

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANGUILLA CIRCUIT  
(MATRIMONIAL)  
A.D. 2021**

**CLAIM NO. AXAHMT2009/0007**

**BETWEEN:**

**RODNEY ANTHONY WEBSTER**

**Petitioner**

**and**

**MAXINE HERBERT-DUGGINS (FORMERLY WEBSTER)**

**Respondent**

**Appearances:**

Ms. Jean M. Dyer with Mr. Theon C. Tross of counsel for the Petitioner  
Mr. Carlyle Rogers of counsel for the Respondent

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2021: February 23;  
June 30.

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*Matrimonial proceedings – Ancillary relief – Settlement agreement incorporated into Consent order – Application by respondent for leave to enforce terms of consent order pursuant Section 31 of the Matrimonial Proceedings and Property Act, R.S.A. c. M60 – Petitioner opposing application for leave to enforce consent order but not applying to vary the consent order pursuant to section 30 of the Matrimonial Proceedings and Property Act or under the liberty to apply clause in the consent order – Settlement agreement valid and enforceable – Whether court obliged to consider the respondent’s application for enforcement of the consent order – Validity and effect of settlement agreements in matrimonial proceedings – Section 26 Matrimonial Proceedings and Property Act – Court’s approach to dealing with orders made in ancillary proceedings for financial provisions and property settlement after decree nisi – Court’s jurisdiction and powers to vary orders made on ancillary relief – Section 30 Matrimonial Proceedings and Property Act – Powers exercisable by the court on application to enforce order made in ancillary relief proceedings – Whether leave should be granted to enforce the consent order – Whether change of circumstances making it unfair to enforce the settlement agreement – Whether the court should have regard to the matters contained in section 26 of the Matrimonial Proceedings and Property Act – Section 30(7) of Matrimonial Proceedings and Property Act*

**JUDGMENT**

[1] **INNOCENT, J:** Mrs. Maxine Herbert Webster, now Mrs. Maxine Herbert-Duggins (the ‘Respondent’) filed an Originating Summons on 18<sup>th</sup> January 2021 seeking leave to commence enforcement proceedings against Mr. Rodney Anthony Webster

(the 'Petitioner') in respect of a settlement agreement (the 'Settlement Agreement') and a consent order entered into by the parties in Ancillary Relief proceedings dated 22<sup>nd</sup> January 2010 and entered on 25<sup>th</sup> January 2010 (the 'Consent Order'). The application was made pursuant to section 31 of the Matrimonial Proceedings and Property Act<sup>1</sup> ('MPPA') and Rule 62 of the Matrimonial Causes Rules 1937 ('MCR').

- [2] The application was premised on the grounds that the Petitioner had failed to make payment of certain sums due to the Respondent under the terms of the Settlement Agreement.
- [3] The Respondent also sought an order that the Court amend the Consent Order to bring it into compliance with Rule 62(2) of the MCR and that the said order be endorsed with a penal notice in accordance with Form 13 in Appendix II of the MCR.
- [4] In addition, the Respondent sought to have the Consent Order further amended to specify the time within which the Petitioner was to comply with the terms of paragraph 5 of the Settlement Agreement which mandated that the Petitioner rectify the share certificates in the corporate entity ANGLEC (the 'Company') to show the shares were held by the Petitioner and the Respondent in trust for the children of the family.

### **The Parties Legal Submissions**

- [5] The application was opposed by the Petitioner ostensibly on the grounds that it would be unfair and inequitable to enforce the terms of the Settlement Agreement given that there has been a substantial and relevant change of circumstances since the date of the Settlement Agreement and the Consent Order; that the Court retained the jurisdiction to vary the terms of the Settlement Agreement and the Consent Order under section 30 of the MPPA as opposed to enforcing the terms of the Settlement Agreement where there exist a significant and relevant change of circumstances that would make it inequitable or unfair to enforce the same; therefore, the Court should refuse to enforce the terms of the Settlement Agreement

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<sup>1</sup> R.S.A. c. M60

and instead exercise its powers under section 30 of the MPPA; and accordingly, the Respondent's application should be dismissed with costs.

