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Docket: File No. 1201-53751

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite: Kjolbro v. MacDonald-Kjolbro, 2001 NSSC 146]

BETWEEN:

JOGVAN FRIDRIK KJOLBRO

PETITIONER

and

MARY DAWNA MACDONALD- KJOLBRO

RESPONDENT

DECISION

HEARD: Before the Honourable Justice J. E. Scanlan
PLACE: Halifax, Nova Scotia
DATES HEARD: October 10, 11, 12, 15 and 17, 2001
DECISION: October 17, 2001(Orally)
WRITTEN RELEASE: October 23, 2001
COUNSEL: Lynn Reiersen, for the Petitioner
Kevin Coady, for the Respondent

SCANLAN, J.:

- [1] Jogvan Kjolbro and Mary MacDonald-Kjolbro were married on August 22, 1998. They separated on March 13, 1999. They now ask this court to grant a divorce in relation to the marriage and deal with all the corollary issues related thereto.

THE DIVORCE

- [2] On the issue of the divorce, I am satisfied there is no possibility of reconciliation. I am satisfied that all jurisdictional matters have been dealt with and complied with. I am satisfied as to the grounds of the divorce. The divorce shall be granted.
- [3] The collateral issues I must deal with relate to the sale or valuation of the matrimonial home and contents. The parties entered into a marriage contract dated July 29, 1998 and that contract is determinative of most of the respective rights of the parties.
- [4] Before I deal with the actual division of the matrimonial assets and the matrimonial home, I wish to refer to the background of the parties and their relationship.

BACKGROUND

- [5] Mr. Kjolbro is now sixty-one years old and Ms. MacDonald is thirty-eight. Mr. Kjolbro had previously been married on two occasions and he has four adult sons from the earlier marriages. He was born in the Fero Islands and left to go to Copenhagen when he was sixteen or seventeen years old where he participated in a three-year business college program. He then travelled the world for a year before returning to the Fero Islands to build homes for approximately five years.
- [6] When Mr. Kjolbro was twenty-two or twenty-three years old, he first started working at sea, fishing salmon in Greenland and then shrimp on his uncle's shrimp trawler from 1967 or 1968 through to 1975. From 1968 to 1975, he lived at sea for approximately fifty weeks per year. In 1975, he went to a nautical school to obtain his captain's papers after which he again returned to sea for approximately fifty weeks per year. In spite of the fact that he spent the vast majority of time at sea, as I indicated earlier, he had four sons. In his evidence, Mr. Kjolbro proudly proclaimed it only took two weeks at home per year to accomplish that feat of having four sons.
- [7] In 1986 or 1987, Mr. Kjolbro came to Canada as a result of signing a fifteen year contract to fish turbot. He had two ships built to service that contract. Eventually there was a transition from turbot into the shrimp fishery.
- [8] Approximately eighteen years ago, one of his sons, Esberg went to sea with Mr. Kjolbro when the son was approximately fifteen years old. Esberg is now a captain on one of Mr. Kjolbro's ships and is a substantial shareholder in the petitioner's main operating company, Ferocan.
- [9] Mr. Kjolbro, as is any other participant in the fishing industry, is subjected to the drastic ups and downs associated with that industry. In the early nineties, Mr. Kjolbro's companies were having very substantial economic difficulties as a result of depressed markets. There were times when he and other employees of his companies were required to defer their salaries because of the difficult cashflow situations in the companies. By 1994, Mr. Kjolbro came ashore, quitting his job as sea captain, in order to salvage his business. In spite of the fact that many fishing companies went bankrupt during that

