SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT LUCIA

CLAIM NO. SLUHMT2001/0131

BETWEEN:

CRAIG LAURIE BARNARD

Petitioner/Respondent

AND

PENELOPE ANN BARNARD NEE BIRD

Respondent/Applicant

APPEARANCES:

Mrs. Brenda Floissac Fleming
for Petitioner/Respondent

Mrs. Beverly Walrond, Q.C.
and Mrs. Esther Greene Ernest
for Respondent/Applicant

2006: April 7, May 5

JUDGEMENT

INTRODUCTION

[1.] **EDWARDS J**: The Respondent's Application for Ancillary Relief has thrown up apparently unlitigated issues. They relate to the present status of '*separate property*' of spouses in St. Lucia, the legal requirements and procedure for

claiming an interest in such property during matrimonial proceedings, and the Court's statutory powers in making transfer of property orders under Section 24 (1) (a) of The Divorce Act.

[2.] By their Counsel's Statements of issues and legal arguments, the parties have sought the Court's interpretation of certain relevant provisions in the Divorce Act Cap 4:03 of The Revised Laws of St. Lucia (2001) and the Civil Code St. Lucia Cap. 242.

THE PRELIMINARY ISSUES

[3.] The following are the issues identified by the Legal Representatives of the Respondent (the Wife) in their statement of the preliminary issues filed on the 27th January, 2006 and subsequently amended -

"(1) **The applicability of Section 45 of the Divorce Act of St. Lucia to the matters before the Court in circumstances where the property of the husband is represented by shares owned in a family business and/or in business owned jointly with his brother** [See paragraphs 17-A to 17-K of this Judgement].

(2) **Whether Section 45 of the Divorce Act of St. Lucia may be applied in this case where the Application and the supporting affidavit filed by the Respondent/Wife under Section 45 were made after the decree nisi but before the decree absolute; and whether such Application is in accordance with the requirements that such an Application be made before the decree of divorce was pronounced?** [See paragraphs 6 to 17 and 18 to 33 of this Judgement].

(3) **Whether Section 45 is fully determinative of the claim of the Wife to be granted property which under the law of the Civil Code is not "community property?"** [See paragraphs 46 to 50 of this Judgement].

(4) **The applicability of Section 24 of the Divorce Act to property which is not community property within the meaning of the Civil Code; and the power of the Court to order a transfer of property found to be the sole property of either party within the meaning of the Civil Code St. Lucia under Section 24** [See paragraphs 50 to 97 of this Judgement]**.**

(5) **The relationship between the Civil Code provisions and Sections 22, 24 and 25 of the Divorce Act** [See paragraphs 50 to 97 of this Judgement]**.**

(6) **The applicability and relevance of the English cases decided under the English legislation the Matrimonial Causes Act 1973, Section 25 to the**

instant case, having regard to the Civil Code of St. Lucia" [See paragraphs 50 to 97 of this Judgement].

[3-A] The preliminary issues in the Statement of Issues filed on the 30th January, 2006 by Counsel for the Petitioner (the Husband) are –

"I. …

II. Whether it is only matrimonial properties (i.e. properties which are not separate properties and which were acquired by the spouses during marriage and as a result of the labour of both spouses) which are available for distribution between the spouses with the result that, subject to the doctrine of implied, resulting and constructive trust and a spouse's right to compensation for domestic contribution, each spouse is entitled to retain his/her separate properties as defined in Articles 1192 to 1199 inclusive of the Civil Code as preserved by Section 45 (b) of the Divorce Act? [See paragraphs 50 to 97 of this Judgement]

III. …

IV. Whether the Respondent is entitled to compensation (under Section 45 (b) of the Divorce Act) for domestic contributions (by way of domestic services rendered as a wife, mother and household manager) to the improvement, enhancement in value, preservation or retention of the Petitioner's separate properties: [See paragraphs 35 to 45 of this Judgement].

V. Whether the statutory powers of a Saint Lucian Divorce Court are as extensive as the Statutory powers of an English Divorce Court in relation to the making of an order transferring upon a claimant, rights and interests in the separate properties of the claimant's spouse?[See paragraphs 50 to 97 of this Judgement]

VI. Whether the Respondent holds her separate properties on an implied, resulting or constructive trust in favour of the Petitioner by reason of the Petitioner's substantial external or extra-matrimonial contributions to the acquisition, improvement, enhancement in value, preservation or retention of those separate properties? [See paragraphs 35 to 45 of this Judgement].

VII. …

VIII. …

IX. Whether Section 25 (1) of our Divorce Court… purports:-

(1) …

(2) to confer upon a wife proprietary rights over the separate properties of her husband when the wife has not made any substantial contribution to the acquisition, improvement, enhancement in value, preservation or retention of those separate properties…? [See paragraphs 50 to 97 of this Judgement]

(3) …..”

[4.] I propose to deal with these issues by endeavouring to answer four (4) simple questions -

(A) What is the procedure and law governing one spouse’s claim to an interest in the separate property of the other spouse in St. Lucia?

(B) What is the nature of the contributions necessary to prove a spouse’s claim under Section 45 (b) of the Divorce Act?

(C) What is the nature of the order that the Court is empowered to make under Section 45 (b) of the Divorce Act:

(D) Can a Court order that the separate property of the husband be transferred to the wife in an Application under Section 22 and 24 (1) (a) of the Divorce Act?

[5.] In dealing with Question A, it is necessary to refer to the background and relevant facts concerning the Applications for Ancillary Relief in this case. Question A embraces the Preliminary Issues Nos. 2 and 1 in the Wife’s Statement of Issues.

BACKGROUND FACTS

[6.] The parties were married on the 25th January, 1975. Prior to their marriage they were living together. On the 18th December, 2001 the husband petitioned for divorce. An answer and cross petition were filed for the wife on the 17th January 2002. An Amended Petition was filed with leave on the 15th May, 2002.

Thereafter, on the 17th May 2002 a decree nisi of divorce was granted. On the 4th March, 2005 the decree nisi of divorce was made absolute.

[7.] The wife did not apply for Ancillary Relief in her answer and cross-petition. In the Decree Nisi Order, Ancillary Relief Proceedings were adjourned to Chambers for hearing on a date to be fixed by the Court Administrator on application of either party.