- [6] On the contrary, the Respondent submitted that that the Petitioner had failed to avail himself of the 'liberty to apply' provision contained in the Consent Order or making an application for variation in accordance with section 30 of the MPPA.
- [7] The Respondent further contended that although section 30 of the MPPA appears silent on the question of whether the court can exercise its power to vary a Settlement Agreement of its own volition or only upon application made by one of the parties, the tenor of section 30 of the MPPA alludes to the Court only exercising such a power on application of one of the parties.
- [8] The Respondent further contended that the power of the Court to vary the Settlement Agreement under section 30 of the MPPA is not in dispute, however, there has been no such application made by the Petitioner. Therefore, the Petitioner cannot rely on the provisions of section 30 of the MPPA to defeat the Respondent's application for the enforcement of the Settlement Agreement, notwithstanding that there may exist a significant change of circumstances.

### **The Settlement Agreement**

- [9] The Settlement Agreement was arrived at by a process of mediation in the course of the Ancillary Relief proceedings. The terms of the Settlement Agreement that are relevant to the present proceedings are contained at paragraphs 1(b), 1(d), 5 and 9 thereof.
- [10] Paragraph 1(b) of the Settlement Agreement provided:

"Tony will pay monthly to Maxine the sum of US\$1,300.00 to cover the maintenance in the United States of the two children payable on the first working day of every month commencing with the month of February 2010 until the age of eighteen or until their education is completed, with liberty to apply to the court for any necessary variation."

[11] Paragraph 1(d) of the Settlement Agreement provided that:

“The physical custody of the children shall be shared jointly by the two parents, with Tony accepting responsibility for six months of custody each year commencing on 16<sup>th</sup> August 2010 until completion of Rodney's medical treatment. While the children shall be in Tony's custody Maxine will contribute the sum of US\$1,300.00 to cover maintenance in the United States payable on the first working day of every month.”

[12] Paragraph 5 of the Settlement Agreement provided that:

“As regards the shares in ANGLEC presently held by Tony in trust for the two children, Tony undertakes to have the share certificates rectified to show the owners as Tony and Maxine in trust for the two children.”

[13] Paragraph 9 of the Settlement Agreement stated that:

“As regards the debt of US\$168,000.00 acknowledged to be owed by Tony to Maxine for the purchase of the aero plane N5775C presently owned in the name of Island Air Charters Inc., Tony will pay to Maxine the sum of US\$1,000.00 per month on the 1<sup>st</sup> day of every month starting with February 2010 for a total of 168 months, any instalment in arrears attracting interest at the rate of 10% per annum until the total sum is paid, in consideration of which payment and commencing with the date of this agreement, Maxine releases all her interest in the company Island Air Charters Inc. to Tony.”

### **The Consent Order**

[14] The Consent Order was contained the following terms:

“1. That the Settlement Agreement attached hereto dated 22<sup>nd</sup> January 2010 and signed by the Parties shall be the order of the Court as it relates to Ancillary Matters in these proceedings.

2. That each party bears his or her own costs.

3. Liberty to apply.”

### **Law Related to Consent Orders in Matrimonial Proceedings**

[15] It is not in dispute that settlement agreements in matrimonial proceedings embodied in consent orders related to the financial arrangements and maintenance in ancillary proceedings differ from consent orders entered into other types of proceedings. In

the latter the validity and effect of the consent order is derived from the parties' agreement and is contractual in nature.<sup>2</sup>

- [16] Similarly, the case of **Thwaite v Thwaite**<sup>3</sup> is authority for the proposition that unlike consent orders in other types of litigation which derived their force and effect from the parties' agreement, consent orders embodying the financial arrangements agreed between the parties to a divorce derived their legal effect from the court order and not from the parties' agreement, since that was a necessary consequence of the policy underlying section 23(1) and 24(1) of the Matrimonial Causes Act 1973 to permit the parties to a divorce to make a clean break in financial matters. It followed that consent orders embodying the spouses financial arrangements were to be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders. Accordingly, if the order fell within section 31(2) of the 1973 Act it could be varied under section 31(1) by the court which made the order.