- period, Mr. Kjolbro was able to continue operating through to 1995 when prices in the shrimp industry began to rebound. As will be noted later in this decision when I start discussing assets and expenditure of monies, it will become obvious that Mr. Kjolbro enjoyed very fiscally rewarding periods after the shrimp market rebounded in 1995. I would also note at this point, I am satisfied the shrimp industry is again suffering through something of a crisis. As a result of that downturn, Mr. Kjolbro and his companies are again having to endure hard times, relatively speaking.
- [10] In 1995 or 1996 after the industry recovered, Mr. Kjolbro re-negotiated some of his company loan obligations with Scandinavian lenders. As part of that re-negotiation he was able to have the bankers agree he could take what Mr. Kjolbro described as a repayment of shareholders' loans out of his companies. That was to allow Mr. Kjolbro to build a new home in Mulgrave. It is now agreed, as between the parties in this action, the cost of construction of that new home, independent of the land cost, was approximately 1.24 million dollars.
- [11] Mr. Kjolbro indicates there is still a bank-imposed limitation on the dividends and salary he is entitled to draw from his companies. I would note however, that Mr. Kjolbro has enjoyed a fairly substantial salary through the years, independent of any dividends or repayment of shareholder loans. His salary has, at times, been in excess of \$400,000.00 since 1995. It is not clear what his salary may have been during the difficult times of the companies in the earlier years. That is somewhat irrelevant for the purposes of this decision other than the fact that, in terms of the gifts and lifestyle bestowed by Mr. Kjolbro upon Ms. MacDonald, it must have required a substantial salary or fairly substantial wealth even prior to 1995. I say this, for few could have afforded the life style he provided to her.
- [12] Mr. Kjolbro continues to operate a company for each of his two ships, "Kinguk" and "Aqviq". In addition, Mr. Kjolbro has a third company, Ferocan, which appears to be the main managing company and one from which Mr. Kjolbro draws a salary. This salary is in addition to his one-half captain share that he gets from each of the Aqviq and the Kinguk companies. In that regard, I note there was some suggestion he was getting more than half the captain salary. I am satisfied Mr. Kjolbro gets one-half of the captain's share from each of these companies. That captain's share is calculated based on a percentage of the value of the landings net of expenses. This is in accordance with a traditional profit-sharing agreement for captains in the industry.
- [13] In addition to the captain share from the Kinguk and Aqviq, Mr. Kjolbro gets \$7,000.00 a month gross salary from the managing company, Ferocan. It appears his salary from that operating company has not yet been directly affected by the depressed market but I do not know how long that can continue. I am satisfied however, at this point in time, the half captain's share on the trawler operating companies are more susceptible to price fluctuations. As the prices of the products have been reduced his share of profit is reduced. This has immediately impacted Mr. Kjolbro's income.
- [14] Mr. Kjolbro also suggests that Revenue Canada is in the process of re-assessing his Income Tax because of the 1.24 million dollars he withdrew from the company to pay the construction cost for his home. He suggests they asked him for payment of income tax plus penalty and interest totalling approximately \$1,000,000.00. He indicates to the

court the reason this problem exists at all is related to the fact that his bank in Fero Islands or Scandinavia became insolvent and many of his bank records were lost. He says also other documents were lost due to the destruction by fire of a home he had in Fero Islands.

- [15] I stop at this juncture and note that if there is any tax liability related to the draw, or repayment of the shareholders' loan, that is not a debt for which the respondent, Ms. MacDonald, should in any way be held liable for. To begin, this was a debt which was incurred based on Mr. Kjolbro's activities prior to the marriage and independent of the marriage. Second, I would refer to Para. 12(d) of the Marriage Contract, Exhibit 4, and in that clause, in the marriage contract, Mr. Kjolbro confirms to Ms. MacDonald that he was the sole owner of the matrimonial home in fee simple and represented that there were no liens or encumbrances on the matrimonial home. He cannot now say that her entitlement to a division of matrimonial property is to be limited because that representation in the marriage contract may not have been true or accurate.
- [16] In addition to those points, I would note there is no evidence before me to indicate the re-assessment process is now complete. There is little or no evidence to convince me that once that process is completed Mr. Kjolbro will owe any income tax in relation to the draw or repayment of the shareholders' loan. If what he says is correct, and this was a repayment of a shareholders loan, then one would expect there will likely be no tax consequence as a result of this re-assessment.

Mr. KJOLBRO'S CURRENT FINANCIAL SITUATION

- [17] Mr. Kjolbro testified he currently has a stock portfolio valued at approximately \$300,000.00 to \$330,000.00. In addition, he has an RRSP for which he did not indicate the current value but to which he contributed about \$40,000.00. He has a home in the Fero Islands which he indicates is worth about \$200,000.00 Canadian. There is no appraisal or any other information to back up that statement as to the value. In addition, Mr. Kjolbro has an interest in the matrimonial home which he built for 1.24 million dollars plus his share of the contents.
- [18] I must say, and emphasize this point, that in relation to other evidence as to Mr. Kjolbro's net worth, I have little or no satisfactory evidence which would indicate to me that Mr. Kjolbro is in anyway impoverished at this point in time. There is nothing before the court to indicate the net value of retained earnings in the three companies I referred to above. Mr. Kjolbro is a major shareholder in those companies and they have, up until the last year or so, fished through a very good cycle in the shrimp industry. The future of the companies is no doubt tied to the world market, prices for shrimp, and to Mr. Kjolbro's ability to negotiate new quota contracts with the Inuit or anybody else these companies may be associated with. I can only say, and again I emphasize, there is a complete lack of evidence on the issue as to the value of those companies. I cannot assess how that value may or may not impact on Mr. Kjolbro's ability to pay anything I may order him to pay to Ms Mac Donald. It is not clear what the position of those companies is at this point. I heard evidence, for example, that one of these companies owns a property, approximately sixty acres of lands. It includes thirty acres which I understand may be in Mr. Kjolbro's personal name. That is waterfront, in Guysborough