THE LEGAL REQUIREMENT FOR APPLICATIONS

[8.] The Divorce Rules 1976 require a Petitioner or Respondent to make an application claiming Ancillary Relief for maintenance pending suit, periodical, secured periodical or lump sum payments orders, settlement or transfer of property orders, or variation of settlement orders in their petition or answer: (Rule 50)

[9.] Otherwise, the Petitioner or Respondent must apply to the Court for **LEAVE** before making any such claim by Notice in Form 15: (Rule 50 (2) (a)).

[10.] Rule 50 (2) (b) permits a late application for such Ancillary Relief to be made without **LEAVE** where the parties are agreed upon the terms of the proposed order, if the claim was omitted from the petition or answer.

[11.] Rule 50 (3) seems to me to cover Applications for Ancillary Relief claiming an avoidance of disposition order or a variation order, given the definition of **"Ancillary Relief"** in Rule 2.

Rule 50 (3) contemplates that such Applications should be made without leave by Notice in Form 15 also.

[12.] Rule 75 of the Divorce Rules 1976 states that Applications for a property order under PART 4 of the Divorce Act, (which includes Section 45) **must be made by Summons with supporting Affidavit verifying the statements in the Application**. Rule 84 states that every application in matrimonial proceedings shall be made by summons, except where these rules or any other applicable rules provide otherwise.

THE LAW OF SEPARATE PROPERTY

[13.] Section 45 (b) of the Divorce Act states -

> **"45 The Court, on making a decree of divorce…may, if it thinks fit, on the application of either party made before the decree of divorce…is made, make an order –**

(a) **…**

(b) **if any property of the parties or either of them is separate property within the meaning of the Civil Code and the Court is satisfied that the other party <u>has made a substantial contribution (whether in the form of money payments, or services, or prudent management, or otherwise howsoever) to the improvement or preservation of such property</u>** –

(i) **directing the sale of such property and the division of the proceeds, after the payment of the expenses of the sale, between the parties in such proportions as the Courts thinks fit, or**

(ii) **directing that either party pay to the other such sum, either in one sum or in installments and either or at a future date and either with or without security, as the Court thinks fair and reasonable in return for the contributions made by that other party."**

[14.] **"Separate property"** under Article 1192 (2) of The Civil Code of St. Lucia includes -

"(a) **property, movable and immovable which the spouses possess on the day when the marriage is solemnized;**

(b) **the income and earnings of either spouse, investments in the name of one spouse…**

(c) **property, movable and immovable, acquired by succession, or by donation or legacy made to either spouse particularly;**

(d) **…**

(e) **fruits, revenues and interest of whatever nature they be, derived from separate property, and property acquired with separate funds or in exchange for separate property;"**

[15.] Article 1196 states -

"(1) **Gifts and legacies made to one of the spouses do not fall into the community unless there is an express declaration to the contrary;**

(2) Gifts and legacies made to the spouses jointly, if made by an ascendant of one of the spouses are deemed to be the separate property of such spouse as being acquired under title equivalent to succession; and do not fall into the community unless there is an express declaration to the contrary."

[16.] Articles 1198 states that - **"Property acquired during marriage with separate funds or in exchange for separate property is separate property."**

[17.] By Article 1193, **"Property is deemed to be the joint acquisition of the community unless it is admitted or proved to have belonged to, or have been in the legal possession of one of the spouses previously to the marriage, or if acquired after marriage; is admitted or proved to have been acquired**…[as separate property under] **Article 1192 or to otherwise belong to one of the spouses only…"**

This provision therefore establishes that the burden of proof is on the spouse asserting that property is separate property, where the other spouse claims it is community property.

SHARES IN FAMILY BUSINESS OF ONE SPOUSE

[17-A] Without delving too much into the factual position, I will examine the arguments of Counsel concerning the patrimonial and fraternal share holdings of the husband in the Patrimonial Hotel Group of Companies, other Patrimonial Companies, and the Fraternal Companies as described by the husband.

[17-B] Learned Counsel for the husband contends that the value of such shares as a result of the enhancement in value of the hotels and other assets of these Companies, are not attributable solely to the labour of the husband and the domestic services of the wife. The following factors have been identified by her as the reason for any enhancement in the value of the Companies' Hotels and other assets of the Company

(a) The injection of capital into the Companies by way of bank loans, advances and overdraft facilities, and an inter-company loan;

(b) The fact that the net profits of the Companies were very seldom distributed by way of dividends among the shareholders, but were applied or appropriated to the use of the Companies and to the enhancement in value of their assets;

(c) The growth of tourism in St. Lucia during the marriage, the phenomenal increase in the value of the Hotels during the marriage.

(d) The labour of the Staff at the Companies' Hotels.

[17-C] Mrs. Fleming further argued in substance, that since the husband was paid a salary for the services he rendered to these companies, and the services rendered by him beyond the call of duty were overtime for which he was not legally entitled to be paid, then such overtime services are direct external or extra-matrimonial contributions by him towards the enhancement in the value of the Companies' Hotels and other assets. So any alleged supportive contributions of the wife, in the form of domestic labour, which may have assisted the husband in his overtime services to the Companies' Hotels, she argued, would not qualify for compensation under Section 45 (b), since the husband was not legally entitled to payment for overtime services, although such services may have contributed to the enhancement in value of the Companies' Hotels and other assets. Let me hasten to add here that Queen's Counsel Mrs. Walrond has strenuously rejected the suggestion that the wife's contributions consisted of domestic labour. The evidence shows otherwise she contends.

[17-D] As for the husband's shareholdings in other Patrimonial Companies and the Fraternal Companies, the facts are in issue as to whether the wife made any alledged contributions that would entitle her to compensation under Section 45 (b).

[17-E] Mrs. Fleming canvassed her view that since these shareholdings of the husband constituted separate properties as having been acquired –

(1) by specific donation and inheritance from the husband's father pursuant to Article 1192 (2) (c) of the Civil Code; or

(2) as investments in the sole name of Mr. Barnard pursuant to Article 1192 (b) of the Civil Code,

the general Rule is that those shares are not available for distribution to the wife and the husband is entitled to retain these shares.

[17-F] On the other hand Mrs. Waldrond Q.C. contends that in the absence of a local statutory definition of the word **"property"**, the meaning in Stroud's Judicial Dictionary, 4th edition at page 2157 should be accepted. There, **"property"** is defined as being the general term for all that a person has dominion over. **"Property is the most comprehensive of all terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have:"** (Per Langdale M.R. in **Jones v Skinner** 5 L.J. Ch. 90). She has urged me to find that the husband's shareholdings in any company should not be exempt from the ambit of those definitions; and that these shareholdings are amenable to the jurisdiction of the Court under Section 45 (b) of the Divorce Act in the circumstances alleged by the wife.