### **Validity and Effect of Settlement Agreements**

- [17] The question of the validity of the Settlement Agreement does not arise in the present case. There is no doubt that the Settlement Agreement was freely entered into by each party with a full appreciation of its implications. There is no allegation that the circumstances existing at the time that Settlement Agreement was entered into would make it unfair to hold the parties to their agreement.
- [18] However, a Settlement Agreement cannot oust the jurisdiction of the Court to make financial orders. Even if the parties have agreed what the court's order should be, the order derives its authority from the court and not from the parties' agreement.
- [19] The court has its own independent duty to check the arrangements agreed between the parties and to evaluate them in light of the statutory duties under section 26 of the MPPA. This principle is embodied in section 26 of the MPPA.

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<sup>2</sup> Radmacher at paras. 149 and 150; Minton v Minton [1979] 1 All ER 79; de Lasala v de Lasala [1979] 2 All ER at 1155

<sup>3</sup> [1981] 2 All ER 789

- [20] However, the court has power to vary the financial arrangements made in Settlement Agreements between spouses incorporated into a consent order under section 30 of the MPPA.

**Approach to dealing with Settlement Agreements in Ancillary Proceedings**

- [21] In Anguilla applications that are made pursuant to sections 24 and 25 of the MPPA are to be determined in accordance with sections 26 of the MPPA. This is the statutory and only basis for the court's jurisdiction and powers.
- [22] Therefore, the starting point for the court's evaluative consideration in ancillary proceedings for financial arrangements and settlement of property is section 26 of the MPPA. This and this alone is the guiding principle for the exercise of the court's discretion under sections 24 and 25 of the MPPA. It is to be applied in light of the actual and reasonably foreseeable circumstances at the time when the court makes its orders. Of necessity these circumstances would include any maintenance agreement or settlement and transfer of property arrangements between the spouses and the appropriate weight to be attached to them.
- [23] Where the settlement agreement is valid, as in the present case, due consideration must be given to whether there is any change in circumstances in light of which any financial arrangements or maintenance agreement contained in the settlement agreement were made or, as the case may be, omitted from it including a change foreseen by the parties when making the agreement being the sort of change that would make those arrangements unjust.
- [24] A significant change of circumstances is the criteria for justifying a departure from the settlement agreement freely entered into by the parties. This clearly is the starting point for the exercise of discretion and evaluation either under sections 30 or 38 of the MPPA.
- [25] The court should give effect to a settlement agreement that is freely entered into by each party unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. The court ought also to give consideration to the effect

of later events on what ought to be the fair outcome of the parties' financial relationship including the parties' subsequent conduct in relation to the settlement agreement.

**Court's Jurisdiction and Power to Vary Orders for Financial Provision under the MPPA**

- [25] Therefore, it is not in dispute that the court has the power to vary a valid settlement agreement made between the parties in ancillary relief proceedings where that agreement is incorporated into a court order. Section 30(1) of the MPPA provides:

“Where the Court has made an order to which this section applies, then, subject to this section, the Court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.”

- [26] Section 30 of the MPPA applies to any order made by virtue of section 24(2)(a) or (b) or 24(4); or any order made by virtue of section 25(1)(b), (c) or (d) on or after granting a decree of judicial separation.<sup>4</sup>

- [27] It appears that section 30 of the MPPA also applies to instruments executed pursuant to the court's order which includes settlement agreements. This is evident from the provisions of section 30(3) of the MPPA which provides:

“The powers exercisable by the Court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.”

- [28] However, section 30 of the MPPA also places restrictions on the exercise of the court's powers conferred by section 30 of the MPPA. Section 30(4) of the MPPA provides:

“The Court shall not exercise the powers conferred by this section in relation to any order made by virtue of section 25(1)(b), (c) or (d) on or after granting a decree of judicial separation, except on an application made in proceedings—

(a) for the rescission of that decree; or

(b) for the dissolution of the marriage of the parties to the proceedings in which that decree was made.”

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<sup>4</sup> Section 30(2) (c) and (d)

[29] The court's powers are further qualified and restricted by the provisions of section 30(5) of the MPPA which provides:

"No such order as is mentioned in section 23 shall be made on an application for the variation of an order made by virtue of section 23(1)(a) or (b) or section 24(2)(a) or (b), and no order for the payment of a lump sum shall be made on an application for the variation of an order made by virtue of section 23(1)(a) or (b) or of section 27(6)(a) or (b)."

