

AIDAN PAUL BECKFORD
versus
ELIZABETH ANNE BECKFORD

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 13,15,16,22 and 24 February; 28-30 March and 20 December
2006

Divorce Action

A.P. de Bourbon SC with him *E. Matinenga*, for the plaintiff
J.C. Andersen SC with him *J. Colegrave*, for the defendant

KUDYA J: On 4th April 2003, the plaintiff husband issued summons out of this court seeking a decree of divorce and other ancillary relief. The defendant wife filed her plea and counterclaim on 10 September 2003.

On 11 November, 2004 at the pre-trial conference, the matter was referred to trial on the plaintiff's issues. These were as follows:-

1. Whether it is in the best interests of the minor children that custody be awarded to plaintiff or defendant or that an award of joint custody be made.
2. Dependent upon the award of custody the *quantum* of maintenance payable in respect of the children.
3. What order should be made in respect of the children's schooling?
4. The quantum of maintenance payable by plaintiff to defendant and the period thereof.
5. What assets constitute the matrimonial estate?
6. The apportionment thereof.
7. Costs.

The plaintiff gave evidence and called the evidence of a further two witnesses while two witnesses testified for the defendant. A total of 23 documentary exhibits were produced, some of them consisting of bulky bundles of an assortment of correspondence and forms. In the period preceding the trial, in an attempt to curtail the proceedings both parties sought interrogatories and made further discoveries and filed

supplementary affidavits after the pre-trial conference had been held. In addition, during the course of the 2005 calendar year, the parties subjected themselves to three separate court applications.

It was common cause that this divorce action has been acrimonious. Its effect on the children has been deleterious. The tussle between husband and wife has given meaning to the East African proverb that: - "When two elephants fight, it is the grass that suffers." In the present matter the children have indeed suffered.

It was common cause that, as also appears in the Marriage Certificate, Exhibit '2', the parties were married in the church of St. Cuthbert's Lytham Road, South Shore in Blackpool and Fylde, Lancashire in England on 26 November 1994. Two children were born of the union in England. These are Elsbeth Bridie Beckford born on 7 August 1996 and Theodore Hugh Beckford born 9 February 1999.

The parties relocated to Zimbabwe in January 1997 where the plaintiff acquired a home, and abandoned his previous domicile. Notwithstanding the change of domicile, when the defendant became pregnant with the boy in 1998, they returned to the United Kingdom and rented a house for 6 months in Blackpool so that the defendant could give birth there and also be close to her family. After his birth they returned to this country where they have lived ever since.

In his testimony, the plaintiff recognized that even during the three years that the parties lived in England, the union had its fair share of cracks but it was a relatively happy one until 2002 when it broke down. In his view it broke down under the heavy burden of the depression that afflicted her, over disagreements on the boy's activities and over financial matters.

The defendant, on the other hand, stated in evidence that she realized in early 2002 that the plaintiff was very unhappy in the union. An Easter holiday excursion by the two, without the children, did not cure the source of his unhappiness. In October 2002 he accused her of having an affair, which accusation she denied. He then left for England purportedly to discuss with his lawyers about the divorce. On his return they attempted to pepper the cracks but the loss of trust between them

could not be repaired. In February 2003 they agreed that they were no longer in love. They tried to work on a divorce settlement but to no avail. On 4 April 2003, the day she was to leave for England for a holiday with the children in the evening, she was served with divorce summons at the matrimonial home at 3 p.m. Even though she had spent the earlier part of the day with the plaintiff, he never intimated to her that this was going to happen. She painted him as an insensitive husband.

The parties were agreed that their marriage had broken down beyond repair. I am satisfied that it has irretrievably broken down to such an extent that a normal marriage relationship can no longer be restored. It must follow that the decree of divorce will be granted.

AMENDMENTS TO PLEADINGS DURING TRIAL

At the resumption of trial on 15 February 2006, the defendant applied to amend her claim in reconvention. The application was duly opposed. After it had been duly argued, the defendant duly withdrew it.

On 24 February 2006, during the cross-examination of the plaintiff by counsel, Mr. *Andersen* moved an amendment of the defendant's counterclaim for the removal of the children from Zimbabwe at the end of July 2007. The application was opposed on the basis that the amendments were prejudicial and that such prejudice would not be cured by a postponement co joined with an appropriate order of costs. The plaintiff further contended that the amendments that were sought contradicted other relief and were therefore excipiable.

The plaintiff sought to buttress his submissions by reference to *Courtney-Clarke v Bassingthwaight* 1999 (1) SA 684 at 689; *Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd & Ano* 1967 (3) SA 632 at 641 and *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 at 107E-I.

I declined to exercise my discretion, to allow the amendment, in favor of the defendant and advised that reasons for so doing would appear in this judgment. It is no longer necessary for me to provide my reasons as on 3rd March 2006 the defendant filed a notice to amend her counterclaim. She moved the amendments on 28 March 2006. They were this time round granted by consent, undoubtedly because the

defendant had not only given adequate notice of the amendments but also because she had removed the contradictions that were apparent in the relief she sought in her amendments of 24 February 2006. The earlier amendments were, in my view not only vague and embarrassing but also excipiable.

On 15 February 2006, the plaintiff moved for the adoption of two amendments for which notice had been given on 23 September 2004 and 11 October 2005.

The notice to amend of 23 September 2004 indicated that the amendments would be sought at the pre-trial conference. The minutes of the pre-trial conference of 11 November 2004 show that the “amendments sought (were) granted by consent.” This appears from the pleadings to have been the only amendment sought.

On 15 February 2006 Mr. *de Bourbon* for the plaintiff moved for the amendment of paragraph 2 only of the amendment of 23 September 2004. It is the one which reduced the amount of maintenance the plaintiff offered the defendant from the Zimbabwe Dollar equivalent of US\$ 1000 to the equivalent of US\$ 500.

The second amendment (of 11 October 2005) replaced paragraph 9.2 of the declaration in which he sought to contribute £200 000 towards the purchase by the defendant of an immovable property in the United Kingdom and to find or purchase a town house or condominium in a secure complex in Zimbabwe for the defendant. He now sought an order that he “contribute £70 560 (representing 50% of the value of the net matrimonial assets in the UK which took into consideration the proceeds of the sale of 265 Lonsdale Road, Barnes for which the defendant had already received £36 350 and had negative equity in respect of the other disclosed assets and plaintiff’s personal debts) plus 40% of the net value of 62A Steppes Road, Chisipite, Harare to be used towards the purchase by the defendant of an immovable property in the United Kingdom and of a town house or condominium in a secure complex in Harare.”.

He abandoned paragraph 9.2A which was part of paragraph 3 of the notice of amendment of 23 September 2004, whose contents had

been overtaken by events. He could no longer seek the transfer of 265 Lonsdale as it had been disposed of by the mutual consent of the parties.

In my view, the amendments that were moved and granted did not materially alter the pre-trial conference issues agreed on 11 November 2004 to the extent that they revolved on custody, the *quantum* of maintenance for the children and the defendant and the identification of the matrimonial assets and their distribution. The amendments by the defendant of 28 March 2006 raised two further issues. These were, firstly, whether in the circumstances it was appropriate for this court to order the removal of the minor children from its jurisdiction and secondly, whether the court could abrogate its jurisdiction to assess matrimonial assets to a foreign court.

I now proceed to deal with the evidence that each party led and how that evidence resolves each of the issues that were raised.

JOINT CUSTODY OR SOLE CUSTODY

The plaintiff testified on the issue of custody.

He was full of glowing praise for the elder child's personality, academic prowess and social mores. He also praised the younger child and was supportive of his brave efforts in overcoming some physical challenges that have affected his growth. He demonstrated his deep involvement in the efforts of his children. He showed a clear interest in every sphere of his children's lives be it in school, sports or leisure. Since coming to Zimbabwe, as the defendant does not have a work permit, he has been the sole provider for his family. He had met all its life's needs.

He prided himself with the virtue of organization and punctuality in so far as it applied to the children. He has been supportive of Heritage Primary School where both children attend. He has been intimately involved in the school's fundraising activities and in supplementing its educational materials. He made out that the defendant is his exact opposite as she lacks both organization and punctuality. She exhibited poor routine and organizational skills. She was lethargic in her time keeping to the extent that the school complained. While he is the primary parent, she lurks in the background preferring that the maids attend to the needs of the children. She suffered from pre-natal

depressions each time she fell pregnant, and after giving birth, thrusting upon him the responsibility of looking after and caring for the children even in their infancy. He thus became acutely attached to his children, hence the deep filial love that he has for them.

The younger child's motor skills special needs elicited the best in him as he rose to the occasion by assisting him overcome ostracism by his peers in ball games. He succeeded in raising his confidence levels.

He recognized that the defendant loves the children too but not to the extent that he does. She is asthmatic and therefore is not keen on the boy's pet animals like Duff's the large male turkey, Fidget his parrot (notwithstanding that they were at the matrimonial residence). She did attend some school functions but was less involved in the minute details.

After he instituted divorce proceedings, he continued to reside under the same roof with the defendant and the children. He made out he did it for the sake of his children. The relationship between his wife and himself was acrimonious. It adversely affected the children. There was a noticeable fall in their schoolwork. The girl was emotionally devastated by what he alleged were the lies her mother touted to her about joint custody when in reality she was against it even though she pretended to her that she was in favor of it. It was difficult to judge the boy's reaction due to his tender years. He however thrived on activities and became inseparable with the plaintiff. The emotional confusion on the part of the children remained until mid 2005.

On 26 July 2005, the parties entered into a consent agreement in which they shared responsibility over the children in a set and detailed schedule. The plaintiff moved out of the matrimonial residence. He moved to 23 Parham Road, Ballantyne Park, which is close to the former matrimonial house and has better sports and other facilities.

In December 2005 they took turns to be with the children. He alleged that the girl enjoyed herself immensely while in both parents' company but she felt that the defendant had neglected the boy. His view was that the children thrived after the July 2005 order as their grades took a noticeable improvement and their emotions stabilized. The parties' lines of communications improved. He produced Exhibit 3A and

3B, which in sum consists of 9 pages of 'short message service' between them to confirm the improvement. He also produced a bundle of documents as Exhibit '4', comprising 46 pages.

The first document is a pencil written message on divorce, which represents the girl's perspective of the defendant's views on the subject. It was written during the 2005 Christmas holidays in England by the girl. Her mother blamed her father for the divorce, accusing him of having impoverished her. She expressed her love for both her parents notwithstanding that her mother had not shown her what she had written. It provides an insight into the emotional shockwaves that assailed her.

The second document was again written by the girl to mum, dad and the lawyer and the court on 9 January 2006. She expressed her preference for joint custody so that she could see her dad. She expressed her disquiet at the activities that her young brother was doing in Blackpool and wished he were involved in tennis, cricket, soccer, rugby and other sporting activities. She expressed her preferences to see all her friends notwithstanding that their parents were friendly to either of the parties. She did not like to attend a government school where she believed they would be bullied because of their accents. It was witnessed by Laura Horton a friend of the plaintiff and one Erica Hughes, the administrator of Oliver House Preparatory School, an independent Catholic Primary School in South London. Laura confirmed in the third document that the girl wrote the second document of her own volition without any prompting from any quarter.

The fourth document is a moving poetic description by the defendant of the first time that she held the girl in her arms at birth and her deep felt emotions of her at eight. It ends thus: - "She is the best and loveliest daughter that any mummy can ask for. I will always love and protect her even when she is my age, she will always be my daughter." It is written mummy at top in the girl's handwriting and is dated 30 January 2005.

The document on pages 5 - 7 was an attempt at settlement by the parties which was scuttled by the plaintiff. Document 8 recorded the

thoughts of the defendant on the issue of custody and access within and outside Zimbabwe.

The documents on pages 9 to 17 are the children's Heritage School reports. They showed how the girl was struggling between 2004 and 2005 and record the behavioral problems that she experienced including absenteeism and how she flourished in December 2005.

In 2004, the boy was in Grade 0 where he showed great improvement. He was in Grade 1 in 2005. His report for the final term of that year showed that he simply blossomed. His class teacher, Mrs. Mitchell, wrote that he grew from strength to strength because of the help that he received from both his parents.

Pages 18 to 22 are a record of the gross motor difficulties that afflicted the boy, which required remedial action. The document on page 23 of 10 July 2003 represents the defendant's views on the letter of 7 July 2003 from the plaintiff (produced as Exhibit 10). In Exhibit 10 plaintiff gave notice to Heritage Primary School of his intended withdrawal of the two minor children as he intended to relocate to a jurisdiction where a father's rights to custody upon divorce were recognized as he saw no immediate prospects of the defendant agreeing to share custodian rights with him.

The defendant was concerned by the plaintiff's failure to consult her over such an important decision. At that time she believed that the children had a circle of loving teachers and friends.

The documents on pages 26 to 27 showed Mr. Austin's preference for the plaintiff as the more responsible parent on whom custody should devolve.

The documents on pages 28 and 29 expressed the views of Mrs. Middleton and Mrs. Blignaut, Headmistress and Deputy Headmistress respectively, of 1 July 2004 that the defendant was uncooperative while the plaintiff was a good parent in all respects.

At page 30, the two ladies had no hesitation in backing the plaintiff's bid for full custody of the children because of the help that he gave to the school.

In his oral evidence, the plaintiff maintained that the panacea to the custody issue was the consent order of 26 July 2005. It was his view that it was the best possible solution, which was in the best interests of the children. He stated that they had not argued over the children since it came into force.

He was subjected to searching cross-examination over two days, which was interposed by *Francois de Marigny* (for the defendant)'s evidence.

He made out that he was an adoring parent who acts in the best interests of the children by protecting them from physical danger and making provisions for their future. He accepted that he commissioned de Marigny on the basis of his international reputation.

He was referred to the final psychological forensic report of de Marigny of 22 March 2005 where at page 49-50 thereof the following opinion is expressed:

"The writer is of the strong opinion that the present circumstances whereby the parties and the minor children reside in the former matrimonial home needs to be changed as a matter of urgency in order to serve the best interests of the minor children. Both children and especially Elsbeth have been and continue to be detrimentally emotionally affected by the current living circumstances."

And page 54 thereof:-

"Elsbeth is at great risk of developing long term behavioural and psychological problems should the present circumstances remain unchanged."

He stated that he only left the matrimonial home in September 2005, 9 months after the de Marigny report expressed the dangers the children were subjected to by the continued acrimony. He admitted that in case HC 2631/05 brought by defendant on 8 June 2005 to force him out of the matrimonial home, KAMOCHA J granted that urgent application on 29 June 2005 and he (the plaintiff) tried to stop it by appealing against it. He never considered counter claiming or moving out conditionally. He did not believe that he was exposing the children to severe and unhealthy risk by ignoring the professional opinion of an expert he had commissioned. He stated that his actions were dictated by the over

riding interest that he had for the children whom he feared would suffer emotionally at the hands of maids who supplemented their mother's affection and especially that the boy's motor skills would be adversely affected. His other view was that his wife should have moved out. He accepted that when he left the circumstances of the children improved. He denied foisting himself on the defendant and the children between the period 4 April 2003 and September 2005.

It seemed clear to me from his answers that, contrary to his other view that he had the children's best interests at heart, he was suborning them to his own interests, especially in circumstances where the two were at cross-purposes. The de Marigny report recommended the defendant as the preferred custodian parent.

He accepted that joint custody was based on a harmonious relationship, trust and confidence that the one parent reposed in the other. Notwithstanding this acceptance, he maintained that the defendant was not the best parent. While he denied that he had characterized her as a thief, he admitted that she purposed a mercenary attitude by believing that he had a pot of gold at the end of his life's rainbow. He appeared to whitewash the past record exemplified by the acrimonious disagreements from April 2003 to September 2005. He clearly failed to answer the question whether he trusted his wife by claiming that he had no answer after his attempt to term it a leading question proved ineffectual. He did not trust her, as he held an unshaken belief that she had hired an unsavory underground character called Cheyenne to harm him.

It became clear to me as he was cross-examined that he had never really abandoned his strongly held view on the efficacy of joint custody. It became clear to me that he only introduced the claim for exclusive custody as a bargaining chip. He refused to countenance the idea of an award of custody to the defendant which would allow him the right of reasonable access.

His view was that the de Marigny report did not put enough emphasis on the day to day involvement of the parties with the children.

He made out that the children had to remain in Zimbabwe under the authority of the court.

He called David Rodney Austin, the Managing Director of Heritage (Pvt) Ltd. He testified on 24 February 2006. He provided his life's profile. He is an experienced educationist with 40 years experience obtained in England, Kenya, Malawi, Kuwait, Cyprus and Zimbabwe. He started Heritage Primary School in 1996. When it opened its doors in January 1998 he was the founding headmaster until May 2004 when he became Managing Director. In December 1997 he called a meeting of the prospective parents at Lonrho House in Harare. It was there that he first met both the plaintiff and the defendant. Their elder child commenced education at Heritage at the age of two. The witness and his wife were friends with the parties and used to visit the Beckford matrimonial home. The parties had a normal family relationship. He did not notice anything untoward during these early years.

He then observed that the elder child lost interest in her schoolwork and that her performance had fallen. She was disruptive and naughty in class. He realized that the parties were having marital problems. He tried to help them by calling for a round table conference. The plaintiff showed interest but the defendant did not. He stopped visiting their matrimonial home. He fraternizes with the plaintiff because the girl is a friend of his granddaughter.

He testified that the children's academic work and concentration had improved in the 6 months preceding his testimony. He was aware that this was a result of the consent order of 26 July 2005. It was his view that the time sharing recorded in that agreement had allowed each parent to play a meaningful role in the children's school work.

He further testified on the boy as follows: he came to Heritage when he was two years old. He noticed that he had problems with his gross motor skills and that his speech was not clear. The teachers were aware of his challenges and together with both parents had assisted the boy cope with them. The plaintiff was visible in his attempts to assist the boy overcome them through involvement in a host of games. He also engaged a speech therapist. The sporting activities that the boy was

involved in are listed on page 8A of Exhibit 4. The witness' view was that as the child did academic work in the morning, he was not overloaded in the afternoon by these sporting activities. On Mondays he does cricket from 1 to 1.30 p.m. On Tuesdays he does cricket from 1 to 1.40 p.m. and at 3.15 p.m. he does spin ball. On Wednesdays he plays soccer for 40 minutes and swims for 45 minutes. On Thursdays he is into Triathlon for 1 hour and lastly on Fridays he plays soccer for 30 minutes and horse riding for 1 hour. These extramural activities have assisted him improve his gross motor skills and especially his eye to hand co-ordination. He does club activities after 4p.m. The boy does 8 activities per week.

He has had no contact with defendant since he stopped visiting her matrimonial home.

His view was that it would be disastrous for the children to relocate to England as they would experience a new and different environment to the one they had become accustomed to. They have friends, they know their teachers and they know the system. A change would affect them both academically and emotionally.

As regards disciplining the children, he did not know their home environment but he knew that the plaintiff was keen on discipline and order. He did not know the defendant's views on discipline as he no longer interacted with her.

