having regard to the evidence in this case the Court orders that the husband pay the wife \$250,000, such an order would provide her with some compensation for her hard work in the business. Plainly, the Court has departed from equality in a case where it finds that the business is the tools of the husband's trade. Based on the evidence before the Court the wife is entitled to 50% of the funds in the Rev Automotive account upon separation. Also based on the husband's lack of frankness, the Court is entitled to draw robust inference that he has funds "salted" away. The husband has 60 days within which to pay \$150,000 of this sum. The balance of \$100,000 is to be paid out of the husband's portion of the proceeds from the sale of Alderley.

69. Insofar as Alderley is concerned, upon the sale, the net proceeds should be divided equally. The parties should have joint conduct of the sale with liberty to apply if there is any disagreement. In the interim, any excess from the rental income (after payment of bills and similar inescapable expenses in relation to the upkeep of the property) should be divided equally.
70. Insofar as the child is concerned the husband is hereby ordered to contribute 50% of all her reasonable expenses including school fees, school clothing and agreed extra-curricular activities monthly towards her maintenance. Each parent should bear the costs of the expenses for the child while in their care. Liberty to apply if the parties are unable to agree on any issue.
71. Counsel is invited to endeavor to draw up a suitable order for the Court's approval. The Court will hear Counsel on cost if they are unable to agree.

Dated the 26th day of April 2013

Norma Wade-Miller
Puisne Judge