[30] Section 30(7) of the MPPA sets out the manner in which the court must exercise the powers conferred by section 30 of the MPPA. Section 30(7) provides:

"In exercising the powers conferred by this section, the Court shall have regard to all the circumstances of the case, including any change in any of the matters to which the Court was required to have regard when making the order to which the application relates and, where the party against whom that order was made died, the changed circumstances resulting from his or her death."

[31] Section 38 of the MPPA deals with the question of the alteration of agreements by the Court during the lives of the parties. This section applies to both financial arrangements and maintenance agreements between the parties as defined by section 37 of the MPPA. Section 38 of the MPPA provides:

"(1) Where a maintenance agreement is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident in Anguilla, then, subject to subsection (3), either party may apply to the Court for an order under this section.

(2) If the Court is satisfied either—

(a) that by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements; or

(b) that the agreement does not contain proper financial arrangements with respect to any child of the family;

then, subject to subsections (3), (4) and (5), the Court may by order make such alterations in the agreement—

(c) by varying or revoking any financial arrangements contained in it; or

(d) by inserting in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family;

as may appear to that Court to be just, having regard to all the circumstances, including, if relevant, the matters mentioned in section 26(3); and the agreement shall have effect thereafter as if any alteration



made by the order had been by agreement between the parties and for valuable consideration.

(4) Where the Court decides to alter, by order under this section, an agreement by inserting provision for the making or securing by one of the parties to the agreement of periodical payments for the maintenance of a child of the family or by increasing the rate of the periodical payments that the agreement provides are to be made or secured by one of the parties for the maintenance of such a child, then, in deciding the term for which under the agreement as altered by the order the payments or, as the case may be, so much of the payments as is attributable to the increase are or is to be made or secured for the benefit of the child, the Court shall apply the provisions of section 29(1), (2) and (3) as if the order to which this subsection relates were an order under section 24.

(5) For the avoidance of doubt, it is hereby declared that nothing in this section or in section 37 affects any power of the Court before which any proceedings between the parties to a maintenance agreement are brought under any other written law (including a provision of this Act) to make an order containing financial arrangements or any right of either party to apply for such an order in such proceedings.

(6) In this section, the expressions “financial arrangements” and “maintenance agreement” have the meanings assigned to them in section 37.

[32] Given the wording of section 38 of the MPPA, it appears that the Court is empowered under that section to vary financial arrangement agreements and maintenance agreements made by the parties while they are subsisting. In the present case there is no subsisting financial arrangement agreement or maintenance agreement subsisting between the parties which triggers the provisions of section 38 of the MPPA. Therefore, the provisions of section 38 of the MPPA are inapplicable to the present proceedings. This is entirely different to what the Court is empowered to do under section 30 of the MPPA.

#### **Whether Court could Vary Consent Order**

[33] Mr. Carlyle Rogers ('Mr. Rogers'), counsel for the Respondent submitted that the court cannot vary the Settlement Agreement embodied in the Consent Order pursuant to section 30 of the MPPA. This restriction on the exercise of the court's power, he argued, exist by virtue of section 30(4) of the MPPA which prohibits the

exercise of the court's powers conferred by section 30 of the MPPA in relation to any order made by virtue of section 25(1) (b) of the MPPA except in the circumstances mentioned at section 30(4) (a) and (b) of the MPPA.

[34] In addition, Mr. Rogers argued that the specific wording of section 30(4) implies that the powers conferred on the court by section 30 of the MPPA cannot be applied subsequent to a decree of divorce being granted.

[35] Mr. Rogers' argument on this point implies that the Court can never have supervision and control of orders made by it. This cannot be correct in principle or in law. This argument is fallacious to the extent that the Court retains its supervisory and discretionary power in relation to orders made in ancillary relief proceedings even after the grant of a decree absolute.

[36] Mr. Rogers also submitted that the court can only exercise the powers conferred by section 30 of the MPPA only upon an application made by the parties and not of its own volition. Mr. Rogers seemed fortified in this view by the provisions of sections 30(5) and 30(6) of the MPPA.