- County upon which the company built a log cottage valued at approximately \$400,000.00. The cottage was used by one of the main employees for Mr. Kjolbro's company for some time. Now that employee lives in Port Hawksbury and the company retains the land and cottage. One of the companies also owns a Jaguar automobile of fairly recent vintage. Neither of these items bespeak of poverty within the companies.
- [19] One thing is clear, Mr. Kjolbro personally still has a home which is or should be unencumbered and the lowest appraised value is over \$400,000.00. The evidence before the court also indicates that Mr. Kjolbro was recently able to purchase a schooner in Florida that he says he purchased for a charter business. Mr. Kjolbro indicates he was able to finance one hundred percent of the purchase price, \$ 370,000.00, with a Canadian bank and it was not necessary that he produce a net worth statement to get the one hundred percent financing. Either the bank has adopted a Reichman approach of lending without getting net worth statements or they know something I do not in relation to Mr. Kjolbro and his net worth.
- [20] I also note in relation to that schooner, Mr. Kjolbro told Ms. MacDonald in July of this year that he was really purchasing the schooner for pleasure. He told her that, for tax purposes, he was saying it was described as a charter service so it would be tax deductible. He also told this Court he purchased the schooner to start a charter business.
- [21] I simply leave this area by saying that I have no clear idea as to what the petitioner's true situation is in terms of net worth and ability to pay. If worse comes to worse, certainly Mr. Kjolbro has the matrimonial home which can be liquidated even in the worse case scenario for much more than this court is going to order he pay to Ms. MacDonald.
- [22] Mr. Kjolbro explains as a reason for building the home that he wanted a large home because he lived most of his adult life in the cramped confines of a captain's cabin at sea. The house he built in 1995-1996 is over five thousand square feet, on a forty acre parcel of land near Mulgrave. As I noted earlier, it is agreed between the parties that the construction cost was approximately 1.24 million dollars. Mr. Weatherby, an appraiser of some twenty-five years, twenty of which have been in Nova Scotia, describes the house as being of exceptional high quality, one of the highest quality he has ever inspected in Atlantic Canada. He describes a complex building envelope with complex angles and slopes. The interior is of a very high quality: I heard evidence of hardwood flooring imported from Brazil, imported marble, numerous fire places, custom designed stair rails, etc. The evidence referred to an in-ground pool, decking and landscaping that could well have cost in excess of \$200,000.00. This, of course, was complimented by a horse stable and trout ponds. I cannot help but comment on the irony of a man who spent most of his life at sea fishing salmon, turbot and shrimp, coming to shore to build a \$19,000.00 trout pond in his front yard.
- [23] This may have been Mr. Kjolbro's dream house but I am fully convinced Ms. MacDonald participated in every aspect of the planning and design relating to the construction of this home. She picked out almost every component and accessory related to the house. She says this included everything down to the forks the parties used to entertain with. She spoke of it as her dream house as well. She says she participated in the dream even prior to the marriage. Mr. Kjolbro does not deny her participation in the construction phase of the house prior to the marriage.

[24] The parties went to great lengths to get what they wanted for the house. Ms. MacDonald spoke of it coming to her attention that there might be something nice in Manhattan or in Montreal that caught her attention. The parties would fly off to Manhattan or Montreal to pick it out or to pick it up. Certainly there was no expense spared in the construction of this house.

MS. MACDONALD'S BACKGROUND

[25] I now turn to the respondent's situation for a moment. I noted earlier that Ms. MacDonald is now thirty-eight years old. After she graduated from high school, Ms. MacDonald worked for about eight years at a local hotel on a seasonal basis, drawing unemployment insurance each winter. After eight years she entered a business accounting program. Upon graduation she worked for approximately one year with another company in Mulgrave not associated with Mr. Kjolbro. In February 1991, she began to work with one of Mr. Kjolbro's companies, Ferocan at a salary of \$8.00 per hour. She started as a secretary but her job was initially not well defined. She quickly took on substantial responsibilities. In a short time, she basically was working as a shore captain, hiring and firing crew members, making travel arrangements and doing a substantial portion of the administrative work required for Ferocan. By 1994, her salary was \$625.00 per week. She testified that was commensurate with her responsibilities and the extra work she took on.

[26] Eventually Ms. MacDonald went to work for another company owned by the plaintiff; ACS Trading. She moved to Halifax for a short time for this purpose then returned to Mulgrave to oversee construction and startup of that shrimp processing facility in Mulgrave. With ACS she was responsible for a lot of the hiring of the staff that worked in that facility. From time to time she oversaw fifty or sixty employees plus construction workers. When she finally ended her employment with ACS in October 1995, she was making approximately \$1,000.00 per week. That again was commensurate with her responsibilities and the type of work she was doing for ACS. She was certainly more than a secretary at that point.