He confirmed writing to the plaintiff's legal practitioners on 22 July 2004 (Exhibit 4 page 26). Its essence was that from 1998 to 2002 the parties attended all school functions together and were supportive of the school, but in last 2 years the plaintiff was the only one who kept up the interest in the school and education welfare of his children. Further, that the defendant had become less involved and was not concerned about getting the children to school on time or picking them up after activities promptly. The plaintiff was always punctual and aware of the different pick-up times. He talked a lot to the plaintiff on the children's educational, emotional and physical development. He stated in that correspondence that he had never had audience with the defendant.

He concluded that the animosity between the parties were affecting both children and expressed the hope that the issue of custody

would be resolved for the good of the children. He was of the view that the plaintiff was the more responsible and caring parent who should be awarded exclusive custody. He did confirm the contents of Mrs. Middleton and Mrs. Blignaut's letter of 1 July 2004, which he had seen.

When asked in examination-in-chief whether he adhered to the contents of that letter he retorted that he had made them while in the United Kingdom some 18 months before he testified but things had changed in the intervening period. The issue then had been exclusive custody but in last 6 - 7 months the interaction between the parties had improved.

He was cross-examined by *Mr. Colgrave*. He was referred to a minute addressed To Whom It May Concern by Mrs. N. Hammuty - Murwira an Occupational Therapist dated 14 February 2006(Exhibit 12). The occupational therapist had reassessed the boy's gross motor skills that day following an initial one of 16 June 2004. In both she noted no abnormality as the boy had performed within his age range in accordance with the COPE school screening test and development profile ratings. She assessed his static and dynamic, standing and walking skills, ball skills and proprioceptive skills. She concluded that there was no need for therapeutic intervention in the gross motor area as the child's performance was within the normal development profile.

His views differed with those of the expert. He agreed that the gross motor skills of the boy had improved but asserted that he was not yet out of the woods.

He further maintained that the boy's schedule of extramural activities were neither heavy nor strenuous for a 7 year old boy as he did them for about 30 minutes at a time.

He had last seen Mr. de Marigny some 18 months before (the witness testified) and had not seen him when he came to Heritage in early February 2006 despite having granted him an appointment. He accepted that Mr. de Marigny correctly foresaw the need for the plaintiff to vacate the matrimonial home.

He denied the suggestion that his letter of 22 July 2004 was motivated by the desire to ingratiate him to the plaintiff who had built a

pavilion (of pole and thatch) at the school, which was named after him in appreciation of his contribution. He admitted that the plaintiff had provided the school with some fireworks and that the witness had attempted to persuade him to buy shares in the school. He stressed the point that many other parents also contributed to the improvement of the school. He had changed his view that the plaintiff be awarded exclusive custody in preference to joint custody. He did not know that Mr. de Marigny had in his evidence recommended that the defendant should be awarded exclusive custody of the minor children.

In my view, while Mr. Austin testified on what was within his knowledge and as the representative of Heritage School (Pvt) Ltd, which has the best interests of the children at heart, he could not escape from the criticism that he was biased in favor of the plaintiff. When the plaintiff sought sole custody he supported him to the hilt, and when he shifted to joint custody, he again changed his mind and aligned it to the plaintiff's. His observations on the defendant's failure to keep time were correct but he never ascertained from her the difficulties that she faced before he jumped to condemn her by seeking to deprive her of the custody of her children. The impression that remained etched in my mind was that he was being considerate to the plaintiff either because he was closer to him socially or because he saw him as a past and potential benefactor to his school. In my view he was, therefore, a biased witness.

Mrs. Noreen Christina Middleton, the Headmistress of Heritage Primary School testified on 28 March 2006. She had been headmaster for 2 years at Heritage when she did so. She had been in the teaching field for 40 years since qualifying in Bulawayo in 1967. She did a tour of duty in Kariba, taught at Avonlea and Bishoplea and was the founding headmistress of Twin River School in Avondale, in Harare. Her many years in the teaching field has equipped her with an interest and understanding of children. She knows both children as pupils at the school and has kept abreast with the events that affect them.

She first had contact with the children in 2004. She regarded them as "thoroughly nice children".

Before the consent order of 26 July 2005, she had noticed a marked decline in the girl's behavior and academic work. The boy was then very little and quiet. The girl needed encouragement and help, and hugs and re-assurance. The boy had gross motor needs. The school recommended occupational therapy. He still has gross motor needs even though there has been some noticeable improvement. She could not say why the mother chose not to recognize this apparent condition.

Like Mr. Austin, she believed that it was not proper to take the children out of school at that stage when they had developed a familiar working support system of teachers and peers who were also familiar with their difficulties and challenges.

As regards the parties, she testified that she knew the plaintiff who has always been supportive of the children's education. The defendant was invisible in 2004. She emerged from her shell in 2005 when she became a reading mother at the school. She stated that the parties had attended the 2006 school assembly together.

She was overjoyed by the improvement in the children's behavior after the consent order. She made reference to the joint letter she wrote with Mrs. Blignaut on 11 July 2004 to the plaintiff's legal practitioners.

In her view the divorce proceedings were having a detrimental and traumatic effect on the two children. Both the plaintiff and the defendant were involved with the children. She noted that the children were invariably late for school by 2 hours when they were under the defendant's care. Mrs. Harber had discussed the issue with her with minimal success. The school had held discussions with the parties on the children's academic and welfare needs. She was impressed by the plaintiff's parenting skills. He was punctual. He provided guidance and routine discipline to the children. She was aware at the time that the children needed the love and support of both parents. It was therefore desirable that the parents did not expose them to situations which were detrimental to their holistic growth. She had followed this letter with another of 11 October 2004. The boy had benefited from the physical activities that were arranged for him such as cricket, tennis and horse riding. His eye to hand co-ordination had improved while his confidence

had grown. In that letter, she had recommended that the plaintiff should be awarded full custody.

She followed this letter with yet another one of 9 June 2005 in which she recommended that the plaintiff should be awarded full custody and in the alternative joint custody, as he was the supportive parent and primary care giver. She further wrote that the children were flourishing emotionally and academically through the total support and moral guidance of both parents. She however described the defendant as a manipulator who had managed in 5 months (from the date of the letter) to carefully present herself as the supportive parent by choosing high profile activities like class reading and decorating halls. She saw the plaintiff as a hands-on father who was totally committed to the well being of the children. She saw him as the parent on whom the children relied on for guidance, love, total support and discipline. She referred to the girl's need for hugs and small talk. The girl had confided in her that she loved both her parents even though her mother did not always tell her the truth. Further that her mother had shown the girl her purse and remarked to her that she had no money whilst the father had lots of it. She wanted her parents to be closer to each other and was upset that her father would leave the matrimonial home. The witness further stated that while the defendant did not attend the activities in which the boy was involved in, the plaintiff always did so.

She questioned the defendant's motives in seeking to deny the plaintiff, who was loving and supportive, access to the children. She felt that his removal from home would affect the children's behavior and endeavors. She supported the plaintiff's quest for custody. She adhered to these letters and to the assessments of the children found at page 13 and 17 of exhibit 4. In the November 2004 report, like in the July 2004 report, the girl's class teacher remarked on her friendliness but recognized her attention seeking antics. The class teacher noted that she had much potential and hoped that she would do much better in 2005 despite her difficult home environment.

In November 2005 the witness remarked that the boy, with the help of both parents had grown from strength to strength while the girl

had made great academic improvement. She stated that she had met de Marigny twice. The last meeting had been in February 2006 in the presence of three other teachers where he had stated that he would recommend joint custody. When it was put to her that he had recommended that the mother be given custody she could only retort that he had perhaps changed his mind. She did not agree that awarding custody to the mother was in the best interests of the children. She believed that an award of joint custody would benefit both children.

She was also cross-examined. She admitted assuring defendant in 2005 that she would not get involved in a partisan manner in their custody dispute and maintained that she was testifying for the children and not for the parents. She maintained that her assessment of the capabilities of each parent was fair and also that her letter of 9 June 2005 was not nasty but was truthful. She accepted firstly, that she did not afford the defendant an opportunity to be heard and secondly that it was unprofessional of her to send such a letter to the plaintiff's legal practitioner without affording her an opportunity to comment on it. She stated that she had never visited the matrimonial home but was aware of the acrimony between the parties but still wanted plaintiff to remain in the matrimonial house. She saw nothing wrong in giving sole custody to the plaintiff. She could not agree with the opinion of Mrs. Hammuty, the occupational therapist, of 14 February 2006 in Exhibit 12 that the boy did not require any further therapeutic intervention in his gross motor skills. It seemed to me that Mrs. Middleton exhibited bias for the plaintiff. She condemned the defendant. When the defendant was invisible for 8 months she expressed this as a lack of love for and interest in the children. When she became visible, she saw her as a manipulator. She made no effort to engage the defendant to find out what problems if any she was faced with.

The criticism I leveled against Mr. Austin applies to her with equal force. She aligned her opinion with that of the plaintiff. It seemed to me that she was allowing herself, like Mr. Austin, to be manipulated by the plaintiff especially in the light of defendant's evidence that the two met for the very first time in May 2004 and yet she was by July 2004 already

writing adverse comments about her. I noted against these two educationists that the defendant's problem as highlighted by them only started after the divorce proceedings had been launched. She was an active mother who showed equal interest as the plaintiff in the welfare of her children and the school. If the two were fair and impartial, they must have realized that the commencement of the divorce proceedings had much to do with the defendant's invisibility. She was a non-working mother who relied on the plaintiff for her livelihood. It seems to me that her ability must have been affected by the withdrawal of funds by the plaintiff who now viewed her as possessing a hidden post-divorce nest.

The defendant also testified on the issue of custody. In her pre-3rd March 2006 plea and counterclaim she sought custody of the children. After the amendment, she now sought sole custody and sought permission to permanently relocate to the United Kingdom after 31 July 2007.

Her evidence dwelt on the events prior to the consent order of July 2005 through which the plaintiff left the matrimonial home. She described herself as a quiet person who would do anything to avoid confrontation and argument. After she had been served with summons the plaintiff became very unpleasant. He intimidated her and bullied her. He kept on telling the children inappropriate information and had disregarded her exhortations to stop doing so. She described how he would quietly walk up behind her, as she was drinking water at night and frighten her out of her skin by some surprise utterance.

He wanted his presence felt in the house and did this by shouting at the servants. She remained for most part ensconced in her bedroom. She sought his removal from the home through a court order.

The defendant filed three applications in this court. In case No. HC 2267/05, on 17 May 2005, she sought proper discovery of certain documents concerning the alleged matrimonial assets, which she believed the plaintiff had not fully discovered. He took exception to the accusation that he had acted disingenuously and dishonestly in his opposing papers of 24 May 2005 as he believed that she had acted maliciously and improperly in bringing the application.

On 8 June 2005 she had launched an urgent application in case HC 2631/05 seeking his forced removal from the matrimonial home following upon Mr. de Marigny, a clinical psychologist's final report, availed to her on 28 April 2005 which, *inter alia*, expressed the fear that the girl was at great risk of developing long term behavioral and psychological problems if the parents remained under one roof pending the acrimonious divorce.

When she received that report she had requested, on 6 May 2005, the plaintiff to either vacate the matrimonial home or to look for a new house for her and the children. The plaintiff responded on 12 May 2005 that the final report was at hand. He further stated that he would not vacate the matrimonial home unless she agreed to joint custody. He had refused to leave even after he had received the interim report, which he had availed to her in March 2005.

She alleged that the plaintiff would ask the girl whom she preferred to live with between the two of them after the divorce. He would further tell her to disclose her choice to the judge. These remarks often upset the girl. She accused him of making disparaging and snide remarks about her and her friends in the children's presence. This also upset both children but affected the girl more deeply who always ran to her in tears.

The urgent application was opposed on 13 June 2005. Firstly, on the ground that it was not urgent and secondly, on the ground that the two had lived together for 3 years after the breakdown of the marriage. It was averred by the plaintiff that the children had settled properly well emotionally, spiritually and educationally and that she was manipulating the situation in the matrimonial home, and raising the issue of custody in order to upset him in a mercenary attempt to obtain concessions from him on the divorce issues. He believed that his presence in the home instilled discipline and provided guidance to the children.

He averred that she exaggerated the acrimony and attached text messages that she had sent to him. He had further relied on the conversations he had had with the girl in which she had confided in him that the defendant had deceived her on many occasions. He had accused her together with a woman friend of hers of trying to alienate the girl from him. He viewed it as inappropriate for her to discuss financial issues

with the girl. He also referred to an alleged discussion between Nikki Morris and the girl in which the girl spoke of how the defendant had threatened to commit suicide because he no longer loved her. He was appalled by this apparent emotional blackmail and manipulation of a defenseless child.

In his opposing affidavit the plaintiff accused her of paying £ 4000 to Cheyenne, an alleged member of the Harare underworld, to physically hurt him. He also accused her of exposing the children to racist ideas, misrepresenting the viability of her two companies Connelly Connection and Ecu Design. He denied her allegations that he was often drunk in front of the children. He averred that she had encouraged and facilitated two of her married female friends engage in a lesbian relationship. He mentioned the timetable of the last two terms which had worked well between the two on the children's schooling activities and transport arrangements and attached the letters of the headmistress which supported his position that he should remain in the matrimonial home. He referred to her predilection for a lavish lifestyle, which in his view, was amply demonstrated by her purchase of French champagne by the case, from Johannesburg; by traveling to Johannesburg and Greece for holidays; by paying £4 000 to Cheyenne; by traveling to the United Kingdom over school holidays; by meeting legal costs in excess of \$200 million; and by high cellular phone bills.

On 29 June 2005 KAMOCHA J granted the provisional order for the plaintiff to vacate the matrimonial home. On 1st July 2005 the plaintiff noted his intention to appeal against the order.

The last application was an urgent application case No. HC 3385/05 filed on 12 July 2005 in which the defendant sought execution pending appeal. She made various allegations of what he had said to the children in her presence, which he did not dispute in his opposing affidavit of 15 July 2005. Both parents went to South Africa following a heart murmur scare from the girl on 7 July 2005. It was this third application that was resolved by the consent order of 26 July 2005.

It is clear that there were accusations and counter accusations made by each party against the other prior to the consent order of 26 July 2005.

In her evidence-in-chief she was honest and fair. She stated that when both parties were in the house the children were apprehensive. The children would ask the two of them questions concerning the divorce which both took advantage of to manipulate them. The effect on the girl was catastrophic. She stole from school citing her mother's impecuniosity. Her school work deteriorated yet in the defendant's opinion she was a "bright button". She described the boy as "plodding along".

She stated that she believes in punishing the children but not before she finds out from them the reasons behind the censorable behavior. She stated that the plaintiff knew that she had no funds and could not work. He therefore sought to leverage these factors against her in order to force her to accept custody, relocation and financial settlement that was favorable to him.

He ignored Doctor Bester's report and the de Marigny interim and final reports, which he commissioned, which both highlighted the emotional strain their living arrangements were having on the children. He ignored KAMOCHA J's judgment.

She was adamant that in her view joint custody would not work as the two of them lacked respect for each other, distrusted each other and were inconsiderate. She cited incidents concerning the plans he had made for the children's skiing programme over the 2005 Easter holidays without consulting her.

Her view was that Mr. Austin and Mrs. Middleton and all those who wrote letters supporting joint custody did not know of the tense atmosphere she endured in the matrimonial home with the plaintiff. She stated that she had been a reading mother from the time that the girl was in Reception School and had not been one in 2004 as the girl's teacher had dispensed with the use of reading mothers. She had found it difficult to be a reading mother in the boy's class in 2004 because his class teacher was a friend of the plaintiff's. She stated that Mr. Austin was involved in her marriage and that he shared this knowledge with the

other teachers at the school. She highlighted how she organized cake sales on sports day in 2005 and how in that same year she became a reading class mother for the boy at his teachers' insistence which overcame her initial reluctance. She decorated classroom windows, as she is creative and enjoys doing things. She averred that she cannot say no when asked and gets joy from kids. She related her involvement in running stalls on cycling days for the boy and how she helps him out on Sundays.

On the education of the children it was her evidence that she was happy with Heritage Junior School but not with the Senior School. She preferred that her children be exposed to senior education the United Kingdom. It was important for the girl to enter a United Kingdom School in September 2007 and learn French at an early age. She could only do so if they leave Zimbabwe by July 2007. She would be required to write entry examinations.

She also believed that was what the plaintiff also wanted as at one time he wanted to remove the children abruptly from Heritage. She stated that during Christmas 2005 and January 2006 holidays the plaintiff had taken the children to a house in Grosvenor Gardens in the United Kingdom where they would live in when they relocated there. He had set a Trust, with United Kingdom based assets, for the children.

The other reason she sought to relocate was that after 9 years in Zimbabwe she was still regarded as a visitor and could not find a work permit. To her mind the country was unstable with spiraling and unpredictable inflation. She did not have family friends and a support system locally. All the friends she had had either left or were leaving the country. The medical scare of the child on 7 July 2005 wherein they ended at the Johannesburg Sunninghill Clinic where the girl was diagnosed with a heart murmur had rudely awakened her to the need to have money to look after the children. She still had property in storage in the United Kingdom. She made the most of de Marigny's report and recommendations that while joint custody was the first prize, in the instant case it was unworkable and his recommendation that she be awarded custody.

The two parties, to her mind, have different parenting styles. De Marigny mentioned the need for the girl to receive treatment for depression from an occupational therapist. The family physician, Doctor Dawson, recommended Doctor Chagwedera whom in turn requested to see the two parties first for counseling before attending to the child. While she was willing to attend, the plaintiff had refused to do so, as he questioned her credentials.

She stated that the boy was too tall for his age and was growing too fast. She believed the parents should work together on his gross motor skills. They had approached two specialists in Zimbabwe and an occupational therapist who recommended a physiotherapist, Frances Foggins, who in turn recommended horse riding and martial arts. In 2005 Mrs. Hammuty to whom she took the boy with the plaintiff's knowledge recommended that the muscles around the boy's joints needed strengthening as he was too wobbly. She advised her that the wobbling was short-term and discouraged occupational therapy.

She felt that the plaintiff challenged her authority with the children. When she requests them to carry out certain activities they reference them against the plaintiff's orders. She stated that he often did things without consulting her and dictated that they be done in his way. She felt that the boy also needed time to do art and craft besides physical activities. She accepted that it was necessary that he does soccer and triathlon. Her view was he was doing too many activities for his age. While the plaintiff insists that he has special needs the defendant accepted the teacher and the specialist's evidence to the contrary.

She stated that the plaintiff belittles her by his deeds. Over the Christmas and New Year holidays of 2005/06 they flew in the same plane to London. The plaintiff and the children were in the business class while she was in the economy class. The children would bring her biscuits, sweets and water from the business class. She stayed with the children in Blackpool with her parents while he stayed at the up market and expensive Hilton Hotel in London and he proceeded with his companion to Disneyland Paris where he stayed for 4 nights. She was however

happy with the continuation of the terms of the consent order but only until she left for the United Kingdom.