[37] Ultimately, Mr. Rogers submitted that the parties were not in a position to vary the terms of the Settlement Agreement incorporated into the Consent Order on their own without the intervention of the Court. In this regard, Mr. Rogers conceded that the Court indeed has the power to vary a settlement agreement incorporated into a consent order. However, Mr. Rogers' concession seems qualified by his earlier argument that the Court can only exercise its power to vary the terms of the Settlement Agreement embodied in the Consent Order on application made by either party.

[38] Relying on the decisions in **Isaacs v Robertson**<sup>5</sup> and **Hadkinson v Hadkinson**<sup>6</sup>, Mr. Rogers argued that notwithstanding the dissimilarity between consent orders

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<sup>5</sup> [1984] 43 WIR 126

<sup>6</sup> [1952] 2 All ER 567

made in other civil proceedings and consent orders made by the Court in matrimonial proceedings, orders of the Court were to be obeyed unless set aside by action or on appeal.

[39] The Court fails to see the reasoning and logic in this latter argument. The present proceedings concern the enforcement of a consent order made in ancillary relief proceedings. There has been no contention on the part of the Petitioner in the present proceedings that the Settlement Agreement subsequently incorporated in the Consent Order was unenforceable or that it was void, voidable or a nullity. Therefore, there was no requirement for the Petitioner to set aside the Consent Order by action or on appeal therefrom.

[40] Therefore, the cases cited by Mr. Rogers have no applicability to the present proceedings. The liberty to apply provision in the Consent Order clearly entitled the parties to approach the Court for the purpose of enforcing the Consent Order or to seek a variation of the Consent Order.

[41] It cannot be said that the Consent Order, having been made in ancillary relief proceedings, was a final order to the extent that the only way of getting around it was to set it aside by action or on appeal. In any event, the Court is of the view that the Consent Order remained executory until the parties had fully and finally discharged their respective obligations thereunder. This is hardly the case in the present proceedings.

[42] The starting point to resolving the issue of whether the court has jurisdiction to vary the Settlement Agreement embodied in the Consent Order is to first consider whether there is in existence a subsisting Settlement Agreement. There is a distinction readily apparent from the wording of the MPPA itself between Settlement Agreements by way of financial arrangements and maintenance agreements and orders made by the court in ancillary relief proceedings.

[43] In the present case, the court adopts the position that there is no subsisting “financial arrangement” or “maintenance agreement” between the parties which can be varied

by the Court pursuant to section 38 of the MPPPA. Therefore, the Court cannot vary the Settlement Agreement.

- [44] The earlier decisions on the point suggest that where the Court had made an order on ancillary relief proceedings incorporating the terms of any financial arrangement or maintenance agreement made between the parties into a consent order that order ought to be treated as final. The rationale behind this principle was that to do otherwise would be an affront to the clean break principle embodied in section 26 of the MPPA.
- [45] This principle was applied in the case of **Minton v Minton**<sup>7</sup> where it was held that on the true construction of section 23(1) of the 1973 Act, the court was empowered, in a proper case, to make a final order for a spouse's financial provision, and where the court had made a final order for financial provisions (except where the order was capable of variation under section 31 of the 1973 Act). Where, therefore, on an application for financial provision in terms of an agreement made between the spouses, the court dealt with the application on its merits and either made an order dismissing the application by consent on terms recited in the court's order or made a consent order incorporating the financial provisions agreed on by the spouses, the court had no jurisdiction to make any subsequent order for financial provision, since in the case of each form of order, the substance of the transaction was a final settlement of the issue of financial provision approved by the court. Moreover, it was inconsistent with the principle of the clean break after divorce if the court's order could be regarded as final only if it dismissed the application for financial provision. Therefore, the court in **Minton v Minton** found that the judge had been correct in concluding that he had no jurisdiction to vary the consent order.
- [46] However, in the later decision of **de Lasala v de Lasala**,<sup>8</sup> where the wife was granted a decree nisi on her petition and on the same date made a consent order approving the parties' financial arrangements set out in the deed of arrangement

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<sup>7</sup> [1979] 1 All ER 79