[27] I refer for a moment back to the employment period with Ferocan. Ms. MacDonald confirmed the difficulty with hiring and arranging for the crew travel in 1991 because of the bad financial situation with Mr. Kjolbro's companies. By 1993, Ms. MacDonald had limited cheque signing authority with the companies. This, to a large extent, was the result of the fact that the other main employee for Ferocan had to travel to Denmark frequently to deal with banking issues for the companies.

THE RELATIONSHIP

[28] As I noted earlier, in October 1995, Ms. MacDonald finally left employment with ACS. She referred to the fact her employment was very stressful and it was interfering with her ability to continue with her personal relationship with Mr. Kjolbro. Since 1995 Ms MacDonald has not worked for any of his companies. She instead, has received a \$3,000.00 to \$4,000.00 per month allowance from Mr. Kjolbro plus a credit card which he paid. It is not clear when this allowance or credit card arrangement began but Ms.

- MacDonald made it clear that Mr. Kjolbro was always very generous to her. That began much earlier than 1995.
- [29] Mr. Kjolbro and Ms. MacDonald from the beginning had a stormy relationship. I use the term relationship quite loosely. Mr. Kjolbro met Ms. MacDonald within a few weeks of her beginning her work at Ferocan in 1991. They almost immediately began an intimate relationship in spite of the fact that for many years afterward Ms. MacDonald had a common-law partner. This is the same person, incidentally, who, for a short time again, lived with Ms MacDonald after the parties separated.
- [30] Mr. Kjolbro and Ms. MacDonald travelled the globe on the pretense of business, perhaps related to the fact that Ms. MacDonald was still involved in a relationship with this other person. Mr. Kjolbro says only one of the trips the parties took was ever related to business. All of the rest were for pleasure. They travelled to places like Jamaica, the Bahamas, Amsterdam, Copenhagen, Denmark, Greece, Germany, Italy. The list could go on. As they travelled, Mr. Kjolbro bestowed many luxuries and gifts upon Ms. MacDonald, including expensive jewellery and clothes. He paid \$20,000.00 for a down payment on a house for her. He later paid the entire balance of her mortgage, well in excess of \$30,000.00. Ms. MacDonald was afforded a lifestyle that could be ill afforded on a secretarial income or even the increased salary that went along with her increased duties with Ferocan and ACS. In Mr. Kjolbro's words, he said he gave Ms. MacDonald the money with no strings attached. I use his words when he says: "I enjoyed giving more than receiving".
- [31] The three to four thousand dollar per month allowance Ms. MacDonald received continued, as I have indicated, after her employment and continued through to the date of the marriage.
- [32] The entire relationship between the parties can only be characterized as being volatile. There were recurring episodes wherein the parties would not be speaking. Mr. Kjolbro would disappear without any forewarning for weeks at a time, not disclosing his whereabouts. This continued even after the parties were married. I refer, for example, to January or February 1999, when Mr. Kjolbro left only a short note saying he was going to Fero Islands. There was no forewarning and there were no other details in the note. Ms. MacDonald said she was never sure if he did go the Fero Islands.
- [33] There were many other episodes as well. Ms. MacDonald described an instance where Mr. Kjolbro gave her a gift of \$10,000.00 while out to dinner one evening in Halifax. She says that after he had a few drinks, it was her perception at least, that Mr. Kjolbro regretted having given as much as he did. The parties ended up fighting about the \$10,000.00 and she tore up the cheque. She referred to this as an example of not taking all the money that was offered to her.
- [34] Much of the relationship between these parties seems to have revolved around money, just as this proceeding itself. It would seem there was little Mr. Kjolbro would not buy for Ms. MacDonald or spend on Ms. MacDonald. She referred to this generosity as having existed from the beginning of the relationship. He provided money not just for her, but money for her family to take vacations to exotic places and money which allowed Ms. MacDonald to be very generous with her family.