She was cross-examined. She stated that Christine, her sister whom de Marigny observed was the one other person besides the witness that the girl had positive feelings for, was recovering from a drug dependence problem. She further revealed that Christine had fallen pregnant at 16 and that her parents had arranged for an abortion for her. She maintained that the plaintiff had ill-treated her by serving summons on her as she prepared to take the children on holiday. She maintained that she had asked the plaintiff to leave the matrimonial home even before the de Marigny report was released. He was only prepared to do so on his own terms. She alleged that up to September 2004 she took the children to school 90% of the time. She agreed that the plaintiff had a domineering personality.

Even after the meaning of sole custody was explained to her in relation to testamentary disposition in terms of the Guardianship of Minors Act [*Chapter 5:08*], she maintained that was what she wanted as she did not trust the plaintiff with the custody of the children even after her death.

She agreed that the consent order had brought about beneficial results for the children. The girl no longer stole though she occasionally lied. She maintained that the plaintiff was not a bad parent, but stated that they had different parenting styles.

She was adamant that the girl should start middle school in the United Kingdom. Her understanding was that middle school targets 11 year olds in order to prepare them for high school at 13. She maintained that her letter of 10 July 2003 in which she was opposed to the removal of the children by the plaintiff was valid at the time. He could not just withdraw the children without consulting her. She disputed the suggestion that she wanted the children to remain at Heritage until they were each 18 years old. She believed that the plaintiff was using the boy's motor skills challenge as a bargaining chip. Her view was that he was overloaded by too many exercises for a boy of his age.

Her attention was drawn to paragraph 6 of the consent order wherein the parties agreed to “jointly decide all issues relating to the education and health of the children” and any matters pertaining to religion, extra curricula activities and the boy’s special needs activities. She believed that the phrase “all issues” meant the major/serious issues.

She was asked on her future plans. She had a relationship with a Greek diplomat formerly based in Zimbabwe. Her dreams of moving to Greece were however tempered by the realities on the ground. She did not have any firm future plans. She stuck to her view that joint custody would not work for them.

She called Jean-Francois Desvaux de Marigny. He testified on 22 February 2006 while plaintiff was still testifying, by consent of the parties, so that he would be released. He outlined his professional qualifications and experience as a clinical psychologist with a practice in Durban South Africa since 1986. He works closely with the office of Family Advocates in South Africa especially in divorce cases involving minors. He has given numerous training workshops on the psychological aspects of access, custody and divorce and has testified in numerous court cases in South Africa and once in Harare.

On 16 November 2004 at his consulting rooms in Durban he was consulted by the plaintiff who had been referred to him by Advocate de Bourbon and Mr. Passaportis. The plaintiff presented documentary evidence to him on which the plaintiff based the belief that he should be made the sole custodian of the two minor children. He claimed that he was the primary care giver because the defendant was afflicted by pre-natal depression. He expressed various concerns and criticisms of his wife as a parent and mother. He feared that if he was not on the scene the girl would suffer great psychological harm and was likely to become promiscuous in early adolescence and a prostitute in her adult life. He also feared that his absence would result in the boy becoming a criminal. He claimed that the defendant would alienate him from his children and home. He suggested that he would declare himself bankrupt. This, he hoped, would cut the financial flow to the defendant who would have no option but return the children to him.

The witness came to Harare in November 2004. He consulted with the children, and their teachers at Heritage and other collateral sources of the plaintiff. He also interviewed the defendant after arrangements had been made with her legal practitioners. He compiled a 20 page interim report dated 7 December 2004. He followed it up with a 56 page final report dated 25 March 2005. The final report makes reference to the 35 page Provisional Psychiatric Report of Doctor Paul Bester, a Consultant Child and Adolescent Forensic Psychiatrist based in Harley Street, London, of 26 January 2005.

In both his reports Mr. de Marigny set out the names of the parties and children and their respective dates of birth. He also indicated the methodology that he used and the sources of the collateral information.

The methodology involved clinical interviews, the use of the Minnesota Multiphasic Inventory Personality Inventory - 2, the Millions Clinical Multiaxial Inventory, the use of the Bene Anthony Family Relations Test, Projective Drawings and the Incomplete Sentences Test.

For the Interim Report he interviewed 5 staff members of Heritage School. He produced it after interviewing plaintiff's collateral sources only and without seeing the defendant's sources. For the Final Report he interviewed three more of the boy's and two more of the girl's teachers and Dr Dawson the parties' family doctor since 1997.

He telephonically consulted with Nicola Morris a friend of the parties and a teacher of the boy in 2004. The plaintiff provided him with nine testimonies from some of the collateral sources he consulted with. He was provided with both parties summaries of evidence and documents signed by the defendant on 18 July 2003 in an unsuccessful custody proposal settlement.

He had access to eight letters written by the plaintiff's legal practitioners to the defendant's, Mrs. Foggins, the occupational therapist's assessment report of 21 April 2004, an undated memorandum given by the defendant to the girl, the report of Dr Bester and the defendant's comments to it of 28 February 2005.

The Final Report is more detailed than the interim report which it replaced. It sets out the conditions on which he accepted to offer his

services. It is noteworthy that one of them was that he would remain a neutral independent expert and would provide this court with an opinion that would serve the best interests of the minor children.

It sets out the background information of the parties, that is, how they met, married and relocated to this country. It highlights each party's version of the sources of friction in the marriage and when the marriage irretrievably broke down. It sets out what was common cause in the parties' evidence that at time that the report was compiled the relationship was acrimonious, and was characterized by extreme mistrust of one another and "a constant awareness of the ensuing custody dispute and various attempts by both parties to ensure that they are awarded custody". The acrimony was clear from numerous allegations and counter allegations which he did not refer to in the report. The parties lived under the same roof, shared different bedrooms and shared very little communication most of it through writing or text messages and often through their legal practitioners. Each sought custody and past proposals on joint custody had not been successful.

It also sets out how the plaintiff presented himself as a co-operative and assertive person who believed that he had the best interests of children at heart. He was a successful property developer whose interests lay in the United Kingdom. In the past he used to travel to the United Kingdom every 6 weeks but in the preceding 1½ years he traveled less frequently. He was alive to the negative impact that the acrimony between the parties had on the children. He was extremely critical, negative and suspicious of the defendant and he believed that she viewed him in similar light. He highlighted eight bases of the plaintiff's criticism of the defendant. She took the children to school late, lacked commitment to their extra mural activities and medical appointments, and constantly referred to financial matters in front of the children. She lied that that she had no money when she in fact had it and sought to use the children as her credit card. She failed to provide routine discipline and abdicated her responsibility in this regard to others, exposed the children to racist views and claimed that she had commissioned an unsavory character to kill him.

The plaintiff took the psychometric testing (MMPI-1) but declined to participate in the Millions Clinical Multiaxial Inventory test. The results revealed the absence of psychopathology but showed him as a defensive person who was unwilling to admit that he had certain problems.

The results showed that he was active, alert and effective, evasive, over sensitive and stubborn. Though a possible exhibitionist, he was intelligent, self confident and witty.

In his interaction with the children he observed that he was a 'hands on' affectionate parent who was loud with both children. He was assertive and consistent in dealing with the children's testing behavior.

The defendant was a softly spoken and co-operative person who initially was cautious as she believed that the witness was the plaintiff's person but relaxed and became more open and spontaneous as rapport was established. She was tearful at times.

The defendant revealed that after they agreed that their marriage had broken down and that there was no hope of reconciliation both had been involved in subsequent relationships notwithstanding that they were sharing the same house and living with the children. She was distressed by the effect the acrimony was having on the children.

He highlighted what she believed caused the breakdown (unappreciated and unloved after child birth, medical problems in pregnancy, prolonged medical care after birth, denied post natal depression but suffered from extreme sleep deprivation.)

She highlighted the effect of pregnancy and child birth on her and the plaintiff's response to these medical problems, which left her feeling unappreciated and unloved. The plaintiff accused her of infidelity and started going on dates. (The plaintiff acknowledged to Dr Bester that he had an extramarital relationship) She commenced a relationship with an Ambassador of a foreign country in Zimbabwe. She repeatedly focused on the plaintiff's lack of financial support for her. She was less critical of him than he was of her. She described herself as a behind the scenes and less overt parent and claimed to be the children's primary parent. She had been involved at Heritage but with the letters, and the reports

emanating from the staff of this school she had become less involved in its affairs.

She explained why she took the children to school late and her reticence over exposing the children especially the boy to too many extramural activities. She was aware of and was concerned over his motor and co-ordination problems for which both parents had in 2001 sought the advice of Dr Dawson who had referred him for evaluation.

On disciplining the girl for cheating, stealing and lying she was more concerned with the underlying reasons which triggered this behavior than meting out punishment in a bid to improve her self esteem. She reassured the girl that both parents would be actively involved in her life even after divorce.

She was reluctant to involve family and friends in the divorce. She was not aware of the involvement of Dr Bester in the assessment of the minors and emphasized her availability to meet with him. She had responded to Dr Bester's report at the witness' request.

She took the MMPI-2 and Millions Clinical Multiaxial Inventory tests. Both these tests revealed the absence of psychopathology. She frankly admitted her failures and shortcomings. She was distressed by the situational pressures. She was highly suspicious of the involvement of others in her family matters and felt mistreated. The two tests also indicated that she was an argumentative person.

She interacted with the children in a tactile and demonstrative manner and responded to their testing behavior in a quiet but firm manner. At times she avoided confrontation by distracting them.

He interviewed the children individually. He found the girl pretty, intelligent, loving and co-operative. She exhibited a dramatic personality. She was distressed and confused. She was obsessed by the desire to please and rescue her parents. She saw herself as the 'adult' because of the role she took in stopping her parents from quarreling.

She used legalistic and age inappropriate language like joint custody, maintenance and rights. She did not like to be asked to choose between her two parents as she wanted a close relationship with both. She mistrusted both parents and did not know who between them was

telling the truth. She hated herself and wished she was not around. She told him that “I don’t want to say who I went to live with even though I might know in my mind. It says who I love most and who I went to spend most of my life with. I don’t want to have to make that decision.”.

She told him that her father regarded her mother as a horrid person, who wanted to keep them to herself, because she refused to sign the joint custody agreement. She stated that her mother did not discuss her father with them.

She also revealed to him that the source of the conflict between her parents was money. Her father alleged that the defendant pretended that she had no money when in fact she had a lot of it hidden away in her safe. Her mother, however, disputed this allegation.

In her spontaneous disclosures she indicated that she felt safer in the presence of her mother. He valued the psychiatric intervention of Dr. Chagwedera in counseling the girl. He conducted the Bene Anthony Family test on her to measure “the direction and intensity” of her feelings towards the various members of her family through a game assessment module which lowered her defense mechanism.

Her life revolved around her parents, herself, her brother and Aunt Christine. Her main sources and objects of love and positive feelings was her mother followed by Aunt Christine. Her father and her brother were her main source and objects of negative feelings. He noted that this sibling rivalry was appropriate. It arose from the fact that, in her view, her mother was overprotecting her while her father did the same to and overindulged her brother. She “saw her father as being quick tempered, impatient and wished at times to hit him.” He often teased, nagged and hit her. He not only complained about her but also frightened her. In contrast, her mother was kind hearted, and often cuddled her. She always liked to have her mother near her. She told him that she would prefer to marry someone who possessed her mother’s attributes. Her mother was kind to her, liked her very much, paid attention and listened to her. She was her mother’s main object of over indulgence. The Bene Antony Family Relations test revealed that the girl was closer to her mother than to her father. The projective

drawing test revealed her as a girl without both grounding and emotional security.

The boy was delightful, warm, cooperative and large for his age. He enjoyed the physical rough and tumble he engaged in with the plaintiff and Mr. de Marigny. His interactions with his mother were gentle and loving.

He was less articulate and detailed in his revelations. He liked praise and affirmation, which was liberally doled out on him by his father. He liked and was excited by animals. It was clear that he had gross motor co-ordination problems. The family doctor, on the consultation of both parents, referred him to Mrs. Foggin. It appeared he took after his father who had similar motor development lags in his youth. The two parents agreed that sport therapy would help him outgrow the gross motor skills challenge but differed on the extent and depth of the required sporting activities.

The Bene Anthony Family Relations test indicated that the boy was mildly defensive and distracted. His life revolved around his parents, sister and himself. His mother was his main source and object of love and positive affirmation, and dependency. His father appeared less involved in his emotional life but his involvement was positive and loving.

The Projective Drawings test revealed a 'paucity of expression, affection and closeness within his family and the presence of emotional regression'.

He presented the information revealed by the educators at Heritage. The children were being pulled between the parties and were subjected to inappropriate information and situations. The plaintiff was active in the children's education and extramural activities. The defendant had been active and supportive in both but had withdrawn for personal reasons for 1-1½ years but had resumed involvement in 2005. The boy had benefited from the activities that were primarily implemented by his father. The mother used to bring the children late for school but this had improved. The plaintiff was more involved in structure, discipline and routine and sought feedback on the children's progress something the mother rarely did. The educators praised the

plaintiff's parenting abilities and criticized the defendant. That criticism had lessened in 2005 as a result of her involvement in the children's school and sporting life. Nicola Morris, in a telephone interview, was very critical of the defendant but was full of praise of the plaintiff's parenting abilities. She, however, was someone who, by her own admission to Dr Bester, was closer to the plaintiff than to the defendant. Dr. Bester's report revealed that he had interviewed the children in Nicola's presence and that the girl had remarked that she wished he had done so in her absence before she quickly retorted that she did not mind Nicola marrying her father.

Vanessa Lewis, the girl's tap dancing teacher saw the plaintiff as supportive of her dancing studio and at times assisted by providing money. She observed that the girl was insecure and that she constantly craved for affirmation and attention. She described the defendant's relationship with the children as loving, warm and demonstrative. She indicated the plaintiff's inclination to dress down the defendant in public, a thing which was not reciprocated.

Lastly, he dwelt on his interview with Dr Dawson whom he found ethically cautious. She spoke positively of both parents' capabilities in addressing the medical, emotional and developmental needs of the children. She referred the girl to Dr Chagwedera at the defendant's request. In 2001, at the request of both parents, she had referred the boy to an occupational therapist. To her mind, he was mildly disabled. She was interviewed in the defendant's presence and she indicated that the defendant took her time to seek her own and the children's treatment. She viewed the defendant as a compassionate person and capable parent. She had, for the very first time, recently treated the defendant for depression arising from the divorce proceedings. She had referred the defendant to Angela Davis for supportive counseling. She was equally positive of the plaintiff though she was concerned by his approach to the boy's extramural activities.

He received other testimonies from the plaintiff which he did not include in the report though he took into account their contents.

In his evidence-in-chief Mr. de Marigny adopted the contents of his reports. He read Dr Bester's 35-page report (which is also part of Exhibit 7). The two reports share much in common. The Bester report contains useful information on some of the two children's milestones that were supplied by the plaintiff. These were that the defendant bonded well with the girl at birth by breastfeeding her for 1 year even though she was ill. The plaintiff became attached to the girl because of the defendant's illness. Both parents were involved in the education of the children until the time that these divorce proceedings commenced. It provides further insight into the delinquent behavior of the girl. She stole from a teacher's handbag and was suspended from school. She lied to other girls and was caught cheating in an examination.

Dr Bester mentally examined the two children in the presence of Nicola Morris on 6 January 2005 at the request of the plaintiff's erstwhile legal practitioners. The girl indicated, as she was leaving, that in future she preferred to be interviewed on her own. She described the divorce as a disaster. She envied her brother whom she believed was unaffected by it all.

She told Dr Bester that her mother threatened to stab herself through the heart if she (the mother) ever lied to her. Her father made confusing contradictory remarks. She concluded that both could not be telling the truth. She did not know how to behave anymore without upsetting either parent. She feared that one or both would run away. She was not sure whether her parents still loved her.

She told her mother over the telephone that she had missed her company during the Christmas holiday. This upset her father and she also ended up upset. She hoped for a speedy resolution of the divorce proceedings. She was worried by the way her father spent money when her mother did not have any. Her mother used to tell her that he was spending her money. She described any contemplated marriage between her father and Nicola as a nightmare. She furtively, with worry written all over her face, reassured Nicola that she did not mind such a marriage as she rather liked her.

The plaintiff told Dr. Bester the events surrounding the birth of the boy and highlighted the effect it had on the defendant. He was born with the umbilical cord wrapped around his neck. It asphyxiated him and he had to be resuscitated. She was ill but she managed to breastfeed him for 9 months. She regarded him as an unwanted baby, hence her failure to bond with him. She was depressed by all these feelings and events. The plaintiff, on the other hand bonded well with the boy. He observed that the boy had motor skill challenges when he was in nursery school. He was clumsy and tripped a lot while engaged in sporting activities.

Dr. Bester mentally examined the boy in the presence of his father, Nicola and the girl. He was alone with him for a few minutes. He had been to the zoo and was excited by the animals that he had seen. He observed that the boy was not only sad but also suffered from speech and language articulation problems. He had a stammer. He disliked being smacked by each of his parents. He talked about his pets. The psychiatrist failed to engage him on the divorce. He had a fractured arm.

He formed the opinion that the girl suffered from psychopathology as she felt responsible for her parents' divorce. She said, as the elder child who appreciated what was going on, she often mediated in the many conflicts that took place between her parents. He found that she suffered from a diagnosable psychiatric condition of a childhood consistent with mixed disorder of conduct and emotions, characterized by defiant behavior, depression anxiety and emotional upsets. He feared that she would carry these into adulthood and recommended play psychotherapy and the removal of the stressors that confronted her.

He was advised that the defendant was not willing to see him. He interviewed other people who were referred to him by the plaintiff. They were all favorably disposed to his, but totally against her, parental abilities.

Mr. de Marigny stated the fears that the plaintiff had that if he left the matrimonial home he would be legally disadvantaged in any future award of custody notwithstanding the adverse effect that the parties' presence under one roof had on the children. He formed the opinion that

the plaintiff was determined to get custody, and at all costs including the best interests of the children.

He had consulted with the defendant on Monday (20 February 2006 before he testified on Wednesday 22 February 2006) afternoon. He also consulted with both legal practitioners of the parties for 20 minutes at the Meikles hotel, and had seen the two minors, and their past and present teachers and the plaintiff on that day. He talked to both children at the respective homes of their parents.

The children were spending quality time with each parent and their emotional framework had improved. The communication between their parents had improved.

The girl however, remained traumatized by divided loyalties. She no longer trusts people. She pleaded with him to tell her the truth. She wanted to know if there was any truth in her father's allegation that he had come to fight for her mother. He had explained to her that he had come to represent their (children's) interests in court. Apparently her father had told her that she would have to come to court to help in the fight for she said to the witness, "I pray to God, the judge doesn't make me choose". She further alleged that her father had told her that the defendant was trying to take them away from him and that he would never see them as she would take them away to the U.K.

She told him her father had bought a house in the U.K. for their use when they relocated to that country. Further, that she no longer visited psychiatrists as they divulged the information that she gave them to her parents. She also revealed to him that Nicola was her father's friend who had told her that the defendant loved her more than her brother because she had wanted to have one child.