[17-G] In the absence of any apparent contest between the spouses as to whether the husband's said shareholdings are 'separate property', I accept that these shareholdings are investments under Article 1192 (b), having been acquired by donation or legacy under Article 1192 (c).

[17-H] Applying Article 1192 (e) to the circumstances in this case, in my opinion, there is no reason why the "fruits, revenues" and any other financial benefits accruing to his shareholding investments, cannot be the subject of an application under Section 45 (b), where the claimant wife is able to prove on a balance of probabilities that she contributed substantially to the improvement or preservation of those investments.

[17-I] It must be remembered however, that **"the improvement or preservation of such property"** within the context of Section 45 (b) in this case, means the improvement and preservation of the husband's shareholdings in the relevant Companies. It does not mean the improvement and preservation of the Companies' hotels and other assets (though this must necessarily be considered) since the separate properties of the husband are not the properties owned by the Companies but his shareholdings in the Companies.

[17-J] In these circumstances, in my opinion, the wife's focus would have to be on proving –

(a) that the Companies in which the husband had share holdings made a profit which increased the value of her husband's shareholdings; and

(b) that she is entitled to a portion of the amount by which the value of her husband's shareholdings were increased, because she made the directly referrable contributions required by Section 45 (b) of the Divorce Act.

[17-K] In any event, regardless of what the wife is able to prove, any application or arguments contemplating the transfer of shares to her from her husband's shareholdings in these Companies would necessarily have to be subject to the Regulations of the Companies as contained in their Articles and Memoranda, and the relevant Company Law, which in my understanding, usually forbid or restrict the transfer of shares, and/or lay down the conditions under which a transfer of shares may be made.

THE APPLICATIONS

[18.] Returning now to consider the Applications, it is important to closely examine the Ancillary Relief claimed in the Notice of Application for Ancillary Relief filed on the 31st July 2002 on behalf of the wife, although it purported erroneously that it was the Petitioner's Application of Ancillary Relief.

[19.] The Form 15 Notice of Application was for an Order for maintenance pending suit, a periodical payments order, a secured provisions order, a lump sum order and **"a property adjustment order"** in respect of 5 properties which are apparently community property.

[20.] The term **"Property Adjustment Order"** is unknown to The Divorce Act of St. Lucia and The Divorce Rules. It appears that it is an English statutory concept, introduced by Section 21 of The U.K. Matrimonial Causes Act 1973. Section 21 (2) of this Act states:

> **"The property adjustment orders for the purposes of this Act are the orders dealing with property rights available (subject to the provisions of this Act) under Section 24 below, for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce; nullity of marriage or judicial separation that is to say –**
>
> **(a)** **any order under subsection (1) (a) of that section** [similar to Section 24 (1) (a) of The St. Lucia Divorce Act] **for a transfer of property**;
>
> (b) **any order under subsection (1) (b) of that section** [similar to Section 24 (1) (b) of the St. Lucia Divorce Act] **for a settlement of property**; and
>
> (c) **any order under subsection (1) (c) or (d) of that section** [similar to Section 24 (1) (c) and (d) of the St. Lucia Divorce Act] **for a variation of settlement**."

[21.] This Notice of Application was filed WITHOUT LEAVE, contrary to Rules 50 (2) (a) and (b) of the Divorce Rules. It also failed to comply with Rule 56 (1) in relation to the community properties. Rule 56 states -

> (i) **"Where an application is made for …. a transfer of property order… <u>the application shall state briefly the nature of the transfer proposed</u> and the Notice in Form 15… shall unless otherwise directed, be supported by an affidavit by the applicant stating the facts relied on in support of the application"** (My emphasis).

[22.] Learned Queen's Counsel Mrs. Waldrond contended that this Notice of Application for Ancillary Relief is in the nature of an application under Section 45 of the Divorce Act although not expressly stated to be such, and as such this application, having been filed before the decree absolute which was obtained on the 4th March, 2005 would have conformed with the statutory requirement for such an application to be made before the decree of divorce.

[23.] She observed also that there was no definition of the words "decree of divorce" in the Divorce Act, and the "decree nisi" is merely a step towards a decree of divorce.

[24.] Although Learned Counsel Mrs. Floissac Flemming seemed prepared to accept that this Application of the wife accords with the procedural requirements of Section 45, it is patently obvious to me that there was no Application for a property order pursuant to Section 45 (1) (b) of the Act and Rule 75 of the Divorce Rules 1976. A transfer of property application is not an Application for a Property Order.

[25.] It is worth noting that Article 1305 of the Civil Code co-exists with the Divorce Act provisions: It states -

> **"A married woman, her husband or any interested person may petition the Judge for the determination of any question affecting the rights, interest, obligations or liabilities of such married woman and the Judge may make such order, if any or given such directions, if any as he may consider just and proper in the circumstances."**

[26.] The present Application under consideration would not qualify as a petition under Article 1305. Arguably, Article 1305 could accommodate an application by way of a petition, similar in substance to an application under Section 45 (b) of the Divorce, since a marriage is not dissolved upon the grant of a decree nisi of divorce. The Courts powers under Article 1305 seem very wide. However, Section 53 of the Divorce Act states that **"Where a conflict exists between this Act and any other law the provisions of the Act shall prevail."**

[27.] Though Article 1305 may probably not be seen as conflicting with Section 45 (b), in my opinion, the Divorce Act contemplates that once proceedings for divorce have commenced, all matters and claims pending suit should be resolved by the Court upon Applications under the Act. Article 1305, in my view is been superseded by the relevant Divorce Act provisions, once divorce proceedings have commeneced.

[28.] I regard a wife's claim under Section 45 (b) as a claim to an 'interest' in the separate property of her husband. Such a claim may be interpreted as an admission by the wife that the specific property however acquired, was indeed separate property, thereby rebutting the presumption under Article 1193 of the Civil Code which deems such property to be the joint acquisition of the community. Such an Application would therefore have to clearly identify the separate property that is the subject of the Section 45 (b) Application, and state in the supporting affidavit the facts which may prove on a balance of probability that the wife had made substantial contributions in the form of either money payments or services or prudent management or otherwise to the improvement or preservation of that specific property.

[29.] Having read the Application of the Wife and her supporting affidavit, I can find no identification of any specific separate property that is the subject of a Section 45 (b) property order application. I therefore hold that the Respondent Wife has failed to make a timely application in the prescribed form for a Property Order pursuant to Section 45 (b), before the Decree Nisi was made Absolute.