<sup>8</sup> [1979] 2 All ER 1146

and annexed trust deeds and, on the husband's execution of those arrangements, dismissed the wife's application for financial relief in her petition. The consent order reserved liberty to apply in respect of implementation of the deed of arrangement and trust deeds. The husband fully executed the financial arrangements. The wife subsequently applied to the Supreme Court to set aside or vary the consent order. The wife's application was dismissed on the ground that there was no jurisdiction to entertain a subsequent application for financial relief by a wife when her original application had been dismissed by consent order. On appeal to the Privy Council by the husband it was held that there was no jurisdiction to entertain the wife's subsequent application for relief. The Privy Council reasoned, applying the decision in **Minton v Minton**, that:

"The decision in the House of Lords was to the effect that it was the policy of the 1973 English Act to permit parties to a marriage to make a clean break in regard to financial matters from which there could be no going back, and that decision applied to all preceding Acts containing similar wording to the 1973 Act. Accordingly, the fact that, subsequent to a final break between husband and wife achieved by a consent order dismissing the wife's application for relief, the court acquired power to make new kinds of order for financial relief which was not available at the time of the final break could not prejudice the finality of the break. It followed that the finality of the break effected by the consent order of 1970 was not prejudiced by the Hong Kong court subsequently acquiring power to make a transfer of property or settlement order, and the instant case was not, on that ground, distinguishable from the House of Lords decision.<sup>9</sup>

The deed of arrangement and trust deeds did not constitute a maintenance agreement within s 15 of the ordinance and were not, therefore, capable of being varied or revoked under s 15, for a maintenance agreement within s 15 was one entered into between the parties without the intervention of the courts which was enforceable by action, whereas the deed of arrangement and trust deeds, having been made the subject of a consent order, no longer depended on the parties' agreement for their legal effect (which derived from the court's order) and enforcement of their provisions, so far as they remained executory, would be by summons under the order, pursuant to the liberty to apply reserved by the order, and not by action between the parties."<sup>10</sup>

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<sup>9</sup> p 1154 c to g

<sup>10</sup> At p. 1155 h to p. 1156 a

- [47] In **de Lasala** it was also held per curiam that where a party seeks to challenge a judgment or order that finally disposes of the issues raised between the parties on the ground that it was obtained by fraud or mistake, the only way of doing so is by appeal from the judgment or order or by bringing a fresh action to set it aside. The test whether a judgment or order finally disposes of the issues raised is whether the court that makes the order has power merely to make orders in aid of enforcing the terms of the order (when the order will be one that finally disposes of the issues) as distinct from a continuing power to vary the terms of the order. Since a judge of the Supreme Court has no power to vary a consent order made previously in that court, the only means open to a party to set aside a consent order on the ground of fraud or mistake is to bring a fresh action for the purpose.<sup>11</sup>
- [48] However, in subsequent decisions, notably **MacCleod v MacLeod**,<sup>12</sup> the Privy Council, relying on the earlier decision of **de Lasala**, held that unlike other court orders made by consent, a consent order in ancillary relief proceedings derived its authority from the court order and not from the preceding agreement.
- [49] Relying on the previous decision of **Edgar v Edgar**<sup>13</sup> court held the view that the power to vary a settlement agreement subsist even after the marriage has been dissolved. The Privy Council in **MacCleod v MacCleod** reconciled the decisions in **Minton v Minton** and **deLasala v deLasala** in the following manner. The Privy Council stated that the court has jurisdiction to vary the settlement agreement because the consent order was still executory. In reliance on the decision in **Thwaite v Thwaite**<sup>14</sup>, the Board held that the court retained the power to decline to enforce the settlement agreement sought by the respondent and instead make an order varying the settlement agreement.
- [50] In **Thwaite v Thwaite**, the court there reasoned that where the order is still executory, as in the present case, and one of the parties applies to the court to

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<sup>11</sup> At p. 1155 h to p. 1156 a

<sup>12</sup> [2008] UKPC 64

<sup>13</sup> [1980] 1 WLR 1410

<sup>14</sup> [1981] 2 All ER 789

enforce it, the court may refuse if, in the circumstances prevailing at the time of the application, it would be inequitable to do so.