She revealed her divided loyalties. When she was with her father's friends she would tell them that she preferred him and when she was with her mother's friends she would nominate her mother as her preferred parent. It seems to me that the girl remained in distress even after the consent order of 26 July 2005.

It was his opinion, based on what the girl said to him that Nicola had a negative influence on the girl as she placed highly inappropriate information to the 9 year old girl.

He found the boy was verbally inarticulate. He was also less aware of the divorce issues between his parents. He was protected by the girl who demonstrated this by requesting the witness not to reveal certain information to him. The witness observed on that Monday that the boy had grown both physically and in confidence. He was still fond of his animals which were found at both his parents' houses.

In his evidence in chief he proved to be conversant with the concept of joint custody. He believed that while there were no fixed criteria for it, there was need for both parents to:

1. communicate with one another
2. Co-operate with one another
3. Facilitate in the children a positive relationship and positive regard for the other parent.

He acknowledged that since the consent order there had been more cooperation between the parties than before. The defendant continued to view the plaintiff as a control freak and a bully. She held negative feelings towards him.

The witness saw joint custody as the first prize in any divorce proceedings but did not believe that the requisite ingredients for it existed in the present case. He observed that the potential for shared parenting may exist but he would not recommend joint custody on the information he had. He was asked:

Q. Would you recommend that the parents continue with this parent sharing?

A. My Lord, yes, as long as the children are benefiting from it, and it is doable and can be implemented.

He was asked on the girl's views about relocating to the UK. He responded that:

"My dad is saying mum wants us to go to the UK I think we will move. Things here are mad and government is mad." It seemed to the court that she was receptive to the idea of relocation. He was asked to

give his opinion on the length of time that was required before the move could be undertaken. He stated that children were adaptable. They flourished in a constant and stable environment. He believed that a year to 1½ years should the divorce occur promptly, was ideal and would provide them with an opportunity to settle down in a new environment. It was in the end also dependent on the period it would take the parents to adjust, as this sent positive or negative signals to the children.

He was asked:

“Q. Whom do you recommend should have custody?

A. I recommend, if suitable and in the best interests of the minor children, that custody be awarded to the mother, Mrs. Beckford.”

He based this opinion on the personality profiles of the parties and the interviews that he conducted with them and the minor children. He also took into account the assessment tests he carried out on the parents and on the children. He proffered the opinion that irrespective of the legal issue, the custodian parent should be able to function emotionally, financially and socially in a way that would benefit the children to quickly adjust in a new environment. He saw the vilification of one parent by the other as destructive and confusing to the children. Every child needs to have positive views of both parents.

He had done a final personality profile of both parents and had spent time with them. He found the plaintiff intelligent, assertive and image conscious while the defendant was quiet and more co-operative but aggressive, stubborn and suspicious if put under pressure.

He was cross-examined by *Mr. Matinenga*. He arrived in the country on 20 February 2006 and was at the defendant's home from 4p.m. to 6:45p.m. He spent 1 hour with her and 1½ with the children. He then proceeded to the plaintiff's house and after about 20-30 minutes with him there was a power cut. He was not able to give equal time to the plaintiff but he compensated this deficiency by having a meal with him. The children had to retire to bed in preparation for school which plaintiff respected and enforced. He was more concerned with the quality of the time and show of affection that each parent had with the

children. The boy talked about his birthday which was jointly arranged by the parties. He showed him the fish tank, the parrot and racquet nets, while the girl showed him her room, big bed and fridge. The plaintiff's home was delightful with two lounges and nice facilities. It was his opinion that while plaintiff loved his children (and the defendant never suggested that he didn't) he also placed his legal interests above those of the children.

On the witness' last visit in 2005, the boy had apparent special needs. He was not handicapped but had mild hand to eye co-ordination problems which had been addressed by the sporting activities that were encouraged by the plaintiff and supported by the defendant. When he consulted with his sports teacher on 21 February 2006, that teacher was not aware that he had motor skill problems.

He was cross-examined on exhibit 4. He had seen some of the documents therein. His view was that the handwritten messages on page 1 attributed to the girl while she was in the U.K. in January 2006 concerned him as the concepts that are expressed therein were not those of a 9 year old. His view was that regard being had to the timing and context, a 9 year old was not capable of critically evaluating a parent. The impression the court had was that he was suggesting that the girl had been put to it by someone. He wanted to know why the letter was written. It seems to the court that Nicola must have put her to it as it was written at about the same time of the visit to Dr Bester. When the witness talked to the girl on 20 February 2006 he showed her certain documents which she could not recall writing. Even though the document has Laura Horton's name, the girl told him that she had been put to it by Nicola.

He maintained that the legalistic language in the girl's vocabulary was inappropriate for her age and was likely to cause irreparable damage to her.

He also commented under questioning that while in Dr Bester's report the plaintiff suggested that there was no bonding between the boy and the mother, it was his experience that the period of 9 months of breastfeeding was sufficient to achieve bonding between mother and

child. The suggestion by the plaintiff was made in an attempt to alienate the children from their mother.

The school reports confirmed the benefits that accrued to the children after the plaintiff left the house. He told the court that the defendant's view of the consent order was that it was beneficial to the children. She was relieved by the absence of tension but maintained that she had to walk on eggshells to please the plaintiff.

He accepted that the parties had communicated through their lawyers and that such communication was legally defined by the consent order, which had a limited shelf life. The nature of the communication exhibited by the parties showed cooperation (the heart murmur scare of the girl and triathlon for the boy) in co parenting but lacked tolerance.

He maintained during cross-examination that notwithstanding the consent order, the ability of the parties to communicate did not exist. They failed to agree on a particular psychiatrist who could counsel the girl. He reiterated that if parents were able to do it, joint custody would be best but it seldom works in instances such as the present, which is characterized by a tug of war. Disharmony and tension, in his view, were an every day occurrence in life prior to and after divorce and these could not preclude joint custody but his research on the point had shown that unless the couple possessed the necessary ingredients its implementation would always be fraught with perpetual litigation.

It was his view that the teachers at Heritage did not appreciate the differences between joint custody and joint involvement/joint parenting. He had indicated to them that joint custody was the first prize. He did not, for ethical reasons, reveal to them what his actual recommendations were.

The children had not shown preference for either home even though the plaintiff's was bigger and better. He believed that the boy's extra-mural activities were excessive as he was the only one in his class with such a large number of activities. The defendant believed that too many activities deprived him of the time to socialize with his friends and to fantasize.

He found that the plaintiff's *modus operandi* in his quest for custody succeeded in hardening feelings between the parties. When he wanted sole custody he said she was unfit. He had modified his approach by seeking joint custody. The acrimony and distrust that he had raised would continue to affect their relationship with each other even after the divorce.

I have dwelt at length on Mr. de Marigny's testimony because, in my view, it was delivered in a professional and impartial manner. His opinion was based on a credible methodology. He conducted in depth interviews with a wide array of collaterals, the plaintiff, the defendant, the children and Dr. Bester. He had access to some of the correspondence from the parties' erstwhile legal practitioners and the reports from Dr. Bester and Mrs. Foggin. He carried out a first class appraisal of the issues and the facts. He was alive to the 13 criteria for custody considerations set out in *McCall v McCall* 1994 (3) SA 20 (C) at 204-205 and the views expressed by de Vos J, in *Krugel v Krugel* 2003 (6) SA 220 (W), on joint custody.

He was commissioned by the plaintiff. He conducted himself well and with dignity in the witness box. His explanations and opinions could not be faulted during cross-examination. He supplied the answer to the puzzling averment by Mrs. Middleton that he had told the children's teachers at Heritage that he was recommending joint custody. He had told them it was the first prize but had explained to them that legal custody and colloquial custody were different. Mrs. Middleton, no doubt, remained with the belief that he would recommend joint custody probably because she confused it with co parenting. He talked to the children when they were both on their guard and when they were off guard. He conducted professional tests on them which revealed their true preferences. This was something which all the collateral sources that were supplied by the plaintiff, apparently, never did.

I am satisfied that he told the truth. I believed his evidence in its totality.

It is also appropriate that I assess the plaintiff and defendant's demeanor in the witness box and their respective oral testimonies. In

both their separate ways they held themselves with decorum and dignity. They each have their own idiosyncrasies. The plaintiff was fond of using the word “struggling” while the defendant’s favorite word was “stupid”, which she used in a self deprecating manner. Each party gave a fairly straightforward story. They both love their children deeply. They each express that love through the agency of their differing personalities.

In the beginning, the plaintiff in his summons sought joint custody. In her plea and counterclaim, the defendant sought custody. The plaintiff reacted by amending his summons and declaration and sought custody in the main and joint custody in the alternative. The defendant counter reacted by amending her claim in reconvention by seeking sole custody and leave to remove the children to the United Kingdom permanently after 31 July 2007.

The attitude adopted by the plaintiff at the trial was to look to the future. In case Nos. HC 2631/05 and HC 3385/05 he raised malevolent attacks on the character of the defendant. He consulted both Dr Bester in January 2005 and Mr. de Marigny. He cast the defendant in extremely bad light. He, in the same manner, also assaulted her parenting abilities. To a certain degree, this manifested a mind assailed by confusion. He seemed to suggest that he strongly believed that the defendant was an unsuitable mother, yet he signaled doubt of this belief by seeking to have her declared a joint custodian of the selfsame children with him. In eventually seeking custody in the main and joint custody in the alternative, he seemed to accept that the defendant was a good mother. It seemed to me that his desire to abandon the past and seek the future was not a result of a genuine desire to let bygones be bygones but was a tactic dictated by the realization of the inevitable trap he had laid out for himself in attacking defendant as an unsuitable custodian. He feared that his initial attacks would be exposed as malevolent for they were not based on firm ground.

I am not in anyway suggesting that it was inappropriate for him to seek custody for himself and joint custody in the alternative. This is, after all, an acceptable and even proper way of pleading. It is however

one method which attracts the inescapable and plausible conclusion of approbation and reprobation.

Reduced to its bare essentials, the plaintiff's case was that while the marriage had its fair share of ups and downs and normal wear and tear, it was a healthy relationship which positively impacted on the two children of the union. He accepted that before he issued and served summons on 4 April 2003, I must say in a very cruel and inconsiderate way (taking into account that the defendant and the children were traveling to England that night for a holiday), the defendant's contribution to the life, health and morals of the children was a positive one. She satisfactorily carried out the duties and responsibilities of a mother. She was involved fully with him in caring for the children's education (both academic and extra-mural) social and spiritual needs. They complemented each other in every aspect of child rearing.

His evidence further revealed that all this positive view of the defendant took a sudden change when he filed for divorce. He began to pick on certain traits in her conduct, which he blew out of proportion to justify his newly found negative view that she was an unsuitable parent. His actions towards the plaintiff from 4 April 2003 to 26 July 2005 were characterized and circumscribed by the desire to paint her as an unsuitable custodian. He had lived with her as husband and wife from 1994, after having cohabitated with her for 4 years since 1990. He had relocated with her to Zimbabwe when the girl was 6 months old in January/February 1997. Outside the occasional holidays that she took with the children to England, she resided with him in this country for 6 years until the divorce and for 8 years until the consent order. She lived in Zimbabwe on a visitor's permit. She was, and has, not been employed in Zimbabwe. The two companies that she operated in England before the marriage had been liquidated/wound up before she moved to Zimbabwe with him. He knew as her husband that she had no source of funds. His testimony did not reveal any that she had.

The stratagem that he utilized between April 2003 and July 2005 was to hemorrhage the financial flows that were due to her from him. He was aware of her introvert nature, (she slept a lot) and as his wife that

she hated confrontation. She ensconced herself in her separate bedroom during this period. That was her character as revealed by Mr. de Marigny. On the other hand he was aggressive, assertive, gregarious, and exhibitionist. That was his character. He exploited both his character and the traits in her character he knew so well, to his best advantage. Mr. de Marigny correctly assessed him as a person who thrived in risky and challenging environments. He became an exhibitionist. While the defendant cried and fretted, he seized the advantage and made sure that the children's educationists at Heritage saw his interest in the children's education and extra-mural activities. He became friends with those teachers who mattered to his children at a time the defendant was afflicted by emotionally driven impotency to act. He, in my view, recruited the teachers to his side by the force of his conduct and character which completely overshadowed and eclipsed that of the defendant. The sheer effect of his personality is reflected in the glowing reports of Mr. Austin, Mrs. Middleton, Mrs. Blignaut and the other teachers of the minor children which are contained in Exhibit '4'. He, thus, financially helped the school and showed interest in his children's work.

He further had the financial wherewithal to consult both Mr. de Marigny in his consulting offices in Durban, in 2004 and to bring him to Harare in 2005 and to meet him in Cape Town together with his legal practitioner Mr. Passaportis in October 2005. He used his financial clout to consult with Dr Bester in London who examined the children without the knowledge or approval of the defendant. Dr Bester interviewed Nicola Morris, the plaintiff's parents and Paula Horton. He used his financial power, to travel in business class on trips to London, in living at the Hilton Hotel in London, to take the children together with his companion to Disneyland Europe in Paris, to take the children for skiing. He also used the power of his money to show the children that they would have a better financial life with him than with their mother.

Mr. de Marigny's report noted that "it would appear that financial issues have been a large focus of attention by Mr. and Mrs. Beckford and the minor children." The accuracy of this observation is demonstrated

firstly, by the theft of money from a teacher's hand bag by the girl in order to help out her mother, secondly by the acquisition of a new set of clothes for the children, for use at his new home, by the plaintiff and the better facilities found at that house. The plaintiff used the Christmas/New Year holiday of 2005-06 to show the children a three storey house in Grosvenor Garden in England.

It is clear that the plaintiff loves his children. He is involved in their lives. He has made a positive impact on their self esteem and confidence. He has driven the boy, like a slave master, to overcome the gross motor problems and wobbliness that have afflicted him from nursery school. He grows just too fast for his age. Dr Bester's report shows that the plaintiff's mother indicated that the plaintiff once suffered from similar problems when he was young. Perhaps he projects his youth through the boy, hence his filial desire to see him overcome these challenges in the same way that he did. It is however clear to me that the plaintiff's very open and overt actions that I have outlined were driven also by his desire to be seen by all and sundry as the primary parent. All this was motivated by his desire to be appointed the custodian parent, whether on his own account or jointly with the defendant. He sought to achieve this end by using all the means at his disposal.

The totality of evidence and especially his conduct prior to the consent order and after it in January 2006 portrayed him as a manipulator. It is clear to me that he manipulated Nicola Morris and Laura Horton to insidiously drive the girl to write what she wrote on pages 1 and 2 of exhibit 4, documents whose contents she categorically told Mr. de Marigny that she had been driven to write by Nicola Morris. Indeed Dr Bester in his examination report refers to the girl's desire to consult with him on her own in future. She further intimated that Nicola was her 'nightmare'. She said her worst nightmare was a marriage between her father and Nicola Morris. The plaintiff sought to give the impression that the girl went to Laura Horton of her volition and confided in her. I did not believe him. He was in my view carrying on with his mission of portraying himself in the most favorable light as the

prospective custodian parent. Dr Bester's report clearly demonstrated that he did not shy away from painting his wife in bad light. He saw no good in her.

He suggested that she wanted to have him killed by one Cheyenne so that she could get custody. He accused her of encouraging a lesbian relationship between two married mothers which destroyed these women's marriages. Mr. *de Bourbon* his senior counsel, without regard to human decency attacked Christine, the defendant's sister who after going through a traumatic adolescence of drugs and early teenage pregnancy and who was in rehabilitation, simply because the girl had expressed to Mr. de Marigny that after her mother she had positive thoughts for her. Senior counsel sought to suggest that the defendant was not a suitable custodian parent.

The plaintiff's conduct after he filed for divorce both before and after the consent order painted him as a manipulator. He manipulated his character, his wife's character, his money and the prevailing circumstances to his advantage. His evidence failed to convince me that the defendant was unsuitable to wear the mantle of a custodian parent.

I am not convinced that a father who behaved as he did, who mistreated his children's mother, who positively painted a negative picture of the mother to the children is a fit and proper parent for the award of custody on his own.

The defendant on the other hand is the natural mother of the children. She has always been there for them. When the plaintiff was away on business every six weeks she remained with the children. The complaints about her lack of punctuality only surfaced after the divorce action was set in motion. The personalities who criticized her did not know her or seek audience with her so that they could, at the very least, attempt to understand her difficulties. They were all drawn into the vortex of the divorce with the result that she withdrew further from them for fear of being misquoted. It is very difficult to judge the genuineness of the complaints leveled against her by the educators bearing in mind that the information they supplied was solicited by the plaintiff's legal practitioners with a view to litigation. They supplied this information

without affording her an opportunity to comment. This information was supplied during the time that the plaintiff sought joint custody and later sole alternatively joint custody. It was all designed to cast her in an unfavorable light.

Mr. de Marigny testimony's portrays the true feelings that the children have towards their mother. She is their clear preference. She appears to have been adversely affected by the divorce action before the consent order. She had no financial resources of her own. She was not employed. She had no means to sustain herself. The plaintiff was ill treating her. They were engaged in an acrimonious relationship. The local support system had effectively become partisan. After the consent order, which saw the resumption of financial flows in her direction from the plaintiff, she was able to emerge from her self-imposed exile from the beginning of 2005 to date. The shrill criticism of her conduct disappeared.

She was also driven from hiding in her shell in 2003/2004 by the desire to get custody. It seems to me that she must have realized that she had to show that she was a suitable prospective custodian of the minor children. She did not gratuitously or otherwise malign the plaintiff as an unsuitable custodian parent. All she did was demonstrate through evidence that she was the most suitable custodian of the children.

She was honest about her association with another man after the marriage had irretrievably broken down. She however had no firm plans about it as she could not for now gauge the direction in which that relationship was going. She felt that she had no support system here. She cannot work here. The plaintiff at one time sought her deportation. She set out the basis of her belief that the children would receive better middle and senior school education in England.

She portrayed herself as a strong willed woman who took time to commiserate over her new found status but who rose there from and availed herself for the children. When the final de Marigny report came out, she acted on it. She won but that pyrrhic victory was short-lived as the plaintiff appealed against the order that was granted in her favor. She was undeterred by this turn of events and launched an urgent

application. She, eventually, was prepared to settle for the consent order for the good of the children. Mr. de Marigny testified that she felt that dealing with the plaintiff was like walking on eggshells. She was hamstrung by the absence of financial resources to look for alternative accommodation.

The approbation and reprobation of the plaintiff in seeking joint custody then sole alternatively joint custody seems, to me, to demonstrate that he saw her as a suitable custodian parent. In the end the plaintiff through the submissions of his counsel abandoned the idea of sole custody and sought to persuade me grant an order of joint custody. That in itself demonstrates her suitability as a custodian parent.

It seems to me that she gave her evidence well. She was not shaken by cross-examination. Her side of story was confirmed by the plaintiff's conduct and Mr. de Marigny's report and oral evidence. I am satisfied that she is eminently suited for appointment as a custodian parent.