[30.] As for the Amended Application filed on the 30th November, 2005 pursuant to a Court Order made on the 23rd September, 2005, I refer to my previous statements on the legal requirements and procedure for the presentation of a Section 45 (b) claim.

[31.] In my opinion, it is very clear that the form of the Application under Section 45 (b) must be by Originating Summons pursuant to Rules 3, 75, and 84 of The Divorce Rules, Order 32 Rule 1 and Order 7 Rule 2 of The Rules of the Supreme Court 1970. It is obvious that Form No 6 in Appendix A to the Supreme Court 1970 Rules is the form to be used in such Applications.

[32.] Given the difference in the procedural requirements, in my view, an Application for financial provision under Section 22 and an Application for a transfer of property order under Section 24 (1) (a) of The Divorce Act are procedurally compatible, but they cannot be combined with an Application for a property order under Section 45 (b). The property order claim must be a separate application by Originating Summons.

[33.] It is obvious to me therefore that the Application for the property order in paragraph (2) of the Amended Pleadings must be dismissed, primarily because it has been made after the decree nisi was made absolute.

[34.] I shall now move on to consider Question B, formulated at paragraph 4 of this Judgement. It embraces Issues IV and VI of the husband's Statement of Issues.

NATURE OF CONTRIBUTIONS FOR A SECTION 45 (b) PROPERTY ORDER

[35.] Issue IV and VI in the husband's Statement of Issues (at paragraph 3 of this Judgement) presupposes in my view, that there are valid Applications for Section 45 (b) property orders, filed by each spouse in respect of the separate property of the other spouse. No such Applications exist.

[36.] Consequently, it seems to me that these issues have been posed for academic reasons since any consideration of them must necessarily involve only a pronouncement in the form of general statements on the applicable law for a Section 45 (b) property order.

[37.] The presence of the words "**whether in the form of money payments, or services, or prudent management, or otherwise however**" in Section 45 (b), clearly indicates by the plain and ordinary meaning of the words, that there are other types of contributions contemplated by the provision which may qualify as substantive contributions apart from money payments and services rendered by the spouse or prudent management. I consider it wise not to state what those other types of contributions may be at this time.

[38.] It seems evident to me also, that where a spouse rendered domestic services as a wife, mother and household manager, and those contributions are directly referable to or identifiable with the improvement or preservation of the separate property which is the subject of an Application, there is nothing in Section 45 (b) which would preclude this type of contribution from attracting compensation under Section 45 (b) as "**services**" rendered, provided it was a substantial contribution..

[38-A] It appears that in New Zealand, a jurisdiction also having the concept of community property, their legislation provides for the Court to have regard to the contributions of an ordinary housewife in her domestic sphere, and this would be an indirect contribution to the retention of the matrimonial home even though it has originally come to the husband by way of a gift. With regard to other assets, the New Zealand Court has a discretion whether to take into account such a contribution: (**Haldane v Haldane** [1997] WLR 760 (P.C.)

[39.] This differs starkly from the position in England as it relates to their Section 17 of The Married Women's Property Act 1882, and Section 37 of The Matrimonial Proceedings and Property Act 1970 which have not been repealed by their Matrimonial Causes Act 1973 (U.K.). These provisions are comparable in substance to some extent with Article 1305 of the Civil Code and Section 45 (b) of The Divorce Act, in my view.

[40.] Section 17 gives the High Court jurisdiction to determine questions as to title or possession of property between spouses, on the application of either spouse, made during the subsistence of the marriage or within 3 years of the date on which the marriage has been dissolved or annulled. The Court may make such order as it thinks fit, including an order for the sale, detention, custody or possession of the property on such terms as it thinks fit: **(Halsbury's 4th ed. Vol. 13 para. 802).**

[41.] Section 37 of The Matrimonial Proceedings and Property Act 1970 (UK) – complements Section 17 of the 1882 Act. It states -

> **"It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property *in which* or in the proceeds of sale of which either or *both of them has or have a beneficial interest,* the husband or wife so contributing shall, if the contribution *is of a substantial nature* and**

subject to any agreement between them to the contrary express or implied*, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share* as the case may be *in that beneficial interest* of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings)."

[42.] It was explained by Davies L.J. in **Griffiths v Griffiths** [1974], ALL E.R. 932 at page 943, that Section 37 **"…was passed in order to put an end to the arguments and to the differences of judicial opinion that used to arise in proceedings under S:17 of the Married Women's Property Act 1882…"**

[43.] The English Courts it appears, **"would not be prepared to go so far as … taking into account – under S.17** - …[a wife's] **contributions in looking after and bringing up the family and in looking after the house, buying the food and so forth. Such contributions can be considered under the 1970 Act (Sec 5 (1) (f))** [which is similar to Section 25 (1) (f) of the Divorce Act St. Lucia] **but not under S. 17 of the 1882 Act… [A]fter there has been a divorce, the property rights of the parties may be adjusted by means of an Application under S. 4 of the 1970 Act** [similar to Section 24 (1) (a) of the Divorce Act St. Lucia]**": (Per Lord Denning M.R. in Kowakzuk v Kowakzuk [1973] 2 ALL E.R. 1042 at 1045 paras f to h).**

[44.] It would seem also from the provision in Section 45 (b) of the Divorce Act, that a finding by the Court that a husband made the substantial contributions prescribed by Section 45 (b) to separate property of his wife, may not by itself lead to a finding that a wife holds such separate property on an implied, resulting or constructive trust in favour of the husband. This is because Section 45 (b) is not necessarily concerned with contributions of a claimant spouse towards the acquisition of the separate property of the other spouse in my opinion. Neither is it necessarily concerned with any common intention between the spouses that the claimant spouse would share in the beneficial interest of the separate property, or whether the claimant spouse acted to his/her detriment in reliance on any agreement.