- [35] This money-based relationship even permeated through to issues such as childbearing. Mr. Kjolbro did not dispute Ms. MacDonald's evidence that he offered her \$90,000.00 if she would have his child. The math was quite simple; he said it was to be \$10,000.00 for each month of the pregnancy. She said she rejected that offer and again used that as an example of her not taking all the money she was offered by Mr. Kjolbro.
- [36] Ms. MacDonald referred to the petitioner as being very powerful in her community and in relation to her family. I have little doubt that, in many ways, the petitioner feels he can buy or control people with his money and power. He is very comfortable in that regard. That is one of the things I take into account in making a final determination as to the proper way to conclude this matter. Having said that, I must say I am also convinced Ms. MacDonald fully recognized the arrangement she had as between herself and Mr. Kjolbro for what it was. She was a willing participant in an arrangement that, for many years up to and including the marriage, was largely based on expensive gifts, travel and luxuries. The understanding the parties had was in many ways reduced to a written contract as evidenced in the marriage contract signed on July 29, 1998. After the wedding in August, 1998, there really does not seem to have been much of a change in terms of the nature and quality of the relationship as between the parties. The parties entered into a very business-like contract in July 1998 which set out their rights responsibilities and obligations. In terms of the quality of the relationship, I refer to the fact Ms. MacDonald said she knew the marriage was in trouble when just eight days after the marriage ceremony the petitioner, Mr. Kjolbro, came to her discussing what arrangements might be made for him to have a mistress. As I said, little appears to have changed as a result of the wedding and the parties probably understood the nature of the arrangements they entered into and what their rights and obligations were. More so than any case I have ever dealt, this is a matter of simply interpreting the contract.

THE MARRIAGE CONTRACT

- [37] The marriage contract required the parties establish a joint bank account and that Mr. Kjolbro deposit his entire salary net of taxes. It was based on earlier years patterns of salary patterns. Ms. MacDonald suggested in this regard that Mr. Kjolbro did not fulfill his obligation to deposit all of his salary. I am satisfied after reviewing the records that Mr. Kjolbro did deposit his entire salary as per the terms of the agreement plus an additional \$5,490.00. I pause, at this point in time, to say that because of that excess deposit to the joint account, Mr. Kjolbro is now entitled to a credit equal to that excess deposit.
- [38] The marriage contract also obligated Mr. Kjolbro to convey the matrimonial home to himself and Ms. MacDonald as joint tenants in fee simple free from any liens and encumbrances. This joint ownership also included most contents in the home. Based on that joint ownership, it is necessary that I now determine the value of the home and contents so as to ascertain what each persons share in the home and contents may be.

VALUATION OF THE MATRIMONIAL HOME

- [39] There were two appraisals of the home submitted to the court. A report was prepared on behalf of Mr. Kjolbro by Mr. Philson Kempton as of June 16, 1999. He valued the home

at \$410,000.00. Recall this was a home that was built for approximately 1.24 million dollars, construction having only been completed in early 1996. A major factor which influenced Mr. Kempton's final valuation was the external obsolescence attributable to the home because of the fact it was built in Mulgrave. This is a remote community with a very limited market in which to sell a home of this quality and cost.

[40] Mr. Kempton also referred to the fact he felt the house was very much overbuilt. In this regard, he suggested it was appropriate to use a replacement cost as opposed to reproduction cost as a basis for determining value. He felt that many of the exotic items, for example, the Brazilian hardwood floor could be replaced with local products, for example, local oak or maple. He said from a functional perspective those local products would provide equivalent use and value. This overbuilding, he suggested, was apparent in many aspects of the home. That is one of the main reasons he said it was more appropriate to use replacement cost as opposed to reproduction cost as a basis for valuing in this relatively new house.

[41] Mr. Kempton also used a direct comparison approach in trying to ascertain the value of the home. One substantial difficulty that I observed in relation to the direct comparison approach is the fact this property was so unique in terms of the Nova Scotia market. There are a number of high quality homes in Nova Scotia but there are very few built and sold in remote locations such as the subject property. These tend to be custom built homes built by the owners for continued and long term occupation.

[42] One of the few homes he was able to point to, which would be somewhat comparable, was a home on Coxheath Road near Sydney, Cape Breton. It was referred to affectionately throughout these proceedings as Rita's home. The other comparables used by Mr. Kempton were in Cameron Road, West Bay and Brierley Brook, Antigonish County. As regards these latter two especially, considering the size and style of these homes, they were so distinct from the subject property that I am satisfied they were not good comparison homes. I am satisfied that the lack of good comparables for the subject properties has a substantial impact on the validity of the appraisal. In saying this, I do not in any way, negatively comment on the abilities of Mr. Kempton. This was a unique home and it was a difficult job to establish the value. I simply say that the less appropriate the comparables are, the more subjective the opinion becomes. This makes it less reliable as a true market value indicator. This same comment applies to Mr. Weatherby's appraisal. As I have noted, the final value arrived at by Mr. Kempton was \$410,000.00.

[43] The second appraisal before the court, as I have noted, was prepared by Lee Weatherby of Turner, Drake and Partners Limited, Halifax, Nova Scotia. Mr. Weatherby also used two different approaches in trying to ascertain an estimated value for the property. He used a cost approach. There is an important distinction in terms of Mr. Weatherby's cost approach calculations and those of Mr. Kempton. Mr. Weatherby used a reproduction cost as opposed to replacement cost for his starting point. In this regard, Mr. Weatherby concluded that many of the construction materials used in the home were things which some people in this high end market would recognize and be prepared to pay a premium. On that basis he attributed some value to some of the peculiar aspects of the home. To a certain extent I am satisfied that this is the case.