JOINT CUSTODY:

The issue that has presented itself on custody really revolves on whether the court should grant joint custody or sole custody, without the testamentary disposition trappings attached to it, to the defendant.

Mr *Matinenga* submitted well prepared written heads of arguments on the issue of custody. I am indebted to the South African case authorities and the textbook writers that he referred to on the issue in bid to persuade me to make an order of joint custody.

Mr *Andersen* on the other hand referred me to two local cases in his submissions that joint custody was inappropriate.

Both counsel where agreed that the authority of this court to grant custody is now based on the provisions of subsections 1 and 2(a) of section (1) of the Matrimonial Causes Act [*Chapter 5:13*].

Erwin Spiro in *Law of Parent and Child 4th edition* at page 86 notes the difficulty in providing a definition of custody that is 'valid once for all'. HR Hahlo in the *South African Law of Husband and Wife 5th edition* at 394 attempted to define it. He wrote:

“Custody is but one incident or sector of natural guardianship. Where as happens in most cases, custody is awarded to the mother and no order is made as to guardianship, the father is left with guardianship minus custody. The mother as the custodian parent is entitled to have the child with her, to control its daily life, to decide all questions relating to its education, training, religious upbringing and to determine what homes or houses the child may or may not enter and with whom it may or may not associate. In case of urgency she can supply the necessary consent to a surgical operation on the child.”

See also Hoffman and BK Pincus in ***The Law of Custody*** and Borberg: ***The Law of Persons and Family 2nd edition at 661-664.***

The definition of custody encompasses two aspects. These are the aspect of physical custody and that of legal custody. The former entails the control of the body while the latter is concerned with the decision-making authority over that physical body on a day to day basis.

In Zimbabwe, SMITH J dealt *inter alia* with the issue of joint custody in *Maarschalk v Maarschalk* 1994 (2) ZLR 110 (H). I agree with the interpretation that he rendered to the provisions of subsection (2) of section 10 of the Matrimonial Causes Act *supra*, as read with subsection (2) of section 8 of the Interpretation Act [*Chapter 1:01*] at page 120B-E. At page 120F, the learned judge stated thus:

“to my mind, that provision shows that it was the intention of the Legislature that the powers of the court should not be narrowly construed. Under the common law, during marriage, the custody of the children is shared by the parents so the concept of joint custody is accepted. For the reasons spelt out in the cases referred to above, on divorce custody is usually granted to only one party. It seems to me, however, that where the circumstances justify the award of joint custody, the court should not be precluded from making such an award. As I have tried to point out above, in my opinion section 10(2) of the Matrimonial Causes Act 1985 permits a court to make such an award.”

The law in this country, therefore, permits a court clothed with the necessary jurisdiction to award joint custody.

There does not appear to be a reported case in this country which has done so. Mr *Matinenga*, for the plaintiff sought to persuade me to follow the line of South African cases which have blazed the trail. He made reference to the following:

1. An article on joint custody covering part of the inaugural speech by Ivan Schafer as a Professor of Law of Rhodes University reported in the (1987) 104 South African Law Journal at 149-164
2. *V v. V* 1998(4) SA 169
3. *Krugel v Krugel* 2003 (6) SA 220 (W) a case I could not locate
4. *Corris v Corris* 1997 (2) SA 930(W)

Professor Schafer discussed the factors for and against joint custody and recommended that consideration should be given for such an award. He outlined the prerequisites for a joint custody order as:

- a) that both parents are fit
- b) that both desire continuous involvement with their children
- c) both are seen by the children as their source of security and love
- d) both are able to communicate and cooperate in promoting the children's interests.

In *Venton v Venton* 1993(1) SA 763 (D), Didcot J considered the following:

- the parties ability to deal with the issue in a sensible, mature, responsible and temperamentally stable manner
- whether the relationship between the parties has been remarkably good despite the collapse of the marriage
- whether they respected, trusted and remained fond of each other
- whether they had shared the duties of parenthood amicably and constructively
- whether they had similar outlooks and values
- whether compromise rather than altercation had been their way of coping with differences
- whether they did not disparage each other in the eyes of the children but praised one another in the children's presence.
- whether they had willingly acted as joint custodians since their separation

In *Corris v Corris, supra*, where the parties had lived apart for a year and had two girls aged 6½ and 8 years, the court awarded joint custody because they were not only co-operative but also resided in

close proximity to each another. KUPER AJ was not deterred by the two objections that were raised against joint custody, that is:

- (1) the one captain of the ship concept and
- (2) the fear of the prospect of future litigation prejudicial to the children

He relied on the opinions of experts that any future disagreements between the parties would be resolved amicably and in the children's best interests and that there was no real risk of any acrimonious and irresolute disagreements arising which would immobilize the operation of the joint custody order.

In applying these principles I bear in mind the caution in *Corris v Corris, supra* at 934C-D that:

"Now any custody order made by a court is itself an act of clairvoyance. No one can spell the future nor do I think does a court imagine it can. Hence the caution. A court is presented with evidence of the past and current situation and a custody order is made on that evidence, experience, and probability and in hope. Such an order anticipates continuance or change but never permanence. Life is risk. Should circumstances change, parties are at liberty to approach the court for variation. They do and not infrequently"

In *V v V supra* at 191F-G FOXCROFT J in awarding joint custody noted:

"In my view, the fact that a child should know where it stands is not the only consideration of importance. It is part of the pattern for a child's future which a court attempts to construct which has to be balanced against the great benefits to be obtained when both parents contribute on a regular and reasonably equal basis to the upbringing of the child. I have no doubt that most children who love their parents as deeply as the children in this case appear to, would always choose to have this kind of contact with both parents which they have enjoyed before divorce. If that contact will inevitably lead to further instability in the lives of the children it should not be permitted. No one can predict the future or say that deadlock between plaintiff and defendant will inevitably arise. They have both retained a measure of respect for each other which was evident during the proceedings before me and I am hopeful that when the traumatic events of the past 2 years have faded a little they will be able to resume their lives for the benefit of the children. I feel reasonably certain they will get on with their lives.

There is no evidence that they have ever used the children as weapons of war to get at each other. Joint custody in such a situation would be unthinkable.

In the present case the children seem to want to protect their parents for whom they have sympathy. There is no evidence of antipathy against either as was the case in *Mc Call v McCall*."

In the present case the attitude of the plaintiff is one in favour of joint custody while the defendant is totally against it. The plaintiff relies on the court order of 26 July 2005 as the basis for his views that the parties co-operate. The defendant's attitude is that the order is working but maintains that dealing with the plaintiff, to her, is like walking on eggshells. She viewed it as a temporary agreement through which the plaintiff left the matrimonial home and reduced the emotional and physical trauma on the children.

The plaintiff does, however, not trust the defendant and that feeling is mutual. She stated that she only respects him as the father of her children.

Communication between the parties is abnormal. They resort, even after the consent order to the use of the short message service on their cellular phones. At other times they do so through their legal practitioners.

Before the consent order, both parents used the children as weapons of war to get at each other. After the consent order, the plaintiff continued to use the girl by requesting her to provide inappropriate reports about her mother. Mr de Marigny testified that even on 20 February 2006 the girl complained to him over her father's bid to curry favour with her while disparaging her mother. The plaintiff does not cast the defendant in positive terms to the children.

The parties have different parenting styles which could in the long run confuse the children. The plaintiff is cast out as harsh while defendant is shown as soft. They do not agree on the doctor who should counsel the girl. They hold diametrically opposed views on the nature and intensity of the boy's extra-mural activities. The defendant believes that the boy is involved in too many sporting activities which are not beneficial to his holistic growth. Her conclusions are buttressed by Mrs. Hammatty's report and the failure by the boy's sports teacher to recognize that he suffers from any gross motor skill challenges. The

plaintiff believes he is not overloaded and that he still needs these activities. He is supported in this view by Mr. Austin and Mrs. Middleton.

The parties also hold divergent views over the future education of the children. The plaintiff believes that the children should continue to attend school in Zimbabwe while the defendant believes that they should relocate to England which offers better educational prospects. At one time the plaintiff wanted to remove the children from both Heritage and Zimbabwe without notice to defendant and she protested. During the trial the defendant firmly expressed her intention to remove the children from this country amid shrill protests from the plaintiff.

I am satisfied that there exists a real danger than the children will be further emotionally damaged by the tug of war which is likely to persist between the parties. They do not even agree on the meaning of clause 6 of the consent order, that is, whether "all issues" bears a literal meaning or whether it simply means major issues.

I agree with Mr de Marigny that joint custody would, in appropriate circumstances, be the first prize. In the present case, the past has been acrimonious. During the trial, the plaintiff attempted to soften his position but he could not resist the temptation of taking pot shots at the defendant by describing her as a financial mercenary who believed he had a pot of gold. I am satisfied that the facts and circumstances of this case militate against an award of joint custody.

It seems to me regard being had to the preferences of the children as elicited in the de Marigny report, that the defendant is the most suitable custodian parent. The plaintiff would have to content with reasonable access.

The defendant sought to remove the minor children permanently from Zimbabwe after 31 July 2007. The plaintiff who submitted that it was premature to seek such relief did not seriously oppose it.

In her testimony the defendant justified the need to prepare the girl for middle school in England. She demonstrated that she did not have any support system in this country. She also cited the deteriorating economic environment in this country.

In paragraph 15 of his draft order, the plaintiff postulates the possibility of either party relocating to the UK with the minor children, with the consent of this court. It is clear to me that at one point the plaintiff contemplated such a move. The defendant would like to do so. She has taken into account the recommendation of the educationists and Mr de Marigny. The plaintiff has already prepared the children for relocation by showing them a house they may live in the UK. That the children have lived in Zimbabwe for the greater part of their existence is not in doubt. They were both born in the UK. Indeed, after the defendant conceived the boy, the parties temporarily moved to the UK for her to be closer to both their families. Clearly the parties have close links to the UK and have always contemplated the possibility of going back home.

It is for these reasons that I feel obliged to grant the defendant the relief that she seeks in this regard.

As long as they remain in Zimbabwe, while the defendant has been awarded custody, the plaintiff's rights of reasonable access, pending her departure, shall be regulated in terms of paragraphs 2,3,4,5 and 6 of the consent order of 26 July 2006.

MAINTENANCE

The defendant sought maintenance for her and the children and prayed that it be regulated in terms of paragraphs 7, 8,9,10 and 11 of the consent order until her departure to the UK. On the other hand the plaintiff contended that he pays the Zimbabwean dollar equivalent of US\$ 250 per month per child and bears the costs of the children's attendance at a private school in Zimbabwe, that he effects the payment of costs of the children's necessary school uniforms and maintains the children as his dependents on his Medical Aid scheme and that he bears all medical shortfalls.

Mr de Bourbon submitted that the defendant had not led evidence on her needs in Zimbabwe. Notwithstanding this failure he submitted that the plaintiff was offering to pay her maintenance in the Zimbabwean dollar equivalent of US\$500 and maintain her as a dependent on his Medical Aid scheme that she was member of, at the date of issue of

summons. These offers were for a maximum period of 5 years but would terminate on her death, remarriage or cohabitation with another person.

The defendant did not lead evidence in support of her claim for personal maintenance. Maintenance is, however, an enquiry. The absence of monetary figures is not fatal to her claim. The consent order already regulated that issue. She seeks that for as long as she remains in Zimbabwe her personal maintenance should be regulated in terms similar to those found in the consent order. I see no reason to discard her reasoning as it is based on a workable, tried and tested formula which has been in operation since 26 July 2005. That formula takes into account the loss in the time value of our currency. In my view, it restores the lavish lifestyle and high standard of living that the defendant, as a non-working mother who is not able to work in this country, was accustomed to during the subsistence of the marriage.

The defendant is not able to work in this country. Throughout the greater part of her marriage she has been supported by the plaintiff. She has established the need for personal maintenance. On 8 December 2003 she set out in her further particulars her schedule of monthly expenses. One option open to this court would be to factor into these figures the incidence of inflation and extrapolate them to arrive at an equivalent total amount of maintenance due to her. This would be a laborious exercise. I therefore prefer to exercise my discretion in favour of the methodology that was crystallized in the consent order in so far as it relates to the personal maintenance of the defendant. I will thus make an order for her personal maintenance in the terms that she seeks.

The plaintiff has accepted that he be bound by consent order on the maintenance of the minor children. That concession is noted and an award along those lines will be made.

The other issues that relate to the educational, medical and holiday needs of the children were agreed to by the parties in their respective counsels' submissions. These will be regulated, as agreed between the parties, in terms of the consent order of 26 July 2005.

The defendant co-joined her claim for maintenance with a prayer that the plaintiff be ordered to supply her with 200 litres of diesel every

month until she relocates to the UK. The plaintiff did not seriously contest her claim in this regard. His only concern was that the cost of the diesel be incorporated into one lump sum monthly figure. The defendant stated that she uses that amount of fuel to ferry the children to school and for her own personal errands. She further stated that the vehicle that she uses guzzles a lot of fuel because it is not only old but also poorly serviced and maintained by the plaintiff. She highlighted the agony she faces in searching for fuel and compared it with the ease with which the plaintiff manages to acquire it. She further stated that the price of fuel is always changing hence the formulation of her claim in the manner that she did.

It seems, to me, that since the order of maintenance that I will make will be in terms similar to those that are found in the consent order and, since the maintenance order and her request for fuel are for the limited duration of her stay in this country I will accede to her prayer for the delivery of 200 litres of diesel to her every month.

MATRIMONIAL ASSETS:

The plaintiff led evidence on matrimonial assets on 16 and 17 February 2006. There was no dispute as regards the local matrimonial assets. The dispute rather centered on the foreign assets that constitute matrimonial assets.

The plaintiff met the defendant in 1990. He was a property developer while she was a graphic designer. At that time the property market was going through a major slump and was very volatile. He had a lot of negative equity and could not maintain interest payments. He was struggling. The going was really difficult for him. He lived by the day and spent what he earned. He had neither pension plans nor savings. He was not a long term financial planner. The result was that in 1994, before his marriage to the defendant, he was declared bankrupt by the Midland Bank, which was the precursor to the HBC bank, and his 1st Avenue house was repossessed. At that time the defendant was surviving as a graphic designer but was struggling. She had two companies under her wing, the Connelly Connection and ECU design. Both were insolvent and

closed down with a large debt in the period 1994/95. When the two were joined in holy matrimony, their respective businesses were in difficulties.

The two contributed equally in the payment of the deposit of the house that they purchased in Rocklane. It was registered in the defendant's name. He tried his fortune in the furniture business but quickly abandoned it for the property business. He relocated to Zimbabwe from where he carried out property transactions from the matrimonial home. He maintained an office in Kent in England, which he closed down in 2002.

He stated that he held beneficial interest in Tarajan Overseas Ltd and Glencora Resources Ltd, which are registered in the Isle of Man. He registered them outside the United Kingdom to avoid paying capital gains tax. He previously held a beneficial interest in Coralsands Consultants Ltd, which was registered in the Isle of Man in 2001. He carried out numerous property transactions through this company. He sold all his interests in it for £40 000 to Dorchester Investments Ltd, which was in turn owned by Martin Neville, in 2002. He, however, carried on as a consultant for this company.

He stated that Paula Horton, who was once his personal assistant, was a business woman in her own right and a director in her own and five other companies.

He owned Prestige Investments 2000 and Franchise and Fast Food Company Ltd the latter of which was a shelf company that was registered in Gibraltar. He once owned Springwood Properties, which he disposed of and not Springwood Group, which he knew nothing of. He knew of Wyford Investment, Ashberry Holdings Ltd and Munich Investments but he held neither shareholding nor interest in any of these companies. He expressed the view that it was easy to find information on these companies in the Isle of Man and Gibraltar through company searches to identify who its directors and shareholders were as these companies lodged company accounts. He also stated that as far as property transactions were concerned, it was easy to surf through the internet to obtain information on these. It was not necessary to physically visit the Land Registry Offices in the UK.

He identified one of his weaknesses as his inability, throughout his business life, to keep a careful record of his documents. His wife had access to a huge bundle of business records and personal identification numbers (PIN) of his various accounts. He never sought to withhold any information from her. He averred that the tax authorities in the UK were very vigilant and he thus never sought to conceal the true nature of his business from them or the defendant for that matter. He never used Coralsands' bank accounts for his personal banking. All his bank statements for the debit cards he held with the banks in the UK were dispatched to the matrimonial home. She intercepted his mail and he never stopped her from doing so. He however preferred receiving his fees in cash and often left this with a variety of solicitors from whom he picked it up.

He testified that he held, as at the date of testimony, a Lloyd Jersey Account expressed in US\$, a National Westminster Natwest credit card account which was still active, £900 in a Cyprus Barclays Bank account. He believed the defendant had credit cards (spent US\$ 15 000 on the divorce and visited the UK frequently) even though he had no details on these accounts.

He was taken through Exhibit 5, a bundle of documents which is (from page 47 to 236) 191 pages long. This was done in conjunction with Exhibit '1', the answers to the plaintiff's interrogatories, which were supplied by the defendant. It was in Exhibit '1' that the defendant, by a letter dated 20 September 2005, listed 35 properties which she asserted were part of the matrimonial assets due for distribution in this matter. These properties were divided into three categories. The first category consists of 6 properties which were sold prior to the institution of divorce, while the second category consists of 19 properties which were sold during the divorce proceedings and the last category consists of 10 properties which she referred to as existing properties.

There is an Annexure 'A' attached to Exhibit '1'. It has 5 columns. These capture the address of the property, the date on which it was sold, the gross sale price where known, the registered owner and the purchaser. That annexure deals with the 25 properties listed in the first

and second categories of Exhibit '1' under sold before and sold during the divorce. The 6 properties which were sold before the institution of divorce were sold between 3 September 2002 and 4 February 2002, while the 19 which were sold after the institution of the divorce were sold between 27 March 2003 and 28 June 2004. Of this total, 12 properties were registered in the name of Coralsands Consultants, 5 under Tarajan Overseas, 5 under Glencora Resources, one each in the name of Munich Investments Gibraltar, Lornox Investments Gibraltar and Minh Hoang and Que Thanh Lieu (latter one suspected by the defendant to be nominees of the plaintiff).

The plaintiff's erstwhile legal practitioners engaged JS Knott Legal Services who are solicitors agents, professional investigators and process servers in Chatham Kent, England to search the Land Registry on all the 35 properties listed. On 28 September 2005, JS Knott Legal Services supplied them with the results of their findings (pages 50-54 of Exhibit 5). They confirmed the accuracy of the defendant's interrogatories on the identity of the current owners of the first 6 properties in the first category of the letter of 20 September 2005. The plaintiff indicated in his testimony that he was involved as a consultant in the disposal of the 3 properties, in this category, which belonged to Coralsands. He sold the property of Tarajan and after deducting fees, interest and other overheads he received lesser amounts than those depicted in annexure 'A' of £255 000 and £285 000 respectively. He made a loss on the latter transaction. He made a profit of between £30 000 and £40 000 on the sixth transaction. This money went towards defraying the living expenses of his family.