[45.] However, where there is evidence that a husband prior to marriage, made substantial contributions to the acquisition, improvement, enhancement in value or preservation or retention of property owned by his wife, in my opinion, the legal principles by which the Court apportions shares in property in a case where a man and woman have had an informal common law relationship would apply. These principles are similar to the case of husband and wife: **Cupid vs Thomas** [1985] 36 W.I.R. 182. It appears that the settled law would allow the Court to award the husband a share in such separate property owned by the wife if the husband has made an Application, and proves that he has a beneficial interest in

such separate property under an implied trust, or a constructive or resulting trust: (See **Lloyds Bank vs Rossett** [1990] 2 WLR 867; **Grant v Edwards** [1986] 2 ALL E.R. 426; **Jones v Jones** [1977] 2 ALL E.R.; **Greasley vs Cooke** [1980] 3 ALL E.R. 719; **Sandra Connor v Elvis Hull**, Claim No. 0116 of 2000 (Anguilla) delivered by Edwards J. September 2004); **Pettitt vs Petititt** [1969] 2 ALL E.R. 385; **Gissing v Gissing** [1971] A.C. 886; **Cooke v Head** [1972} W.L.R. 518

[46.] I turn now to consider Question C at paragraph 4 of this Judgement. This question addresses issue No. 3 of the Wife's Statement of preliminary issues.

THE NATURE OF A SECTION 45 (b) PROPERTY ORDER

[47.] Section 45 allows a Court to quantify the value of the substantial contribution in relation to the net value of the spouse's separate property that is the subject of the Application. Thereafter the Courts power is restricted only to ordering a sale of that property and distribution of the net proceeds between the spouses, or directing the terms of payment either in lump sum or in periodic payments with or without security.

[48.] The Court is not empowered by Section 45 (b) to grant that separate property of a husband to a wife who makes such a claim under this provision only.

[49.] It is to be noted however, that Applications under Section 45 of the Divorce Act, Applications for settlement or transfer of property, and Applications for financial provision usually rely on evidence that is common to all the Applications. The outcome of an Application under Section 45 is therefore likely to affect the other applications in my view.

[50.] I refer to paragraph 39 above and my view that Section 17 of the U.K. 1882 Act, and Section 37 of the U.K. 1970 Act are comparable to Article 1305 of the Civil Code and Section 45 (b) of the Divorce Act. Speaking of the provision in the 1973 U.K. Act which is similar to Section 24 (1) (a) of the Divorce Act, Edmund Davies L.J. in **Hunter v Hunter** [1973] 3 ALL E.R. 362 at 356-366 opined:

> "**The power to order a transfer of property should … be employed …as a means of recognizing the transferee's contributions to the accumulation of the family wealth and of assuring so far as just and practicable, his or her future living standards. Consideration of what legal interest in property one spouse might have been able to establish as against the other on an application under the Married Women's Property Act 1882 are in some cases of academic concern only, and where a spouse's interest has been quantified within the framework of such an application the interest may be only relevant as serving to reduce or extinguish his or her right to a property transfer under the Act of 1973."**

[51.] It seems therefore on the authority of **Hunter v Hunter** (supra) that the absence of the wife's Application under Section 45 (b) is not necessarily fatal to her Application under Section 24 (1) (a) for a transfer order relating to the separate property of her husband. It seems also that a prior determination of a claim under Section 45 (b) cannot prevent the Court from determining a claim under Section 24 (1) (a). The absence, failure or success of a claim under Section 45 (b) is only a circumstance to have regard to when considering the wife's Application for a property transfer order, in my view. It might serve to reduce on extinguish her right to a property transfer under Section 24 (1) (d), but it certainly does not follow therefrom that the wife is disentitled to a transfer of property order under Section 24 (1) (a) of The Divorce Act.

[51-A] In light of this authority, coupled with the difference in the procedure for claiming a property transfer order and a property order, and the nature of the Section 45 (b) order, I have no difficulty in endorsing the submissions of Queen's Counsel Mrs. Walrond. She has argued that Section 45, Section 22, and Section 24 of the Divorce Act exist independently with a separate head of power being granted to the Court by each of these provisions. It follows therefore that the Court's excise of its powers under each of these provisions will depend on the nature of the application before the Court.

[52.] The countervailing submissions of Learned Counsel Mrs. Fleming suggest that the Court, pursuant to Section 24 (1) (a) of the Act, has no statutory power to make any order transferring to or conferring upon a claimant any right or interest in the separate property of the claimant's spouse, unless it is proved that the claimant made a substantial contribution to the improvement or preservation of that separate property. However, Mrs. Fleming seems to have ignored the significance of the 2 provisions which have been mentioned in the introductory paragraph to Section 24. Sections 28 and 32 (1) are mentioned there as the only 2 provisions in the Divorce Act to which Section 24 is subject to Queen's Counsel Mrs. Walrond quite rightly argued that had the legislature intended Section 24 (1) (a) to be subject to Section 45 (b), the provision would have stated this. This view finds favour with me.

[53.] Further, Learned Counsel Mrs. Fleming contended that any encroachment on the husband's separate property in the circumstances in this case would be contrary to Articles 1172 to 1199 inclusive of the Civil Code, as expressly preserved by Section 45 of the Act.

[54.] I do not agree with Mrs. Flemming's arguments in light of the judicial statements in **White v White** and other cases about the ambit of the property adjustment provisions in England: **([2000] 3 W.L.R. 1571)**. Section 53 of the Divorce Act must also be borne in mind, and any conflict between Section 24 (1) (a) of the Divorce Act and Articles 1172 to 1199 of the Civil Code must be resolved by allowing Section 24 (1) (a) to prevail.

[55.] This now leads me therefore to consider the issues encompassed by my Question D (see paragraph 4 above). These are issues 4, 5 and 6 of the Wife's Statement of Issues, and II, V and IX of the Husband's Statement of Issues. I have confined my deliberations to Section 24 (1) (a) of the Divorce Act because Counsel made no submissions concerning Section 24 (1) (b) to (d).

FINANCIAL AND TRANSFER OF PROPERTY PROVISIONS

[56.] It is necessary to reproduce the relevant portions of Section 22, 24 and 25 of the Divorce Act.

> " **22 (1) On granting a decree of divorce or a decree of nullity of marriage or at any time thereafter (whether, before or after the decree is made absolute), the Court may, subject to the provisions of Section 32 (1), make any one or more of the following orders, that is to say –**
>
> **(a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the Order;**
>
> **(b) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified;**
>
> **(c) an order that either party to the marriage shall pay to the other such lump sum as may be specified.**
>
> **(2) Without prejudice to the generality of subsection (1) (c), an order under this section that a party to a marriage shall pay a lumpsum to the other party –**
>
> **(a) …**
>
> **(b) may provide for the payment of that sum by installments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the Court."**
>
> **"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, subject to the provisions of Sections 28 and 32 (1), 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 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 marriage contract made by the parties to the marriage or 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 contract or settlement."