- [44] I would indicate at this point in time that there were some weaknesses in Mr. Weatherby's report just as I referred to some weaknesses in Mr. Kempton's report. I refer, for example, to the reproduction cost. There was a lack of precise information as regards the actual cost of reproduction of some of the particular aspects of the home. He relied substantially on the suggestion that the actual cost was 1.24 million dollars and basically worked backward by trying to ascertain the values of some of the improvements. Mr. Weatherby allowed only two per cent for the physical depreciation and no allowance for functional obsolescence. He allowed fifty percent external obsolescence depreciation based on the location of the property and the limited market. The final value, he attributed to the property, using the cost approach, was \$722,000.00.
- [45] Mr. Weatherby also used the direct comparison approach. He too used Rita's house as one of his comparables and two properties that were not used by Mr. Kempton. One was near Wolfville in Kings County and the other near Brookfield in Colchester County. I am not going to go through in detail trying to say how valid or invalid those comparables were. There were no more or no less valid than the comparables used by Mr. Kempton. They too were so much different than the subject property that it resulted in a large degree of subjectivity going into both reports, when using the direct comparison approach.
- [46] Using the direct comparison approach Mr. Weatherby determined the value of the home to be around \$580,000.00. Counsel noted the drastically different values determined by the appraisers. Both used methods which are acceptable within the industry. Mr. Weatherby, after using the comparative approach and the cost approach, said he felt that it was appropriate to attribute equal weight to each of the approaches. He averaged the two figures, fixing a value as of March 2000, at \$651,000.00.
- [47] When I compare the two appraisals, I am satisfied there are no serious flaws with either opinions as offered by the appraisers. The difference in valuation is easily explained by the subjective elements in each of the reports attributable to the unique construction and location of the property in a limited market.
- [48] One of the larger markets for this home would be off-shore European. As noted by Mr. Kempton and Mr. Weatherby, a major attraction for that market is waterfrontage. The subject property is not located on the water, although there is a panoramic view of the Canso Strait from the subject property.
- [49] The only true way to find or to establish market value is to have the property on the market, listed at a reasonable price. Mr. Weatherby indicated it is his opinion that if the property was listed for twelve to eighteen months it would sell for \$651,000.00. Mr. Kjolbro has twice listed the property; once, for 1.2 million dollars and the second time for \$850,000.00.
- [50] I must say that I am not at all convinced that Mr. Kjolbro really wishes to sell the house. In that regard Ms. MacDonald has testified that Mr. Kjolbro informed her, as recently as July of this year that he has, through his companies, made major financial investments in the Mulgrave area. It would appear that these are indicative of his commitment to stay in the area. In that sense there may well be a willing buyer at this point in time for Ms. MacDonald's share. That is Mr. Kjolbro. I am not convinced he cannot afford to acquire her interest.

- [51] Ms. MacDonald wants a closure to the relationship and a settling of the financial arrangements as between the parties. I am satisfied it is in the interest of both parties to settle all remaining issues as soon as possible. In this regard, I am satisfied it is necessary that the court fix a value based on the evidence before the court. Both the Kempton and the Weatherby appraisals, as I said, can be subject to certain criticism. I am satisfied in essence that neither is without foundation in spite of the very large difference between the final values as suggested by the appraisers. I do not say this lightly, but I do accept the average of the two appraisals as being indicative of the value of the home at this point in time. I fix a value at \$530,500.00. Ms. MacDonald's share of the matrimonial is, therefore, \$269,250.00.
- [52] It is appropriate that her share be reduced by a proportionate share of the disposition costs. For the purposes of these calculations, I fix them at five percent realtor fee (\$13,262.80) plus HST at \$1,989.80, plus \$300.00 for legal fees. The total deduction, in terms of disposition cost, therefore, is \$15,551.87 to be deducted from Ms MacDonald's share of the value of the property. Her net share of the real property before other adjustments is \$249,698.10.
- [53] I want to note that Mr. Kjolbro referred to what he described as extensive problems with the exterior siding on the house. This is a synthetic stucco product. His evidence is that on the northeast side a substantial portion of the stucco is coming away from the wall. Neither Mr. Weatherby nor Mr. Kempton noted this as being a substantial concern at the time their appraisals were completed. Mr. Kjolbro did not address this problem in a timely manner. It is not clear to the court, number one, the extent of the problem at this point in time, or number two, whether this issue could have been treated in a timely manner and, therefore, have been limited in terms of severity had it been treated at the appropriate date.
- [54] Mr. Kjolbro has been occupying the matrimonial home since the separation. I refer to the marriage contract where it indicates the husband shall assume sole responsibility for all expenses associated with the matrimonial home during the marriage and pending final settlement by the parties after separation. According to the contract expenses include, but are not limited to, mortgage, taxes, utilities, insurance "maintenance and repairs associated with the matrimonial home".
- [55] I am satisfied Mr. Kjolbro had an obligation, under the marriage contract, to maintain and repair the home. Had he done it in an appropriate and timely manner, the problem may not have been anywhere near or severe as it is in this point in time. In any event, it was his ultimate responsibility to do that maintenance under the terms of the contract. I therefore make no deduction from Ms. MacDonald's share for any maintenance associated with that exterior wall.
- [56] I do not make any award to Ms. MacDonald for occupational rent for the period Mr. Kjolbro occupied the home. He was entitled to so occupy pursuant to the terms of the marriage contract. He paid the \$5,000.00 per month as an advance to her. In spite of the fact this litigation has taken longer than anticipated to conclude, the court process has not been unreasonable.
- [57] Para. 21(a) of the marriage contract stated and I quote:

(a) Should the parties separate within 36 months of the date of the marriage, the Husband shall pay the Wife Five Thousand Canadian Dollars (\$5,000) per month subject to Paragraph (c) below commencing on the date of separation and on the first of each and every month thereafter (the "Advance") pending final settlement of the division of all Joint Property at which time the Advance shall be deducted from the final settlement amount.

- [58] I do not rely solely on the marriage contract in relation to that \$5,000.00. There is nothing before me that would indicate this \$5,000.00 per month payment should be anything but an advance as against the final division of assets. The parties were married for a very short term. The parties had a unique relationship prior to the marriage. In an unusual way there had been substantial payment to Ms. MacDonald prior to the marriage. She received a lot of money, a lifestyle which she could not have afforded. In that sense, she partook of Mr. Kjolbro's wealth pre-marriage.
- [59] There was nothing in terms of the marriage contract that I would consider to be unconscionable or unduly harsh. Considering the equity of the situation and the law I am not convinced it would be appropriate to characterize the \$5,000.00 payment as anything other than the advance on the final settlement. All of the \$5,000.00 per month payments, therefore, shall be deducted from the final settlement. I understand from counsel that the total of these payments to date is \$150,000.00. I would ask that counsel verify those amounts prior to submitting any final order. If they cannot reach an agreement of what has been paid then I am prepared to hear further evidence to establish the exact amount paid to date.

CONTENTS OF THE MATRIMONIAL HOME

- [60] I turn to the issues related to the contents of the matrimonial home. There is evidence the parties spent in excess of \$200,000.00 to acquire the furniture and contents in the matrimonial home. I am sure this does not include some of the travel expenses to pick some of the things up in Manhattan, Montreal or anywhere else they went. There are now two appraisals before the court. The first would indicate a total value of \$33,358.00 and the second, prepared on behalf of Ms. MacDonald indicates a total value of \$52,353.00.
- [61] There was no evidence whatsoever called in relation to these appraisals. Ms. Reieron suggested the court look at the CV of the person who prepared the appraisal on behalf of the parties and give more weight to one appraisal versus the other on that basis. It would be a disservice to the administration of justice if I were to assess the validity of any opinion based on the thickness of the author's CV. There is nothing in the CV of any appraiser, let alone these two appraisers, that would alone justify accepting one appraisal over another. Surely the task of fact finding and compilation of experts opinions is more complex than that. I am satisfied that, in the absence of any other evidence, the only way to fairly determine the value of those assets is to average the two appraisals. The average is \$42,855.50. Ms. MacDonald's half share of the contents therefore is \$21,427.75. The total unadjusted entitlement for the house and contents is \$271,125.88.

ADJUSTMENTS

- [62] I have already referred to a couple of adjustments to the final payment to Ms. MacDonald. There are several other adjustments that must be made to the amount Ms. MacDonald is entitled to receive. These are largely the result of the fact she took money beyond that to which she was entitled to take from the joint accounts.
- [63] Prior to and immediately following the separation Ms. MacDonald made numerous substantial withdrawals, either from the joint chequing account or as cash advances against the Scotia Gold Visa card. Many of these advances were used by Ms. MacDonald to pay for repairs on the house she owned in Port Hawkesbury or, as she described it, for financial protection for her in contemplation of the marriage breakdown.
- [64] Ms. MacDonald suggested some of these draws were gifts to her from the petitioner. I am not satisfied Mr. Kjolbro authorized the removal of the monies during the disputed times. I am satisfied Mr. Kjolbro specifically rejected any idea that he would allow Ms. MacDonald to take, for example, the \$25,000.00 to repair her father's cottage, as a Christmas Gift, or that he would pay for the renovations on Ms. MacDonald's home in Port Hawkesbury. There were numerous other withdrawals which were referred to as financial protection which were without authorization and contrary to the spirit and intent of the marriage contract. In that sense, I am satisfied it is appropriate that the court simply calculate what monies Ms. MacDonald has inappropriately or improperly removed from those accounts. Those amounts should be deducted from any amount she receives on final settlement.
- [65] On the above noted basis I am satisfied that one-half of the following amounts should be deducted from the amount owing to the respondent, Ms. MacDonald, as these were amounts that she inappropriately removed from the joint accounts or withdrew from the joint Visa account:

Jan. 11/99 paid to Andi Palmer	\$	1,974.25
Jan. 22/99 paid to Garnet (the plumber)	\$	5,607.00
Feb. 9/99 Central Supply	\$	4,061.58
Feb. 28/99 MOBILE welding	\$	494.73
Nov. 19/98 King Metal	\$	978.74
Oct. 8/98 Cheque No. 005	\$	2,389.05
Nov. 26/98 Cheque No. 062	\$	1,377.70

There were two cheques on that list that I did not deduct as they were not improper withdrawals, all others I have included. I am satisfied these above-noted amounts were expended on the respondent's house contrary to authorization and instruction from the petitioner. She will also be required to pay one-half of \$1,800.00 paid to "Tommy, the electrician" in relation to the Port Hawkesbury house. The total amount paid is \$18,683.05. These amounts were paid out of the joint account to

which the respondent was entitled to one-half under the terms of the contract. \$9,341.52 will be deducted from her final share.

[66] In addition, there were cash withdrawals from the joint account which the petitioner made in contemplation of the marriage breakdown or after the marriage breakdown. This included \$27,300.00 in February 1999, March 15th - \$800.00, plus \$200.00 and \$4,000.00, respectively; March 25th - \$200.00; April 10th - \$100.00; April 12th - \$500.00; April 23rd - \$500.00, for a total of \$34,400.00 from the joint account. She must account for one-half of that amount (\$17,200.00).

[67] In addition to the draws from the joint account, the respondent drew monies as cash advances from the joint Visa card totalling \$6,950.00. This occurred just prior to or shortly after the separation. She must now repay, by way of deduction from her share of the matrimonial property, one-half of that amount which is \$3,475.00.

[68] In addition to the above-noted draws against the Visa card by way of cash advance, the petitioner had to pay a balance of \$5,079.79 which was a balance accumulated above and beyond that which could be paid from the joint account during the marriage. Mr. Kjolbro's counsel urges the court to require the respondent to pay the full amount of that balance paid after the marriage. I am not satisfied it was any more than a reflection of one or both parties living beyond their means as being fundable from the joint account. In that sense, it is a matrimonial debt to be funded equally by both parties. The respondent's share in that regard therefore will be further reduced by \$2,539.00. Remember counsel had she not been withdrawing all the other monies there probably would have been enough in the joint account to pay that Visa balance and the parties could have been living within their means. I have made her pay back or reimburse the joint account so that the Visa balance could have been paid from the joint account. That is why it is one-half.

[69] The petitioner also alleges that, in addition to the monies I have already noted, the respondent now has approximately \$25,000.00 in her cash accounts which she holds either alone or jointly with her sister. The respondent cannot account for this money. In this regard, the petitioner's counsel went through the evidence with Ms. MacDonald relating to all her possible sources of income. It is clear she had no source of income that would allow her to accumulate that additional \$25,000.00. It is impossible for me, on the evidence before the court, to pin point exactly the source of that \$25,000.00. Certainly Ms. MacDonald had lots of cash available to her by way of withdrawals from the parties joint account during the marriage. There was no contemplation in the marriage contract that she would take money beyond that which was required to live to fund a separate account for herself. I am satisfied the \$25,000.00 was accumulated through the marriage period and perhaps shortly after the marriage breakdown. It was all through the marriage accounts. She could not explain any other possible source for that money. Because I am satisfied that it came from the joint proceeds of the couple's chequing account, she must account for one-half of that \$25,000.00 or \$12,500.00.

[70] The balance owing to Ms. MacDonald at this time therefore is \$224,532.55 less any advances to date by way of the \$5,000.00 monthly payment. Counsel suggest to me that there is approximately \$150,000.00 advanced to this time. If that total is accurate then the balance owing after all credits would be \$74,532.55. I would ask counsel to check my

calculations and also confirm how much has been already advanced. The balance is payable immediately by Mr. Kjolbro to Ms. MacDonald. Pending final payment, the \$5,000.00 per month will be paid and further deducted later.

[71] Counsel have asked that I reserve on the issue of costs and I will hear from them by way of written submissions on that issue.

J.