The findings of JS Knott on the second category of 19 properties agreed with Annexure 'A' of Exhibit '1' on the identity of the current owners as at 28 September 2005 on all but 4 of the properties (these being numbers 8, 14, 17 & 22).

He testified that he was not involved in the disposal of 201 Church Road (Freehold) by Coralsands Consultants on 30 May 2003. He had been involved when it was sold to Coralsands by Prestige Enterprises before that date. He was involved in property No. 8 but he was not privy

to the net sale amount that was realized. He did not have any knowledge on the disposal of the ninth property, which belonged to Munich Investments. He was involved in sale of properties shown as No. 10, 11, 12 and 13. On No. 10 (a Glencora property) he failed to disclose the amount of the "small profit" which he made. He stated that he was the consultant of Coralsands in the disposal of the properties indicated under 11, 12 and 13. He was not aware of the net payment that was due to Coralsands in the absence of the necessary transaction documents to guide him.

He did not know the two Orientals who purchased property number 14 nor where they his nominees.

On properties 15 and 16, whose freehold and leasehold title for 7 Granville Road were owned by Tarajan Overseas, he stuck to the response he gave in his interrogatories filed of record on 2nd December 2005. These were that flat 7A was sold to Nicky Morris on 10 November 2005 for the gross amount of £195 000, which after apportionments to the redemption of mortgages held by Wintrust Bank of £140 000, the repayment of the deposit of £25 000, allowances for building work and solicitors charges, costs, disbursements and fees he netted a profit of £2 306.81.

He sold Flat 7B in March 2003 for £180 000, which save for the costs of £5 700 redeemed the Wintrust mortgage bond while the ground floor shop, which was on offer from April 2003, was sold in July 2003 for £135 000 redeemed the Wintrust mortgage bond save for the disbursement of £2 791.

On property 17, 18 & 19 he acted as a consultant for Glencora Resources on 3 July and 27 July 2003. He accepted that he erred when he stated in his interrogatories that he had disposed of these properties before he instituted the divorce proceedings. He realized £30 000 from these sales which he spent on living expenses. On property 20 he acted for Coralsands as a consultant. He knew nothing about No. 28 as he did not know or associate with Lornox Investments.

On property number 22, that is, 36 Upper Richmond Road, London (leasehold) which was sold by Tarajan Overseas on 9 March 2003, he

accepted that he had wrongly asserted that it had been sold before the institution of divorce and that he made a profit of £35 000. He alleged that he gave this answer in error in his interrogatories. On properties 23 to 25, which were owned by Coralsands and disposed of to Neasden Electronics Ltd on 28 June 2004 he stated that he had acted as a consultant only. He however had also been involved when these were sold by Glencora to Coralsands before the transactions of 28 June 2004.

He stated that he was not involved in the disposal of 3 of the 19 properties that are listed in this category, that is, No. 9, 14 and 21. He referred to the letters of 14 December 2005 from Robert Hutchinson and their accompanying declarations of trust to show that Hutchinson was the beneficial owner of Munich Investments Ltd and Lornox Investments Ltd, which were incorporated in Gibraltar on 10 October 2002 and 9 July 2002, respectively. He further stated that he received proceeds prior to 2002, which he expended either on purchasing property or on living expenses.

On the accepted existing properties he stated that:

Property no.26: 43 Deptford Bridge London (freehold) and property no. 27: 45 Deptford Bridge London (freehold) were both owned by Chatham Investments Limited. He had no connection with these properties by 28 September 2005. He had dealt in them when they were owned by Coralsands before they were sold. He however did not have the completion statements of their disposal by Coralsands.

Property no. 28: 160 Forest Road London (freehold) was not owned by Coralsands as indicated by JS Knott. This was an error in the Land Registry. He had once bought it from Coralsands. He however did not know who currently owned it.

Property no. 29: 7 Granville Road London (leasehold) did not belong to Tarajan Overseas Limited. It had been sold for no gain as indicated in his interrogatories.

Property no.30: 24 Grosvenor Gardens London (freehold) was bought for £400 000 for the Aidan Beckford Trust Gibraltar and that it is owned by the trustees, Eric and Marc Ellul. The beneficiaries of the trust are the girl and the boy. The trust was set up for educational purposes and will not

be affected by his death or bankruptcy. He set it up on 3 June 2002 and did not advise the defendant for fear that she would deprive the children of their legacy. This fear had been justified, in retrospect, by her claim of a half-share in the Trust property.

The Trust deed of 3 June 2002 confirmed the plaintiff's version as to its existence and purpose. The plaintiff is the Settlor while the 2 Ellul partners are the original Trustees. The beneficiaries are the 2 minor children of the marriage. The Protector is Paula Horton. It has duration of 100 years but this may be curtailed by the death of the last surviving beneficiary or by the written consent of protector. The initial trust fund was a £100.00.

It seems to me, however, that the Protector appears to have overarching powers over the Trustees as she could remove any trustee by deed (see clause 12). Thus, depending on the influence that the Settlor is able to exercise on the Protector, the trust may not be as inviolable as the plaintiff wanted us to believe. Indeed the Trustees, with the consent of the Protector, may appoint or remove a beneficiary.

He explained that he raised £400 000 through mortgage finance and from the proceeds of the sale of other property. The rentals for the trust property are paid to the Trustees or into a bank account and since June 2002 have been between £800 and £900 per month. The children are aware of its existence but are not aware of their mother's claim.

Property No. 31: 45 Leinster Avenue London (freehold) was part of the matrimonial estate. He confirmed the accuracy of the Land Registry records in this respect. He valued it at £650 000. He financed the purchase through borrowings from the National Westminster Bank of £536 000. He repays the loan from rentals received from tenants and from his own resources.

Property no. 32: 31 Lewisham Road London (freehold) is not owned by him but by the Rahman couple who are unknown to him. He did not deal in this property.

Property no. 33: 297 North End Road London (freehold) was sold to Mr. Carstairs by Coralsands. He was and is not his nominee.

Property no. 34: 390 Sutton Common Road Sutton (freehold) is owned by Glencora Resources Ltd. which paid between £120 000 and £130 000 for it. It needs the Planning Commissioner's permit to realize its true potential. It has been vacant because the Planning Commissioner reneged on an earlier agreement. It has negative equity. The flat was sold in December 2002 for £72 000 at a profit of £27 970.00.

Property no. 35: 36 Upper Richmond Road (freehold) is owned by Munich Investments Ltd, an entity he claimed was unknown to him.

The plaintiff stated that he purchased 24 Grosvenor Gardens but for the Aidan Paul Beckford (Gibraltar) Trust. In his view it does not form part of the matrimonial estate. He accepted that 390 Sutton Common Road was owned by Glencora, a company in which he is the sole shareholder and that it therefore formed part of the matrimonial estate as did 265 Lonsdale Road in which his wife initially held the view that it was her sole property as it was registered in her name.

On 21 October 2003, David du Pre and Company, solicitors for the plaintiff, indicated to the Telford District Land Registry that 265 Lonsdale Road was purchased on 14 November 1997 for £400 000. The plaintiff paid a deposit of £20 000, raised a mortgage of £200 000 and contributed a further £40 000 towards the purchase of this property. The balance of £140 000 was paid by the defendant who utilized the proceeds from the sale of 10 Rocklane. It was a 5 bedroom house. It was rented out to a Spanish bank, which failed to look after it. He utilized the rentals towards maintenance work and supplemented any shortfalls from his own resources. The defendant had tried to re-mortgage and sell it behind his back. He stopped her by seeking the intervention of the Telford Land Court. She had relented in her earlier contention that it was a gift to her that did not part of the matrimonial estate.

His version of events as regards the attempt by the defendant to appropriate 265 Lonsdale to his total exclusion was confirmed by the documentary evidence in Exhibit 5. A caveat/restriction was registered against the disposal of the property without the plaintiff's written consent (see pages 168-174 of Exhibit 5). The failure by the defendant to oppose

the restriction demonstrated that she accepted that 265 Lonsdale Road was a matrimonial asset in which the plaintiff held a beneficial interest in.

The property was by consent of the parties sold for £725 000. A completion statement (page 175) indicates how the money was appropriated. £72 500 was deposited in a high interest earning tracker account in the joint names of RBM Davies and Partners (defendant's solicitors) and Fladgate Fielder (plaintiff's solicitors) while the balance of £321 199.75 was transferred into that account. The parties shared the first deposit in half and each received £36 250.

The balance of £321 199.75 is held subject to the decision of this court or agreement of the parties as to its disbursement. Plaintiff prayed that it be shared in the ratio 60:40 in his favor.

Initially, the plaintiff stated that he had no knowledge of and had never dealt with either Lornox Investments or Munich Investments Limited. It was only after he was shown by his counsel the letter that was written by Hutchinson on 14 December 2005, which indicated that both these companies had engaged and paid for his services in the past, that he recanted on his earlier testimony.

He also produced, in Exhibit 5 at page 59, a letter from Areti Charidemou & Associates of 6 July 2004 to the Directors of Coralsands Consultants Ltd in Cyprus, which confirmed that he was not a shareholder in Coralsands. His name did not appear in the Shareholder Register and Declaration of Trust that was issued under Cypriot law. The same law firm wrote, on 6 October 2005, to the plaintiff's erstwhile legal practitioners in Harare and identified Dorchester International Incorporated as the sole shareholder in Coralsands. The letter further indicated that the company had been dissolved for the benefit of a Cypriot family trust of which the plaintiff was neither a member nor a beneficiary.

On 31 January 2005 Martin Neville had indicated that he was the principal beneficial owner of Coralsands. He indicated that the plaintiff did not hold any interest in its shares either through the family trust or the company. He was aware that the plaintiff had initially set up the company. The letter did not specify when and why the plaintiff received

£40 000 from the company. It, however, indicated that he had been granted, through a power of attorney, the power to carry out property transactions in the UK on behalf of the company. The power of attorney had been withdrawn pending the dissolution of the company. The company was dissolved on 4 February 2005 under section 273 A of the Companies Act 1931 of the Isle of Man according to the Financial Supervision Commission's letter of 8 February 2005.

On 25 October 2005, the defendant alleged in a letter to the plaintiff that he was the beneficial owner of Coralsands. She based her averments not only on his bragging to this effect but also because their credit cards and other bills were cleared through the company's Lloyds Bank current account. This averment was disputed by Lloyds TSB in a letter of 10 November 2005, which was addressed to the plaintiff's legal practitioners. The bank intimated that it had never opened an account in Coralsands' name in England.

The letter of 25 October 2005 also alleged that he was the beneficial owner of Chatham Investments and Munich Investment Ltd. He produced in exhibit 5 documents from the Company Registry Office in England which showed that Paula Horton (the Protector of the Trust born 22 April 1961) was a director and shareholder of Chatham Investments (Pvt) Ltd whose business line was the development and disposal of real estate. It was incorporated on 9 October 2003 and started trading on 1 November 2003. National Westminster Bank PLC had three charges registered against the properties 1, 26 and 27 listed in the annexure to Exhibit '1' shown on pages 75-76 of exhibit 5 (dated 27/09/05) on 26 October 2004 and 6 October 2004 respectively, which are owned by Chatham Investments. In his evidence in chief the plaintiff averred that he did not know who owned Chatham Investments, yet the document in his possession showed that it was owned by his friend, former personal assistant and protector in the Aidan Paul Beckford Trust.

He stated that even though he had known Paula for 14 years she was neither his nominee nor his girl friend. She had remarried after her divorce. The public records that were placed before me did not show that he was involved in Chatham Investments.

He also produced in Exhibit 5 the public documents of Connelly Connection Ltd and Ecu Design Ltd. These were the companies that were beneficially owned by the defendant from 8 June 1988 and 21 March 1991 respectively until they were dissolved on 17 March 1995 and 3 October 1995 respectively. They both ceased operations on 20 June 1991 and in May 1994.

He produced these documents as evidence that the defendant misled the Court when she stated in her pleadings that when she met him she was wealthy and prosperous. The accounts of her 2 companies which were liquidated and remain indebted to creditors demonstrate that she was struggling. The Connelly Connection went into voluntary liquidation and appointed a liquidator on 26 June 1991. No assets were salvaged when it was wound up on 21 June 1995. A liquidator was appointed on 15 November 1994 (11 days before the wedding) for Ecu. Both companies were victims of recession and a single line point catalogue account which failed to compete with cheaper products.

The evidence led by the plaintiff showed that the two operations were monumental failures.

Exhibit 5 also contains the Henderson Charity for the Visually Impaired accounts for year ended 21 March 2003 and 31 March 2004 whose net effect was that the charitable institution was not generating enough money for on lending to the defendant for her to meet her needs prior to the consent order.

The balance of the bundle of exhibit 5, that is, pages 176 to 227 deal with the valuations of the properties that the plaintiff accepted were part of the matrimonial estate.

The 7 Granville Road lease was valued by Mead Briggs Chartered Surveyors on 6 February 2004 at £180 000. It was sold on 10 November 2005 for £195 000. Its completion statement showed net proceeds of £2 306.81 after the deduction of the deposit which was paid by the plaintiff of £25 000.

Edwin Evans Surveyors compiled a valuation report for 45 Leinster Avenue on 17 February 2004 and valued it at £630 000. It was also

valued by JAC Associates on 23 February 2004 at £700 000 and Ashdown Lyons on 10 June 2004 at £700 000.

A redemption statement on this property from Natwest dated 27 January 2006 indicated that the plaintiff was indebted to the bank in the sum of £537 414.52. A second mortgage was registered against the property in the sum of £67 000 in favor of the plaintiff's parents, after 7 February 2006.

390 Sutton Common Road, which was mortgaged to Lloyds TSB, was valued by Symingtons on 6 May 2004 at £52 500, and by Cook Steed Associates on 30 June 2004 at £50 000. On 17 June 2004 Lloyds TSB indicated that it was owed £145 046.74 which increased to £146 186.86 on 10 November 2005 and £148 556.81 on 26 January 2006.

Lastly, Merctrust Real Estate (Pvt) Ltd in Zimbabwe valued the former matrimonial house, 62A Steppes Road Colne Valley Harare at \$13 billion (old currency) on 26 January 2006.

The plaintiff stated that he made a loss in the disposal of 37 Holloway Road (No.5). He explained that profit was determined by how much one borrowed, the purchase costs, the interest costs, the commission paid and the advertisement costs, repairs, rates and insurance. He defined negative equity as the loss that would result if property was sold at a price which was below its attendant costs.

He then dealt with page 228 of exhibit 5 which shows the movements on his Lloyds bank debit card account. It had a credit balance of £1 463.43 on 16 December 2005. The statements from January 2005 to October 2005 indicate a debit balance in his Lloyd Gold Card, which oscillated between £30 637.02 in June 2005 and £14 071.43 in October 2005. By 16 December 2005 it was in credit.

He also produced his schedule of matrimonial assets and liabilities as at 10 February 2006, as Exhibit 6. He came up with a net matrimonial estate of approximately \$54 billion dollars (old currency).

He did not provide any value to Tarajan because he had not used it as a vehicle to conduct property transactions during the preceding 3 years as his attention has been diverted from business by the divorce proceedings.

Glencora has negative equity as one of its assets; 390 Sutton Common Road is in the red while the other; 45 Leinster is also encumbered by charges from Natwest and his parents. He explained how he accumulated and valued the air miles that are shown in Exhibit 6. He was aware that his net asset figure was inaccurate and misleading as it did not incorporate the defendant's liabilities which he estimated at US\$150 000.

He was not privy to his wife's assets in the UK other than the Lonsdale house furniture, which was in storage in her name. He kept his offer to pay for its cartage to Zimbabwe open.

He was cross-examined on his evidence. He did not think it was apparent that the matrimonial assets that were at hand on the day he gave his evidence were much less than they were in October 2001, when he determined that the marriage was over, and even in April 2003 when he issued summons. He denied depleting the defendant's entitlement maintaining that he was never a great saver as his philosophy was based on spending what he had at any given time. He attributed the paucity of the existing assets on the difficult 3 years which took his mind from business. He was still a consultant in the UK which was his sole source of income.

He attributed the appearance of having a better life than the defendant since instituting divorce to his ability to access credit cards in England. He indicated that his credit limit was of £45 000 and that he hoped to gross £60 000 in 2006 even though he had grossed £80 000 per annum from consultancies and property transactions in the preceding three years. He did not keep any records of his income. He expressed his preference to pick up cash from his principals. He was asked to highlight the 12-14 sources of his income in the last 3 years. He only managed to mention 4 sources, that is, Mark Talbot and Simon Turpin and Coralsands and Tarajan.

He had not requested from the companies that he had dealt with the supporting documents, which would reveal his earnings. He would neither make such a request nor authorize them to provide this information to his wife. He was not prepared to obtain the requisite

information, on the property transactions that he carried out from the time he instituted divorce, to prove that he earned £80 000 per annum in the preceding 3 years.

He acknowledged that all he required to prove the gross sales on each property and the attendant disbursements were completion statements. He stated these were readily available and could be provided by the solicitors whom he briefed like Comptons. He disingenuously sought to lay the blame for his failure to produce completion statements on the defendant whom he accused of withholding his documents, yet he accepted that he could obtain such documents from the company archives and computer data bases of his handlers.

He did not wish to transfer the determination of the dispute on the matrimonial assets to England as he believed that this Court had the jurisdiction and the requisite information to do so.

He could not provide any financial records or annual returns for Tarajan Overseas Ltd, registered in British Virgin Islands, for the past 7 years even though he was the sole shareholder of the company. He averred that it was not a requirement in the British Virgin Islands for a company to publish its accounts. He alleged that the company had no bank accounts and that its financial dues were held in solicitors' accounts. He in turn received cash payments from the solicitors.

Contrary to his earlier averments, he confessed under cross-examination that Paula Horton was his girlfriend. He sold 7A Granville Road to her in November 2005. The completion statement was compiled by Comptons Solicitors. While he stated that he was not prepared to obtain the completion statement for this transaction, he actually provided it in exhibit 5 at page 187. He, however, was not prepared to do the so for 36 Upper Richmond Road.

He reiterated that Glencora was registered in the Isle of Man. It was his company. It had no bank accounts or statements, credit cards or completion statements.

He admitted incorporating Coralsands in the Isle of Man in 2001. It was a vehicle he used to buy and sell property. He could not recall the

number of transactions that he carried out through this entity. He was referred to exhibit 9, a 61 paged bundle of documents. The first 2 pages of this exhibit list 80 properties. He admitted that this list was representative of the scale of business that Coralsands was involved in. He was not able to provide the accounts of Coralsands Consultants Ltd. He had sold the company in January 2002 as he was struggling financially. He denied he sold it to avoid its inclusion into the matrimonial estate. He could not provide evidence to confirm the document/letter from Martin Neville's lawyers that it had been sold for £40 000. He admitted the contents of the letter from Sherrads, his solicitors, of 21 September 2001 that he had earned in the previous year net proceeds on his transaction through his offshore companies in excess of £170 000. (See page 61 of exhibit 9)

He was asked to produce the agreement of sale of his shares in Coralsands. He retorted that he had concluded it over the telephone with Neville.