"25 (1) It is the duty of the Court in deciding whether to exercise its powers under Sections 22 …or 24 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 duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) contributions made by each of the parties to the welfare of the family, including any contributions 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 of 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 the 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 obligations and responsibilities towards the other."

[57] THE ENGLISH LEGISLATION AND CASE LAW

In light of Issues No. 6 of the Wife's Statement of Issues and No. V of the Husband's Statement of Issues (See paragraph 3 and 3-A above), it is now convenient to state the differences between our relevant provisions and the relevant English provisions. Section 23 (1) (a) (b) (c) of The Matrimonial Causes Act 1973 (U.K.) is similar to Section 22 (1) (a) (b) and (c) of our Divorce Act. Also, Section 23 (3) (c) of this U. K. Act is similar to Section 22 (2) (b) of our Divorce Act.

[58] Section 24 (1) (a), (b), (c) and (d) of this U.K. Act is similar to Section 24 (1) (a), (b), (c) and (d) of our Divorce Act.

[59] However, Section 25 of the U.K. Act has been amended by Section 3 of the matrimonial and Family Proceedings Act 1984. Prior to this amendment, Section 25 (1) of the U.K. 1973 Act was almost identical to Section 25 (1) of our Divorce Act .

[60] The present Section 25 in the Matrimonial Causes Act 1973 as amended by the Matrimonial and Family Proceeding Act 1984, states in Section 25 (1), that it is the duty of the court in deciding whether, and how to exercise its powers to have regard to all the circumstance of the case. First consideration is to be given to the welfare of any child of the family under the age of 18. Section 25 (2) provides that as regards the exercise of these powers in relation to a party to the marriage, the Court shall in particular have regard to the familiar list of matters that are stated in Section 25 (1) (a) to (g) of our Divorce Act, and the former Section 25 (1) (a) to (g) of the U. K. Matrimonial Causes Act 1973 (which existed prior to the 1984 Amendment). Most significant, is the absence of what has been called "**the tailpiece"** by Lord Nicholls of Birkenhead in **White v White** (supra at page 1577 para H) Missing in the current U.K. provision is the rider in our Divorce Act appearing after paragraph 25 (1) (g) – "**and also to exercise those powers---- -- as to place the parties… in the financial position in which they would have been if… each had properly discharged his or her obligations and responsibilities towards the other."**

[61] Consequently the English Courts since 1984, in the absence of any legislation stating what is to be the aim of the Courts when exercising its wide powers, have implied that "**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… The powers must always be exercised with this objective in view, giving first consideration to the welfare of the children."** (Per Lord Nicholls in **White vs White** [2000] 3 W.L.R. 1571 at 1578 para B.)

[62] Prior to the Matrimonial Causes Act 1973 U. K., there existed the Matrimonial Proceedings and Property Act 1970 (U.K.). As I have already stated (at paragraph 43 above), Section 4 (a) to (d) of this Act is similar to Section 24 (1) (a) to (d) and (2) of our Divorce Act. Also, Section 2 (1) (a), (b), (c) and Section 5 (1) of the 1970 U.K. Act are similar to Section 22 (1) and Section 25 (1) respectively of our Divorce Act.

[63] It is obvious to me therefore that the English cases decided under Section 2 (1), 4, and 5 (1) of the 1970 U.K. Act and Section 23 (1) (a), (b), (c), 24 (1), and 25 (1) of the 1973 U.K. Act, between 1971 up to 1984, should provide ample guidance for the Court in St. Lucia when it is exercising its powers under Sections 22 (1), 24 (1) and 25 (1) of the Divorce Act. The English cases decided under Section 25 (1) and (2)of the 1973 U.K. Act as amended since 1984, are still relevant as useful guides, but the differences in the object and aim that I have referred to, must be borne in mind. Learned Queen's Counsel Mrs. Walrond recognized these differences. She argued that in the face of these differences, the St. Lucia legislation is arguably more generous to applicant than the current English legislation. I agree with these observations of Queen's Counsel.

[64] She also referred to several English cases which contain judicial statements explaining the meaning of Section 25 (1) (a) to (g) of the 1973 U.K. Act, or the 1970 equivalent, one of which was decided in 1971, and the others after 1983. They are: **Wachtel v Wachtel [1971] 1 ALL E.R. 829; Duxbury v Duxbury [1991] 3 W.L.R. 639; GojKovic v Gojkovic [1992] Fam (C.A.) 40; White v White [2000] 3 W.L.R. 1571**.

[65] Mrs. Walrond also referred to 2 cases decided in St. Lucia: **Irene Joseph v Daniel Joseph Claim No. SLU 1093 (B) of 1996 delivered by Hariprashad-Charles J. on 31/10/02; Joseph v Joseph L.C. 2001 HC 2, Civil Suit No. D 80 of 1998 delivered by Barrow J (Ag.) 8/3/2001.** The latter case underscores this Court's recognition and acceptance that Section 25 of the Divorce Act has given "**very wide powers to the courts**." This was an application for Ancillary Relief in which the wife, after a decree nisi order, was claiming among other things transfer of property orders assumedly under Section 24 (1) (a) of the Divorce Act.

[66] She sought to have an order directing the husband to transfer to her his rights, title and ½ share interest in a dwelling house at Entrepot in which they were residing; and further that one of the 2 lots in the parcel of land, Lot 17, should be given to the husband with her ½ share in the building on Lot 17, being transferred to the husband. Barrow J (Ag.) applied the Section 25 (1) (a) to (g) factors in our Divorce Act and the rider to Section 25 (1). The Learned Judge did not allude to or consider the applicability of Section 45 to the Applications before him. His focus was on the denotation of "family assets" with reference to Section 25 (1) (a) of the Act. He relied on decisions in several English cases in applying these provisions: **(Daubrey v Daubrey [1976] 2 ALL E.R. 453; P V P [1978] 3 ALL E. R. 70; Wagstaff v Wagstaff [1992] 1 ALL E.R. 275; and Happe v Happe [1991] 4 ALL E.R., 527)**

[67] In the **Wagstaff** case, damages in the form of a capital sum which was awarded to a spouse as compensation for loss of amenity and pain and suffering, were treated as part of the spouse's financial resources under Section 25 of the 1973 Act in determining an application for Ancillary Relief. In the **Daubney** case, it was held that a flat that was bought by the wife with money that she was awarded as damages arising from a car accident, should have been regarded by the Court as part of the wife's financial resources, when the Court is considering the English equivalent of Section 25 (1) (a) of our Divorce Act, at the time when a lumpsum payment or a property adjustment order (transfer of property order) is to be made.