[51] The court, in **Thwaite v Thwaite** further held, that where the legal effect of the order derives from the order itself the court has jurisdiction over its own orders. The court reasoned that the judge's jurisdiction arose not from the liberty to apply but from the fact that the wife's original application for ancillary relief was still before the court and awaiting adjudication. It had not been dismissed since the conveyance had never been executed so that part of the order by which her application had been dismissed had never come into effect.

[52] Therefore, in the present case, although the Petitioner did not apply to vary the Consent Order under the liberty to apply provision in the Consent Order, the Court adopts the view that it is competent to exercise its power to vary the Consent Order of its own volition on an application by the Respondent to enforce the Consent Order.

### **Discussion**

[53] The application was opposed by the Petitioner ostensibly on the grounds that there has been a delay in excess of ten years on the part of the Respondent in bringing the present enforcement proceedings and that there has been no satisfactory explanation for the delay. In the circumstances, he contended that the present proceedings would have the tendency to operate unjustly, prejudicially and or unfairly in relation to him, particularly as it relates to a substantial change in respect of his personal financial position from the date the Consent Order was made.<sup>15</sup>

[54] Ms. Jean Dyer ('Ms. Dyer') counsel for the Petitioner argued that the Respondent was proscribed, on the basis of the principle of equitable estoppel, based on her conduct, from seeking to enforce the Settlement Agreement.

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<sup>15</sup> At paragraph 3 Petitioner's Affidavit filed 3<sup>rd</sup> February 2021

- [55] Mr. Rogers, on the contrary, submitted that the principle of equitable estoppel had no part to play in the Court's consideration of the Respondent's application to enforce the Settlement Agreement. Instead, according to Mr. Rogers, the application of the principle of equitable estoppel would undoubtedly conflict with the principle that the Settlement Agreement having been made an order of the court, derives its existence from the exercise of the Court's powers and not any contractual agreement between the parties. Therefore, the Respondent cannot be estopped from enforcing the Court's order. According to Mr. Rogers, to hold otherwise, would amount to an ousting of the Court's jurisdiction.
- [56] The Court accepts Mr. Rogers' submission on this point. In the Court's view, the principle of equitable estoppel has no application to the Respondent's application to enforce the Settlement Agreement. In addition to the correct statement of principle contained in Mr. Rogers' submissions, the Court also finds that where as in the present case, there is a valid and enforceable settlement agreement which has been made an order of the Court, and there being no appeal from this order or any application to set it aside, allegations of fraud, mistake or equitable estoppel had no part to play in the Court's consideration of the application. The question of equitable estoppel would clearly be an issue that would interrogate the validity and enforceability of the Settlement Agreement and whether it ought to be set aside. But this is not the case here. The Court is here concerned with the enforcement of a valid and enforceable settlement agreement transposed into an order of the Court.
- [57] It may very well be, that the Court may have regard to the conduct of the parties during the currency of the Settlement Agreement incorporated into the consent order as one of the factors upon which the Court can rely in determining whether to exercise its powers to vary the Settlement Agreement or not. However, the parties cannot in their own right seek to vary the terms of the Settlement Agreement which was incorporated into a court order on their own without the Court's intervention on an application to vary the same made by either or both parties.



- [58] In addition, the Petitioner opposed the application on the ground that the parties by their respective conduct had mutually varied the terms of the Settlement Agreement embodied in the court order as it related to the maintenance payments.<sup>16</sup>
- [59] Again, this argument is misconceived for the simple reason that the parties cannot seemingly vary the terms of the Settlement Agreement incorporated into a consent order endorsed by the Court on their own and without the Court's intervention.
- [60] The Petitioner also alleged that the Respondent is in breach of paragraph 1(d) of the Settlement Agreement in that she had failed to make maintenance payments in relation to one of the children while that child was in his custody. In this regard, the Petitioner relied on principles of equity. That those who come to equity must come with clean hands.
- [61] The Court does not accept this principle as constituting a bar to the Respondent making the application for leave to enforce the Settlement Agreement as incorporated into the Consent Order. Clearly, it was opened to the Petitioner himself to seek to enforce this term of the Settlement Agreement. He chose not to.
- [62] In relation to the debt of US\$168,000.00 which the Respondent claims is owed to her by the Petitioner, the Petitioner contended that the Respondent had agreed to forego the debt.<sup>17</sup> In the premises, the Petitioner contended that notwithstanding his failure to apply to the Court to have the Consent Order varied, he has acted to his detriment having accepted the Respondent's promise to forego the debt in good faith.
- [63] Therefore, the Petitioner contended that it would be manifestly unjust for the Respondent to be permitted to enforce this debt in these circumstances. The Petitioner also contended that the debt payable on the aircraft had been paid off upon the sale of certain commercial property owned by the Respondent's siblings