He averred that there was also no agreement on how his payments were calculated for introducing sales. These were done orally. It was neither based on percentage nor on time spent.

He was referred to the guarantee for £230 000 that he gave to Coralsands over the mortgage for 176-180 Croydon Road. He retorted that it was just a guarantee for he ceased to be a beneficial owner in Coralsands on 26 March 2002. His attention was drawn to page 5 of exhibit 9, that is, a revised completion statement of 203/207 Uxbridge Road Hanwell, which indicated that Granville Road was purchased for £57 643.10. He averred that this was the profit that he received from selling the property which went to purchase 7 Granville Road, yet in his interrogatories 39.1 he had indicated that it was paid as a discharge of the accumulated consultancy fees owed to him by Martin Neville who by then was the owner of Coralsands Consultants and paid at the plaintiff's request to Tarajan Overseas Ltd which company he owned for the purchase of 7 Granville Road.

He averred that what was in his interrogations was a genuine mistake. He stated that his evidence in court on oath represented the

truth. He thus denied that 7A Granville Road was purchased by Coralsands. He alleged that he had sold a different property to Coralsands at a profit which he used to purchase another property.

He wrote a letter to Sherrads solicitors on 30 May 2002 in which he indicated that he had spent approximately £200 000 on property fees in the preceding 2 years and listed 16 properties whose files he wanted removed from them. He referred to the property transactions that had been carried for "himself or any of his associate companies". He maintained that 127 Anerley Road was owned by Talbot. He saw no need to refer to Martin Neville as he had the power of attorney to act for him.

He denied, despite the references to "you" and "your companies" in the letter of 1 August 2002 from Fladgate Fielder solicitors concerning 279 North End Road, that Coralsands belonged to him.

He further disputed that the fax transmission from Sheila O'Sullivan (page 14 of exhibit 9) showed that Coralsands was his property just because it stated that "Aidan has agreed to purchase the other property for £165 000", which property was purchased by Coralsands. He was adamant that he merely acted as an agent of Coralsands by virtue of the power of attorney that had been bestowed on him.

He stated that he sold 176-182 Croydon Road for the account of Neville who received £750 000 while he received a commission of £20 000.

He was adamant that the parties should share the proceeds of the sale of 265 Lonsdale on the basis of the calculations in Exhibit 6. He denied that she was entitled to the whole amount.

He was referred to the letter he wrote on 5 December 2000 in which he wanted set up a pension scheme for his sole benefit by depositing assets valued at £1.5 million on a long-term basis of over 12 months. He said he wrote it when he was trying to borrow £5 million to fund property transactions. This obviously flew in the face of his evidence-in-chief that he made no provisions for the future but lived on a

day to day basis. He also alleged that he genuinely forgot about the 1999 Barclays bank Cyprus account in which he deposited £935-20.

During re-examination he went through the remaining pages of exhibit 9, that is, from pages 15 to 60. Some of the pages therein were a reproduction of the documents in exhibit 5. It was clear that the defendant had documents which showed that Neville was the owner of Coralsands. Exhibit 11, a document that the defendant had in her possession and which she only discovered some 8 days before the plaintiff testified showed that Coralsands was incorporated in the Isle of Man on 26 September 1997. The plaintiff was not amongst its 3 directors. One of the directors performed the company's secretarial functions with the assistance of Quantum Nominees Ltd. On 6 October 2002 Dorchester International Inc become new secretary following the resignation of the former secretary.

Exhibit 11 undermined the plaintiff's contention that the absence of his name on the list of directors of Coralsands showed that he was not a beneficial owner. He admitted that he was once the beneficial owner, yet his name did not appear in Exhibit 11 and other subsequent papers.

It seemed to me that the plaintiff was an evasive and dishonest witness. He simply was not prepared to disclose his assets fully. I agree with observations of Mr. *Andersen* that the plaintiff was an utter liar who manipulated the situation and avoided producing documents such as the completion statements. He appeared bent on denying the defendant her entitlement.

The defendant also testified on the matrimonial assets. She prayed that the proceeds from the sale of the matrimonial house and the furniture be distributed equally between the parties.

On 265 Lonsdale Road, she confirmed the plaintiff's testimony as to its disposal and the subsequent agreement reached by the parties as to the fate of the outstanding amounts held in a joint account by the parties United Kingdom Solicitors Fladgate Fielder and RBM Davies and Partners. She however explained that before its disposal in September 2005 the house was being rented out through Chestertons. Rentals were supposed to go towards the reduction of the Lloyds mortgage but they had been

directed towards maintenance as the house fell into a terrible state of neglect. It needed £100 000 to £150 000 to restore it. It had been registered in her name because the plaintiff was bankrupt at the time. It was to be their family home. She sought that the amount being held in the solicitors' joint account be awarded to her and the children. She testified that she did not believe that the plaintiff had made full disclosure of the matrimonial assets and income. He was a property developer who bought property. He would rent out the ground floor and sell the flats above. He did very well and the parties lived a lavish lifestyle. She stated that he acquired properties using a number of companies. He then transacted inter company sales on these properties. She did not believe that he had been truthful in his testimony. She especially disputed that he was impecunious as he went on business trips in business class and stayed at top hotels (did not travel economy nor live with his parents when in the UK).

She also did not believe his testimony that he did not keep books of accounts. She stated that while he did not keep such books at the matrimonial home, he had an office run by Paula Horton. He used a retinue of lawyers and accountants to oversee his business transactions. She pointed out that in his interrogatories he averred that he did not have an office in the UK after December 2003, but alleged that he shared one with Paula Horton at Astra Site, Gillingham, England. In December 2003 she opened an office at the Chatham Historic Dockyards, which she closed in October 2005. She permitted him to use the offices for a fee.

She took the view that his revelations in the interrogatories were at variance with his evidence-in-chief such that she needed to investigate his assets in the UK. She stated that these were matrimonial assets, which he acquired for their future security. She will need court orders to get information from his solicitors and the people he dealt with. She produced exhibit 14, a record of the UK legal fees for financial investigations that were conducted by RBM Davies from April 2003 to September 2005 at a cost of £24 635 and from Farrer & Company from June 2005 to February 2006 at a cost of £56 965.

She alleged that she had studied Coralsands. She described it as his flagship company which dealt with a substantial amount of property.

She copied a lot of documents and accessed his computer. These sources showed that he is the owner of Coralsands. She did not find any tax returns, company accounts or personal accounts. She averred that he only made the averments that he had sold it to Neville, for the first time, in his interrogatories of December 2005. She produced exhibit 15 which listed 37 properties bought by Coralsands between December 2000 and 13 June 2003 and sold between 5 June 2002 and 5 October 2004. She indicated that the profit realized was £2 063 000 on only 9 of the properties that she was able to obtain information on. She created Exhibit 15 from the documents she accessed after the purported date of disposal of Coralsands. She did not believe that he sold the company for £40 000 regard being had to the value of the assets that it had. She did not accept he acted as a consultant thereafter. She believed that all the profit was for his account. She averred that he did not make full disclosure of his bank accounts. She referred to the first two pages of Exhibit 9, which she compiled in 2002 and page 3 of the same Exhibit as indicative of the magnitude of the business transactions that the plaintiff conducted. She believed that the fact that in 2002 he dealt in 80 properties and that Wintrust Securities was prepared to lend to him approximately £4 million above his undisclosed prevailing facility was adequate proof that he was financially sound. She maintained that the plaintiff was the beneficial owner of Coralsands because he had purchased 31/31a Lewisham Road on 19 September 2002 for the account of Coralsands.

Her belief that the plaintiff was the owner of Coralsands was, in her view, confirmed by the contradictory responses of his legal practitioners on how they obtained the documents that suggested that Neville was the owner of that company. On 7 October 2005 the plaintiff's legal practitioners stated that they had obtained this information from Areti Charidemou and Associates. This was confirmed by Areti Charidemou and Associates' letter of 6 October 2005 which was addressed to the plaintiff's legal practitioner. On 8 March 2006 the defendant requested

for the letters that the plaintiff's legal practitioners had written to Areti Charidemou. The plaintiff's legal practitioners responded on 15 March 2006 and stated that they did not write directly to Martin Neville and Areti Charidemou and Associates. They averred that they had obtained the information from the plaintiff's English solicitors.

She thus, laid the basis for her doubts.

She was also cross-examined. She was referred to her letter of 20 September 2005 in which she listed the properties that she believed constituted the matrimonial estate. She claimed that she left out the Lonsdale property because it had been sold. She further averred that she did not include the matrimonial home in the list because she had referred to it in her pleadings.

She had in her possession 8 files full of extracts from the Land Registry in the UK of the 35 properties she believed formed part of the matrimonial estate and of another 20 properties which were not listed in her letter of 20 September 2005. She disputed that she had obtained a complete record of all the properties in issue through her English solicitors averring that she was not able to access the completion statements on these properties.

She maintained that the plaintiff worked from the matrimonial home and discussed many things with her but he never indicated that he was in financial difficulties, which necessitated the disposal of Coralsands Consultants Ltd. Her attention was drawn to Exhibit '11' the certificate of incorporation of Coralsands Consultants Ltd, which she had in her possession since 30 June 2003. She received it through Richard Davies. She claimed it was discovered by her on 20 May 2004 yet it is not specifically listed in her discovery affidavit of that date. Her local and English legal practitioners had it for 2 years before trial. Her attention was directed to the company's nominal share capital of £2 000 of which 2 shares were issued. The directors were John Bryne, an Irishman who was an accountant usually resident in the Isle of Man, and who was also the company secretary of Coralsands Ltd; Samantha Jane Parkes nee Southern, British, who was a director of Chesterfield Management usually resident in the Isle of Man and Sophie Szrednicki, French, Senior

Administrator resident care of Pissas Building, 17 Theklas Lyssloti Street, Chesterfield Suite 102-1st Floor Limmassol, Cyprus. Quantum Nominees Ltd of the Isle of Man was the assistant secretary. She did not know any of these directors. Sophie Szrednicki shared the same address with Dorchester International Inc. [who claimed on 6 July 2004 (exhibit 9 page 15) in a letter by April Benson (Director and Secretary of Dorchester) to plaintiff's erstwhile local legal practitioners, that Dorchester International Inc. was the registered shareholder of Coralsands].

Exhibit 11, on page 5, indicated that on 5 October 2002 Samantha and Quantum Nominees resigned as director and assistant secretary, respectively, of Coralsands. Brendon Hayes, a company administrator and Dorchester International were appointed in their stead, respectively. On 9 December 2002 John Bryne resigned as company secretary and was replaced by Peter Martin Doyle while Samantha was reappointed company director.

The defendant did not agree that the appointment of a new director and Dorchester International Inc. as Assistant Secretary meant that the plaintiff had divested his beneficial ownership of Coralsands Company Ltd on 6 October 2002. Her doubts arose from the certificate of incorporation of Glencora Resources Ltd, (Exhibit 23) which was registered in the Isle of Man, on 6 December 2001. It also had a nominal share capital of £2 000 with 2 issued shares of £1.00 each. The directors were John Bryne, Irish accountant of the Isle of Man who was also the company secretary; Sophie Szrednicki senior administrator of Pissas Building (same address of Dorchester International Ltd), and Brendon Hayes, British, company administrator of Pissas buildings (same address of Dorchester). Dorchester International Incorporated was the assistant secretary. On 9 December 2002 John Bryne resigned as company secretary and director while Peter Martin Doyle was appointed as company secretary and Samantha was appointed as company director. The plaintiff admitted that he was the beneficial owner of Glencora but denied that he was the owner of Coralsands.

She was yet to conduct investigations on Dorchester. She was not satisfied with his responses to her interrogatories of 10 November 2005.

She intends to investigate Glencora, Tarajan and Wysford Investments Ltd in the UK to ascertain the nature and extent of the plaintiff's links to these companies.

She denied that her belief that plaintiff still controlled Coralsands Ltd was a fixation. She retorted that her belief was also based on Wysford letters which came to the matrimonial home in 2003 advising him that Chesterfield Management was moving to Cyprus. She had requested for information on Coralsands from him on numerous occasions. He was unwilling to supply her with the correct information. It was only in response to the interrogatories of 2 December 2005 that he indicated that he had sold Coralsands but still had interests as the sole beneficiary in Tarajan and Glencora.

Notwithstanding the fact that she had engaged the services of reputable solicitors in the UK and competent legal practitioners locally to carry out her own investigations, she maintained that the plaintiff was stonewalling and was deliberately hiding information, which was at his disposal, from her. She averred that the fact that plaintiff left documents lying around the matrimonial home after he issued divorce summons, which documents she compiled and photocopied, did not show that he had nothing to hide. Rather, it showed that he had too many documents that he left around, which he thought were not important. She regarded him as devious, and averred that the 8 files of documents contained 95% of documents that he left lying around before he issued divorce summons.

She agreed that his line of business was speculative but was adamant that the letter of 8 February 2002,(Exhibit 9, page 3) in which an English financial institution was prepared to lend him in excess £4 million, showed that he was successful at what he did. She did not know whether the variable loan agreement of 22 March 2003 for £455 000 went through.

She wanted the plaintiff to explain why he transferred 7 Granville (his own property) from Coralsands (his own company) to Tarajan (his other company).The completion statement on page 5 of Exhibit 9, for 203/07 Uxbridge Road indicated, to her mind, that the plaintiff was

making inter-company transfers. She, however, failed to justify the economic rationale of such a transfer, which impoverished the plaintiff through the payment of the attendant legal and stamp duty costs.

She did not accept that the Uxbridge property was disposed of by Glencora to Coralsands. She did not request any information from Neasden Electronics Ltd who purchased it from Coralsands.

She admitted that she prepared Exhibit 15 from the information that was supplied to her by the plaintiff's lawyers in October 2005. She produced exhibit 19 and 20 in bid to explain the meaning of leasehold and freehold in relation to 176-182 Croydon road, which she averred was sold by Coralsands to the Milford Group in the sum of £1, 250 million for the ultimate benefit of the plaintiff. She did not contact the Milford Group Ltd to ascertain whether or not they were the plaintiff's nominees.

She believed that M Hoang and Q Lieu, item 6 of Exhibit 15, and N. Patel and Y.Virani, item 11 of Exhibit 15 were the plaintiff's nominees.

She read out letters, which in her view, indicated that the plaintiff was the beneficial owner of Coralsands and disputed that these selfsame letters suggested that he was a consultant.

She accepted that Coralsands was in the process of winding up. She believed that 297 North End Road purportedly sold to Lornox was definitely his property. She stuck to her evidence-in-chief as regards exhibit 15. She did not call the evidence of Mr. Daniels to explain the legal opinion that Coralsands was purchased by the plaintiff's nominees.

The defendant, in essence, contended that the plaintiff did not dispose of Coralsands. It remained his company until it was dissolved on 4 February 2005. He failed to disclose the full extent of his benefit from the transactions he carried out in its name. He hid the proceeds that he derived from the company's transactions.

She further contended, by reference to Exhibit 15, that the plaintiff sold the properties listed therein to his nominees. She did not explain the mechanics and the perceived benefits of doing so. It seems to me that the sale- to-nominees contention does not make commercial sense. On the one hand she claimed that the plaintiff made a profit of £2 063 000, whose destination was unknown. On the other hand she claimed

that as he did not sell these properties he continues to own them and as such they remain matrimonial assets. The defendant cannot simply approbate and reprobate.

She wrote Exhibit 21 through her legal practitioners to Areti Charidemou & Associates on 13 February 2006 seeking confirmation that Martin Neville was the beneficial owner of Coralsands Ltd. No response had been received by 30 March 2006.

The defendant gave her evidence well. She often remarked, during cross-examination, that she was waffling. She was adamant that her husband had not disclosed all the foreign held matrimonial assets. She stated that when the plaintiff initially broached the subject of divorce with her, she had asked him about the matrimonial assets. He had retorted that all the assets were his and that they had nothing to do with her. It is clear from the exchange conducted through the detailed interrogatories that the defendant merely sought an open and honest account of his financial affairs during the subsistence of the marriage. When she realized that he was stonewalling, she conducted her own searches. She relied on the information he had shared with her in happier times. She ferreted through the many documents that he kept at home and scoured through his computer in search of this information. She utilized the services of reputable English solicitors, in an attempt to unravel the corporate labyrinth that he constructed.

The plaintiff's responses in the interrogatories and in his testimony amply justified her suspicions that he had not made full and frank disclosure of the matrimonial assets. He asserted and averred that he had disposed of the contentious assets, and especially those associated with Coralsands, in the normal course of business. While it was within his power to do so, he failed to produce completion statements on the sale of those assets. He did not produce the agreement of sale of Coralsands. The version that he gave that he sold it over the telephone for the paltry sum of £40 000 was contrived. He failed to produce any financial statements of the many property transactions that he conducted. He gave the impression that he was an incompetent businessman who did

not keep accounting records. These records were essential to him, if for no other purpose than to reconcile his output to his input.

A comparison of the paper work depicting the alleged change of guard and hands at Coralsands in Exhibit 11 with those pertaining to Glencora Resources Ltd in Exhibit 23 demonstrates an uncanny commonality of the directors and the registered office of these corporations. There was no documented proof of the plaintiff's interest in either company, yet he wanted this Court to accept that he had cut his umbilical cord with Coralsands but not with Glencora.

It seems to me that once he produced documentation to indicate that he had divested himself of Coralsands the onus lay on him to show on a balance of probabilities that those documents told the truth about themselves. It was not enough to produce letters from a conspectus of persons averring that Coralsands had changed hands without calling the evidence of those persons so that at least they could be subjected to cross-examination.

I am satisfied that the defendant's suspicion, which grew into certainty that the plaintiff was hiding much more than he was revealing was justified. In my estimation, she was an honest and credible witness who had a thorough and sound grasp of the import of the avalanche of documents that came her way which she used in this matter. Her use of local and foreign law firms did not yield much in the absence of cooperation from the plaintiff. The plaintiff, in my view, clearly used the law, in these foreign jurisdictions in which she sought information on how he had dealt with a variety of assets, to stonewall and deny her access to that information. It was clear that without his consent, his foreign business associates would not co-operate with her.

Mr. *de Bourbon* sought to persuade me that exhibit 6 is the full list of the matrimonial assets available for distribution. He submitted that page 62 of exhibit 5 demonstrated that Coralsands had been wound up. It was, therefore, no longer part of the matrimonial assets, which are subject to division. He submitted that these are the only assets that can be shared between the parties as the defendant accepted that her husband spent all he earned.

The import of the letter of 20 September 2005, which listed what the defendant, believed were the matrimonial assets demonstrated the defendant's acceptance that the first 25 properties had been sold. Clearly therefore they are no longer available for distribution. Her only quarrel therewith concerns the fate of the proceeds and how much they were. What she therefore believed still existed were the 10 properties under the last category of that letter. The plaintiff submitted that all but 2 of these 10 were sold. These 2 were property number 45 Leinster Avenue London, which belonged to the plaintiff, and property number 390 Sutton Common Road, which was his through Glencora. 24 Grosvenor Gardens belonged to children's trust, which was not cited as a party in these proceedings.