[67-A] **"It is clear that the damages when received became at that moment part of the financial resources of the wife. It is equally plain that she used them to acquire the flat, the property thus acquired became the property of the wife. The Act speaks clearly on the point. It is the duty of the court to have regard to the property and other financial resources of the spouses"**: (Per Scarman L. J. in **Daubney** at page 459).

[68] In the **Happe** case, an army pension was treated as an available asset for the purpose of determining the financial provision which was to be made between the parties.

[69] Barrow J (Ag.), having considered the above mentioned English cases, found that in relation to the Entrepot land and the building situate thereon, the husband was emotionally attached to this property, and given the family input of the husband's brothers and his friends into the construction of the property, it is fair fitting and reasonable to allocate this land to the husband as his **"separate property'**. Consequently he ordered that the husband should pay $60,000 to the wife representing a notional half of the value of the property, since the wife was being put out of doors as a result of the Court's order.

[70] The principles to be distilled from the English cases referred to by Barrow J, are in my view, that all of the separate properties of each spouse are to be included in the Court's deliberations when applying Section 25 (1) (a) of the Divorce Act to an application for Ancillary Relief under Sections 22 (1) and 24 (1) (a) of the Act.

[71] Article 1192 (2) (d) of the Civil Code regards **"Compensation payable to either spouse for damages resulting from delicts and quasi-delicts, and the property purchased with all funds thus derived"** as separate property.

[72] Article 1194 states that **"the income and earnings are the separate property of that spouse from whose separate property or by whose sole labour they come."**

[73] Article 1195 (1) states that **"A deposit in a bank in the name of one spouse is presumed to be his or her separate property…"** Article 1195 (2) states that **"Money payable to the wife by or through a bank or from funds in Court in her name only is presumed to be her separate property."** It follows also that the **"separate property"** referred to at paragraphs 14 to 16 of this judgement must be included for consideration in applying Section 25 (1) (a) of the Divorce Act.

[74] In resisting the interpretation of the word **"property"** to include "**separate property**, under Section 24 (1) (a) of the Act, Learned Counsel Mrs. Fleming also remarked on certain statements in **White v White** supra and **Haldane v Haldane** [1997] A. C. 673.

[74-A] With the utmost respect to Counsel, in my opinion, the judicial statement of Lord Simon in **Haldane** at page 697 paras. A to G, does not advance Mrs. Fleming's contention. That statement was made in relation to statutory provisions peculiar to New Zealand, and incomparable with Section 24 (1) (a) and 25 (1) of our Divorce Act.

[74-B] I however regard the relevant observations of Lord Nicholls in **White** as pertinent and important in deciding how separate property should be treated under Sections 24 (1) (a) and 25 (1) of the Act in St. Lucia.

[75] Speaking of INHERITED MONEY AND PROPERTY, Lord Nicholls in **White vs White** observed (page 13 paras G to J and 14 paras A to B):

> "**I must also mention… another problem which has arisen in the present case. It concerns property acquired during the marriage by one spouse by gift or succession or as a beneficiary under a trust… Typically, in countries where a detailed statutory code is in place, the legislation distinguished between two classes of property; inherited property, and property owned before the marriage, on the one hand, and matrimonial property on the other hand. A distinction along these lines exists for example, in the 1985 Act and the New Zealand Matrimonial Property Act 1976.**
>
> **This distinction is a recognition of the view, widely but not universally held, that property owned by one spouse before the marriage, and inherited property wherein acquired, stand on a different footing from what may be loosely called matrimonial property. According to this view, on a breakdown of the marriage these two classes of property should not necessarily be treated in the same way. Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness, where this property still exists, the spouse when it was given should be allowed to keep it. Conversely, the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property. Plainly, when present, this factor is ONE OF THE CIRCUMSTANCES OF THE CASE. IT REPRESENTS A CONTRIBUTION MADE TO THE WELFARE OF THE FAMILY BY ONE OF THE PARTIES TO THE MARRIAGE. The Judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property and the time when and circumstances in which the property was acquired, are among the relevant factors to be considered. HOWEVER, IN THE ORDINARY COURSE THIS FACTOR CAN BE EXPECTED TO CARRY LITTLE WEIGHT, IF ANY, IN A CASE WHERE THE CLAIMANT'S FINANCIAL NEEDS CANNOT BE MET WITHOUT RECOURSE TO THIS PROPERTY." (My emphasis)**

[76] The exercise of the Judge's discretion under Sections 22(1) and 24 (1) of the Divorce Act obviously requires the judge to weigh up a large number of different considerations in accordance with section 25 (1).The decisions show that by a combination of all the powers in Section 22 (1), Section 24 and section 45 it is

possible for the Court to make an order transferring the separate property of a spouse to the other spouse.

[77] The case **Griffiths v Griffiths** demonstrates that the same evidence of contributions of a claimant spouse to the improvement of separate property of the other spouse, may be used to fuel an application under section 45 (b) and also one under section 22 (1) (c) of Divorce Act: **([1974], A11 E.R.932.)**

[78] In this case a claimant husband who had purchased a matrimonial home in his name only during the marriage, paid the mortgage for 13 years, conveyed it to his wife for a nominal sum, and thereafter spent substantial amounts of money improving the whole house while his wife paid off a part of the mortgage. Upon losing his job approximately 3 years later, his wife obtained a decree nisi of divorce. The husband applied to the court under section 37 of the Matrimonial Proceedings and Property Act 1970, by reason of the improvements he had made to the house. He also claimed a lump sum payment under the English equivalent of section 22(1) (c) of the St. Lucia Divorce Act. The spouses' only capital asset was this matrimonial home which the wife sold for £54,000 (net) following the decree nisi. The court awarded the husband a lump sum of £7,000 and £4,500 for the improvements. The husband appealed and the Court of Appeal by a Majority decision did not disturb this award. CAIRNS L J however opined that in considering the English equivalent of section 25 (1) (f) of our Divorce Act, the husband's contributions to the welfare of the family should have been given more weight since "**it was entirely, or almost entirely from his means, that the house was provided in the first instance, and he was found by the learned judge to have worked hard to support his family during most of the marriage:"**(at page 944)

[78-A] Roskill L. J. observed (at page 940): "**When one looks at s 2 (1) of the 1970 Act** [similar to section 22(1) of the Divorce Act of St. Lucia] **one sees that the court has power to make anyone or more of the following orders, that is to say as set out in (a) (b) and (c). Under (c) it may "order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified". When one turns to s 5 (1) (f)** [similar to section 25 (1) (f) of the Divorce Act St Lucia] **(s 5 being the overall provision regarding the matters to which the court must have regard including what orders to make under ss 2… and 4)** [Section 4 is the equivalent of Section 24 of St. Lucia Divorce Act]**, one finds as one of the prerequisites – '(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…'**

For my part I do not see why any adjustment required in order to give effect to the undoubted contributions that the husband made cannot be made under s 5 (1) (f) more easily than under s 37. Section 37, to my mind, has its own place where it is proper to bring the proceedings under s 17 of the Married Women's Property Act 1882."

[78-B] Continuing at page 942 (paras a to b) Roskill L J. said that "**The purpose for which the house may previously have been conveyed to the wife may in this case (and indeed in other cases) be a material factor; but…I think that one starts from the fact that one has to look at the totality of the family assets. It does not matter who is actually the legal owner of the asset in question"**

[79] There is just one other English case I came across that is worth mentioning. It illustrates in my view how section 25 (1) (g) of the Divorce Act may be used to award compensation to a claimant spouse for her moral support to her husband, and her contributions under section 25 (1) (f), which assisted him in carrying on an inherited patrimonial family business A.W. Trippas Company. He had acquired this business during the marriage: **(Trippas v Trippas [1973] 2 A11 E.R.I)**

[80] This patrimonial family business belonged to the husband and his brother after the spouses were separated for 1 year, the husband and his brother sold the business (a take over) for £350,000, with each of them entitled to £175,000. Payment to the husband was in the form of £80,000 in cash and £95,000.00 in shares in the new business.

[81] In considering the wife's claim to a part of the husband's proceeds of sale, Lord Denning M.R. concluded: **"The wife says that she… should have some part of the money. The wife cannot claim a share in the business as such. She did not give any active help in it. She gave moral support to her husband by looking after the home. If he was depressed or in difficulty, she would encourage him to keep going. That does not give her a share."**

[82] Lord Denning then went on to consider the effect of the English equivalent of the Section 25 (1) (g) of the Divorce Act of St. Lucia. He opined that this equivalent Section 5 (1) (g) of the Matrimonial Proceedings and Property Act 1970, covered the position exactly, and the wife would be awarded compensation for loss of a benefit.

[83] Lord Denning reasoned: "**If the marriage had continued, it is plain that the wife had a good chance of receiving a financial benefit on the sale of the business. Just as the two sons had received £5,000 each, she might have received something. The husband might well have felt it proper to settle on his wife a substantial sum out of the very large sum which he was receiving. Now that there has been a divorce, she should be compensated for the loss of that chance."** The Court held that the wife's lump sum award of £8000 should be increased to £10,000 in the circumstances.

[84] This case is also the authority for saying that where the time and nature of the wife's benefit under Section 25 (1) (g) of the Divorce Act can be ascertained on a

balance of probability, the Court should give effect to it. Where it can't be ascertained some estimate must be made.

[85] It seems to me therefore from my analysis of the decisions and English legislation referred to in this judgement, that in the absence of the concept of community of property in England, there is no Statutory provision like Section 45 (a) of the Divorce Act St. Lucia in England.

[86] Section 45 (a) empowers the Court to dispose of community property by directing usufruct sharing of the community assets by the spouses or that one spouse must forfeit to the other his or her half share of the property.

[87] Consequently, the English doctrine of trusts and their legislation, have made provisions for spouses and children. Section 24 (1) (a) of the Divorce Act of St. Lucia, like the English equivalent contemplates only a disposition by a spouse of property of which that spouse is a beneficial owner.

[88] It seems now well settled law that Section 24(1) (a) of the English Act (and the St. Lucia Divorce Act), has given the Courts jurisdiction to make transfer of property orders in respect of separate property solely owned by one spouse, as well as other property co-owned by both spouses, whether it be the matrimonial home as in most cases it is, or any other capital asset of either party.

[89] **Rayden on Divorce** (13th ed at pages 776,779 and 780) points out the following important principles about transfer of property orders: no limitation is imposed as to the nature of the property over which the jurisdiction may be exercised, as long as the property is sufficiently identifiable.

[90] A share or interest in property seems to be included in the word "**property"** in Section 24 (1) (a), provided the property is not the subject of a settlement, or is not the subject of a limited or unlimited charge.

[91] The Court cannot exercise its power in derogation of the rights of third parties. The Court has no power to order a sale of property on an application under Section 24 (1) (a) of the Divorce Act.

[92] The Court must approach the question of property transfer, having regard to the whole financial structure of both parties' assets.

[93] The Court should make a transfer order, only in recognition of the claimant spouse's contribution to the accumulation of the family's wealth, and so as to assure so far as practicable the claimant spouses future living standards.

[94] Section 25 (1) of the Divorce Act lists the various matters that the judge must focus on, without ranking these matters in any kind of hierarchy. All of them are important and must be regarded. Which one of them will carry most weight must

depend upon the facts of the particular case: **(Piglowska v Piglowska) [1999] 1 W.L.R. 1360, at 1370, 1373**.

[95] The concept of equality between the spouses has no place under Section 25 (1) of the Divorce Act**: (P v P) [1978] 3 A11 E.R.70**.

[96] Where both spouses are capable of maintaining themselves, even for a short marriage, ordering the husband to merely transfer his share in the matrimonial home to the wife is not enough, since the Court must have regard to the wife's standard of living during the marriage, and place her in the position she would have been in had the marriage not broken down, and the husband had performed his financial obligations to her: **(Potter v Potter) [1982] 3 A11 E.R.**

[97] Finally, in my opinion, the category of separate property referred to in the Judicial Statement of Lord Nicholls in **White v White** (See paragraph 75 above) should not be regarded as closed, in light of the enacted provisions in the Civil Code specifying what is separate property. This judicial statement also provides me with the authority for saying that apart from community property, or other property co-owned by the parties, the transfer of the separate property of one spouse by the Court to a claimant spouse, unless volunteered by the transferor spouse, ought to be a last resort. In my view, such an order should be considered and made only where the amount at which the future financial needs of the claimant spouse has been assessed is formidable, and the evidence shows that it probably cannot be paid by the other spouse.

Dated the 2nd day of May 2006.

……..
OLA MAE EDWARDS
High Court Judge