Mr. *Andersen*, on the other hand submitted that exhibit 6 was not a correct depiction of the assets. The whole thrust of the defendant's evidence demonstrated that the plaintiff had not made full disclosure of the properties and the bank accounts and statements. He therefore sought that the court surrenders its power to determine matrimonial assets to the UK legal system, which he contended was more competent and better placed to deal with such cases.

I may remark in passing that the cases, which he referred me to, of *Baker v Baker* [1995] 2 FLR 829, *J v V (Disclosure: Offshore Corporations)* [2004] 1 FLR 1042 and *Minwalla v Minwalla and DM Investments SA, Midfield Management SA and CI Law Trustees Ltd* [2005] 1 FLR 771 demonstrate that the Family Division in the UK is familiar with schemes such as the ones that the plaintiff was involved in. These courts, however, have not surrendered or abandoned their jurisdiction to determine these issues even in those cases where the evidence was unclear. See the *Minwalla* case, *supra*; at page 776 paragraph 15. The English courts have drawn adverse inferences against the spouse who has used complex corporate undergrowth to hide matrimonial assets.

The defendant took 3 years to assess her case. At one time in her interrogatories of 10 November 2005 she threatened to seek letters of request from this Court to the High Court in England in terms of the

English Evidence (Proceedings in other Jurisdictions) Act 1975 as read with order 70 of the Rules of the Supreme Court.

This demonstrates that the defendant appreciated that the courts in this country do not abdicate their responsibilities in favor of foreign courts, wheresoever situate and however competent they may be perceived to be.

I am satisfied that I cannot make the order sought by the defendant in that regard. I agree with the submission that was advanced by *Mr. de Bourbon* that while section 7 of the Matrimonial Causes Act gives this Court a wide discretion to divide, apportion and distribute the assets of the spouses it does not allow this Court to abrogate its jurisdiction to another court.

THE COMPETING CLAIMS OF THE MATRIMONIAL ASSETS:

The plaintiff averred in his declaration, as amended, that it was just and equitable that the matrimonial assets should be distributed as follows:

- a) That the defendant be awarded 40% of the matrimonial estate in the sum of £70 560;
- b) That she be awarded 40% of the value of 62A Steppes Road, Chisipite, Harare;
- c) That she keeps all the movables from 265 Lonsdale Road, Barnes, London;
- d) That she keeps the Mazda 2.5 motor vehicle.

The defendant initially counterclaimed for a 50% share of all the matrimonial assets. In her amended counter claim of 3 March 2006 that was granted on 28 March 2006, she sought the following:

- a) an order for the sale of 62A Steppes Road, Chisipite, Harare and the contents thereof on her permanent departure from Zimbabwe and an equal division of the proceeds between the parties;
- b) all of the proceeds of the sale of the Lonsdale Road property;
- c) the movables from the Lonsdale Road property and their delivery at the plaintiff's cost to a designated address in London;

- d) an order for the dismissal of the plaintiff's claim for the distribution of the matrimonial assets.

The amendment by the plaintiff of 11 October 2005, to the extent that it sought to prescribe how the defendant would use the £70 560 and 40% of the sale of the matrimonial home that he was offering her, was presumptuous and paternalistic.

The plaintiff assumed the obligation to give and deliver the contents of 265 Lonsdale Road from storage to an address of the defendant's choice in London.

THE ASSETS:

I agree with the submission by Mr. *de Bourbon* that the foreign assets that the defendant identified for distribution are captured in part C of her letter of 20 September 2005. There was in existence 2 foreign registered immovable properties at the hearing of this matter. The plaintiff failed to disclose the income that he received from his business transactions. He also failed to provide a credible account of what he did with that income. I am satisfied that he hid his income in complex corporate undergrowth.

The defendant was concerned by these deliberate non disclosures. She felt cheated of her fair share of the matrimonial estate. The evidence showed that the plaintiff did not dispose of his beneficial interests in Coralsands. He thus benefited from the income he received from the sale of the properties that belonged to Coralsands, before he wound it up on 4 February 2005. The assets, therefore, that are available for distribution are those that are listed in Exhibit '6.

THE DISTRIBUTION:

The plaintiff submitted that the matrimonial property domicile at the time of the marriage, the *lex domicili matrimonii*, determines the proprietary consequences of the marriage. See *Frankel's Estate & Anor v The Master & Anor* 1950 (1) SA 220(A) at 251, *Sperling v Sperling* 1975 (3) SA 307 A, at 716E-H which was followed in *G V G* 2003 (5) SA 396 (ZH) at 409. He contended that I could apply English law to appropriate

the matrimonial assets. The defendant pleaded as much in its amendment of 28 March 2006 in paragraph 4:10 where it stated "The parties were domiciled in the UK at the time of the marriage and accordingly their property rights should be determined in accordance with the laws of the United Kingdom."

It appears from the plaintiff's statement with reference to *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C) which was taken on appeal and is reported in 2005 (2) SA 187 (SCA). At page 195-196 the Supreme Court of Appeal set out the English position with reference to the House of Lords decision in *White v White* [2001] 1 AC 596; [2001] All ER 1 (HC). It is to the effect that a spouse needs only to show that he or she could not have done more than he or she did to create or contribute to the matrimonial estate, before he or she can be awarded at least a one-half share in the estate.

In essence, the plaintiff contended that the defendant was a housewife and mother who fulfilled that traditional role. He contended that she contributed in the purchase of the Lonsdale property to which she was entitled to a 50% share. He did not suggest that she could have done more than she did during the period of her stay in Zimbabwe. I take it that the plaintiff conceded that if I were to apply English law, she would be entitled to a one-half share in the matrimonial assets at the dissolution of the marriage.

Plaintiff further submitted that I could utilize the provisions of section 7 of Matrimonial Causes Act [Chapter 5:13] which deals with the financial consequences of the dissolution of a marriage for both property rights and maintenance.

The provisions of section 7 are couched in very wide terms and they confer on me an equally wide discretion. It is correct that *Ncube v Ncube* 1993 (1) ZLR 3A (SC) at 42C-D sets the date of apportionment, division or distribution as the date of divorce. McNALLY JA in *Takafuma v Takafuma* 1994 (2) ZLR 103 at 106B-E set out the methodology of determining apportionment based on the his, hers and theirs criteria and then apportioning the distribution by using the criteria set out in the current section 7(4) of the Matrimonial Causes Act *supra*. The desired

outcome being to place the spouses in the position they would have been had a normal marital relationship continued.

In terms of Zimbabwean law I would be obliged to consider her contribution to the matrimonial estate and apply each of the criteria set out in section 7(4) of the Matrimonial Causes Act. See *Shenje v Shenje* 2001 (2) ZLR 160 (HC).

It is clear to me that if I were to do so, save for the purchase of the Lonsdale property, she did not directly contribute to the business and financial affairs of the plaintiff. Under Zimbabwe law even applying the criteria in *Shenje v Shenje supra* she would not be entitled to a half share. The 40% share that has been offered by the defendant would be generous.

I have no reason to doubt that the position in English law is as was set out by the plaintiff. In the *Minwalla* case, *supra*, SINGER J referred to the criteria that are set out in section 25 of the English Matrimonial Causes Act, 1973. The approach that he adopted is set out from page 797 paragraph 80 to page 802 paragraph 105. He took into account the income earning capabilities, the needs and obligations, the health, the length of the marriage, the standard of living, the ages and the contributions of the parties. He then measured them against the notional dictates of fairness, equity and justice. The manner in which he dealt with the criterion of contribution confirmed the accuracy of the observations of the English position that were made in the *Bezuidenhout* case, *supra*. He stated at page 798 paragraph 88 as follows:

“As to contributions: it is acknowledged that the sole financial contribution has been from H. On the other hand there does not seem to be any dispute but that W played her part as wife and as supporter to H in his business activities through out their relationship. This is not a case in which there is any basis for differentiation between the spouses in the area of their respective contributions.”

See also the approach of Coleridge J in *J v V, supra*, at 1052-1062.

In my view, the English position achieves equity and justice by placing the parties in the position they would have been had the marriage continued. It is only fair and just that I determine the distribution of the marital assets in terms of English law. After all, the

parties identify more with England than with Zimbabwe. It is not necessary for me to apply the criteria found in English law to the facts of this case. This is because the plaintiff accepted that if I were to apply English law, the defendant would be entitled to, at the least, a one-half share of the matrimonial estate. I am satisfied that the defendant is entitled to, at the least, a 50% share of the matrimonial assets.

I, however, find that the plaintiff did not disclose all his assets and income, especially after he instituted these proceedings. The consequences of his attitude are summed up in the English court of appeal by Butler-Sloss LJ in *Baker v Baker, supra*, at page 835, in these words:

“Mr. Posnansky pointed to an utterly false case and asked us to consider why the husband was lying and what did he have to hide. If the cupboard was bare, it was in his interests to open it and display its meager contents. But on the contrary, the husband, despite his protestations to the contrary, continued to live the life of an affluent man. I agree with the submissions from Mr. Posnansky that if a court finds that the husband has lied about his means, and failed to give full and frank disclosure, it is open to the court to find that beneath the false presentation, and the reasons for it, are undisclosed assets.”

I will use this fact against him in distributing the assets that he disclosed. It is fair, just and equitable that I award to the defendant all the money that is held in the joint account of their respective English solicitors. I have agonized over the appropriate order to make concerning the distribution of the immovable properties that the plaintiff disclosed which are registered in England.

In making the order that I have come to, I have been influenced in great measure by the plaintiff's failure to make full and frank disclosure, the size of the business transactions that were carried out by Coralsands and the concomitant income that must have accrued to him, the benefit that accrued to him from the disposal of 7A Granville Road to Nicky Morris on 10 November 2005, the concerted programme that he undertook in asset stripping the matrimonial estate to his benefit and to the impoverishment of the defendant of which the registration of a charge in favor of his parents for £67 000 against 390 Sutton Common Road was part of, his financial acumen and resourcefulness and his

apparent disdain for the integrity of the legal process. I will order that the two disclosed properties be transferred into the defendant's name while the plaintiff shall remain responsible for the discharge of all the encumbrances such as the mortgages and restrictions registered against them.

I also believe that the justice of this case requires that I leave the door open for the plaintiff to approach this court for the distribution of any property, properly regarded as matrimonial property, which was not disclosed on the date of divorce, which she may unearth in future.

I see no reason why the local immovable property and the contents thereof should not be divided in equal shares between the parties and to their mutual advantage. In that regard I will adopt the suggestions made by the plaintiff in his draft order.

Lastly, I will award to the plaintiff the money held in the Cyprus account, in the Lloyds TSB Debit Card account, the Jewel Bank account and the 180 000 British Airways air miles and the Kia Sorrento motor vehicle and distribute the Mazda 2.5 motor vehicle to the defendant. She will retain her pension, Sun Life Canada policy and other income as shown in Exhibit 6.

COSTS:

The defendant abandoned her claim to the costs that she incurred in her UK investigations. Mr. *Andersen*, in my view conceded that such costs, which are not associated with the calling of an expert or qualifying expenses, are not claimable under Rule 307 of the Rules of this Court as read with the High Court (Fees and Allowances) Rules 2000. The defendant sought costs of suit inclusive of the qualifying expenses of Mr. de Marigny. The plaintiff on the other hand submitted that each party should be ordered to meet its own costs.

It seems to me that the two most contentious issues between the parties revolved around custody and the disclosure of the matrimonial assets. The defendant's case on both these issues has largely been vindicated. She has not been in employment for the past 9 years and has been dependant on the plaintiff for her livelihood except for the period from April 2003 to July 2005 when she survived on the largesse of her

parents and grandmother. It was also essential that she call the expert opinion of Mr. de Marigny, which was invaluable to this Court in the determination of the custody issue.

In my view, she is entitled to her costs of suit for both the main and counter claims, and including the qualifying expenses of Mr. de Marigny.

It is for these reasons that I would dismiss the plaintiff's claim.

IT IS ACCORDINGLY ORDERED THAT:

1. A decree of divorce be and is hereby granted to the Defendant.
2. Custody of the two minor children of the marriage, namely Elsbeth Bridie Beckford, born on 26 November 1996, and Theodore Hugh Beckford born, on 9 February 1999, be and is hereby granted to the Defendant.
3. The Defendant be and is hereby granted leave to remove the minor children from Zimbabwe to the United Kingdom permanently on or after 31 July 2007.
4. The Plaintiff shall vacate the property at 62A Steppes Road, Chisipite, Harare, and the Defendant shall have the unfettered right to continue residing upon such property with the two minor children of the marriage. The Plaintiff shall be responsible for the costs reasonably and necessarily incurred in the maintenance and repair of the improvements on such property. The Plaintiff shall be consulted on all proposed expenditure and he shall have the right to call for quotations in respect of any work that may be required.
5. The Plaintiff shall have the right for the children to stay with him-
 - 5.1 During School terms, on alternate weekends from lunchtime on Friday until Monday morning, when he will drop them off at school;
 - 5.2 When the Plaintiff has had the children stay with him for the preceding weekend the following provisions will apply:

- 5.2.1 He will take the children to school on Monday, Wednesday and Friday;
 - 5.2.2 He will collect the children from school on Tuesday when he will return them to the Defendant by 6:00pm;
 - 5.2.3 He will collect the children from school on Thursday when he will have them overnight.
- 5.3 When the Plaintiff has not had the children stay with him for the preceding weekend the following provisions will apply:
- 5.3.1 He will take the children to school on Tuesday and Thursday;
 - 5.3.2 He will collect the children from school on Monday when he will return them to the Defendant by 6:00pm;
 - 5.3.3 He will collect the children from school on Wednesday when he will have them overnight;
 - 5.3.4 He will collect the children from school on Friday when the provisions of Clause 5.1 above will apply;
- 5.4 One-half of each school holiday;
- 5.5 alternate Christmas and Easter periods, other alternate public holidays and Elsbeth's birthday;
6. When the children are with one of their parents, the other parent shall be entitled to reasonable telephone access to the children.
7. In the event that the Plaintiff is absent from Zimbabwe for any reason during the school term, the Defendant will allow the Plaintiff to make up for the time that he has missed with the children over a weekend, subject to him giving reasonable notice of his return date to the Defendant and further subject to him not spending more than two consecutive weekends with the children.
8. The parties shall jointly decide all issues relating to the education and health of the children, any change in their religious denomination, special needs' activities for Theo and the children's extra- curricula activities

9. The Plaintiff shall pay the following household and other expenses incurred in the running of 62A Steppes Road, Chisipite, Harare direct to the suppliers thereof strictly by due date: electricity, water, rates, Tel-One telephone account, Vet bills, DSTV subscriptions, insurance of house and contents, third party insurance, licensing and reasonable maintenance and repair costs together with the procurement and payment of 200 litres of diesel per month of the motor vehicle in the Defendant's possession, security guard costs, wages of two domestic workers at the prescribed rate.
10. The Plaintiff shall pay maintenance for the Defendant and the children in the sum of ZW30 000 per month (as revalued at 1st August 2006) with effect from 1 September 2005 per month, such maintenance to be subject to review every three months by reference to the increase in the Consumer Price Index for the preceding three months produced by the Central Statistical Office.
11. The Plaintiff shall pay the children's school fees, costs and charges, school and reasonable casual clothing and footwear, extra-mural activities including all accessories and sporting equipment and clothing.
12. The Plaintiff shall at his cost retain the children and the Defendant on a local medical aid scheme and pay all medical and dental shortfalls incurred under such scheme and furthermore the Plaintiff shall be solely responsible for any emergency medical treatment the Defendant and the children may require outside the country.
13. The Plaintiff shall pay the children's airfares to enable them to travel to London every school holiday together with an allowance in the sum of £75 per child per week plus the cost of Elsbeth's ice-skating lessons to a maximum of 3 hourly lessons per week during such school holidays when the children are with the Defendant. In addition the Plaintiff shall pay every school holiday for the

children to travel from London to Blackpool by rail and fly from Manchester to London by economy fare.

14. Clauses 4 to 13 of this order shall only apply during the period that the Defendant and the children remain in Zimbabwe pending their permanent relocation to the United Kingdom, and thereafter the Plaintiff's rights of access to the minor children and the rights of the minor children and the Defendant to maintenance shall be by agreement between the parties or failing which by order of a Court of competent jurisdiction.
15. Upon the permanent departure of the children and the Defendant in terms of Clause 3 of this order:
 - 15.1 the house situated at 62A Steppes Road, Chisipite, Harare, or the shares in the company holding such property, shall be valued within 30 days of this Order by an independent valuer to determine the likely market value of the shares or the property, and the Plaintiff shall elect within 14 days of such a determination whether to sell the shares or the property or to do neither.
 - 15.1.1 If the shares or the property is sold, the Defendant shall receive 50% of the gross proceeds of the sale (less any assessed payment in respect of capital gains tax and the cost of the independent valuer).
 - 15.1.2 If the Plaintiff elects not to sell shares or the property, he shall pay to the Defendant 50% of the market value of the shares or the property within 30 days of such a determination by the valuator, whichever is the greater, as assessed by the independent valuer (less the costs of the independent valuer).
 - 15.2 The Defendant shall sell the contents of this property for their market value and the proceeds of the sale shall be divided equally between the parties.

16. The Plaintiff shall transfer against payment by him of the transfer costs his rights, title and interest in the property situated at 45 Leinster Avenue London SW14 7JW, Title Number-SGL67648 to the Defendant free of any encumbrances, mortgages or other obligations duly existing or duly registered by law over the property.
17. The Plaintiff shall transfer against payment by him of the transfer costs his rights, title and interest in the property situated at 390 Sutton Road, Sutton, SM3 9PH, Title Number-SGL637408 held under the name of Glencora Resources Limited to the Defendant free of any encumbrances, mortgages or other obligations duly existing or duly registered by law over the property.
18. The Defendant shall receive all the funds presently held in a bank account in the joint names of RBM Davies and Partners and Fladgate Fielder Solicitors, such funds being the net proceeds of the sale of the property at 265 Lonsdale Road, Barnes, London SW13 9QL.
19. The Defendant be and is hereby awarded all the movable items that were formerly at the Lonsdale Road, Barnes, London property and it is further directed that they shall be delivered by the Plaintiff at his cost to such address as may be designated by her in London.
20. The Plaintiff shall transfer into the name of the Defendant the Mazda 2.5 motor vehicle presently being used by her.
21. The Plaintiff is awarded the following property:
 - 21.1 The Kia Sorrento motor vehicle;
 - 21.2 all the money in the Lloyds TSB Debit Bank account, in the Barclays Bank in Cyprus account, in the Jewel Bank account, and all the British Airways air miles.
22. The Plaintiff's claim be and is hereby dismissed.

23. The Plaintiff shall pay the Defendant's costs of suit, including any costs reserved for determination in this matter and the qualifying fees and expenses of Mr. de Marigny.
24. Either party shall have the right to register and seal this order with the High Court of Judicature of England and Wales, subject to the rules and practice of such Court.

Messrs Honey and Blanckenberg, Plaintiff's Legal Practitioners
Messrs Atherstone and Cook, Defendant's Legal Practitioners