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<sup>16</sup> At paragraphs 4 to 10 *infra*

<sup>17</sup> At paragraphs 14 to 16 *infra*

with the knowledge and consent of the Respondent.<sup>18</sup> This, the Petitioner argued has extinguished the debt owed to the Respondent. These claims were trenchantly opposed by the Respondent.

[64] This argument by the Petitioner is deserving of the very same treatment meted out to the previous arguments made by the Petitioner in opposition to the enforcement proceedings.

[65] In relation to the issue of the rectification of the ANGLEC share certificates, the Petitioner took the position that paragraph 9 of the Settlement Agreement did not specify any deadline for the transfer of the shares held in ANGLEC to the Respondent in trust for the children of the family.

[66] According to the Petitioner the children already having attained the age of eighteen years, it would be an exercise in futility at this stage transfer the shares in the manner contemplated by the Settlement Agreement instead of transferring the shares to the children in their own right. The Petitioner claims to have already taken steps towards securing the transfer of the ANGLEC shares to the children.<sup>19</sup>

[67] The court recognizing that there were issues of fact to be resolved and determined in the proceedings, heard oral evidence from the Respondent and the Petitioner who were both cross-examined. Therefore, findings of fact made by the Court are made in accordance with both the affidavit evidence and the oral evidence given by the parties.

[68] Therefore, it appears that the Court in exercising its power to vary the Consent Order would have to determine the matter on its merits. The question, therefore, is upon what basis the Court should exercise this power, and the correct approach that the Court ought to adopt in exercising the power conferred by section 30 of the MPPA.

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<sup>18</sup> At paragraphs 17 to 18 *infra*

<sup>19</sup> At paragraph 23 *infra*

## Issues

- [69] In the Court's view, the issues that arise for determination in the present proceedings are (1) whether there has been a change of circumstances from the circumstances existing at the time that the Settlement Agreement was entered into and the making of the Consent Order that would make it fair or just to depart from the Settlement Agreement embodied in the Consent Order, (2) Whether it is now fair to enforce or give effect to the Consent Order and (3) Whether the Court should exercise its power to vary the Consent Order on the basis of what is fair and equitable or on the basis of what is contained in section 30(7) of the MPPA.
- [70] Section 30(7) of the MPPA makes it plain, that in exercising its powers conferred by section 30 of the MPPA, the Court shall have regard to all the circumstances of the case, including any change in any of the matters to which the Court was required to have regard when making the order to which the application relates.
- [71] The matters to which the Court was required to have regard when making an order under sections 23 or 25 of the MPPA are set out in section 26 of the MPPA. Section 26(1) of the MPPA provides that in deciding whether to exercise its powers under sections 23 or 25 in relation to a party to the marriage and, if so, in what manner, the Court shall have regard to all the circumstances of the case including the following matters, namely, (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; (c) the standard of living enjoyed by the family before the breakdown of the marriage; (d) the age of each party to the marriage and the duration of the marriage; (e) any physical or mental disability of either of the parties to the marriage; (f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home under section 52; (g) any order made under section 52; (h) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (such as a pension) which, by reason of the dissolution or annulment of the marriage, that party

will lose the chance of acquiring; and the Court shall so exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

[72] In relation to the question of financial provision for a child of the family, Section 26(2) of the MPPA provides that, without prejudice to subsection (3), it shall be the duty of the Court in deciding whether to exercise its powers under section 24 or 25 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, namely, (a) the financial needs of the child; (b) the income, earning capacity (if any), property and other financial resources of the child; (c) any physical or mental disability of the child; (d) the standard of living enjoyed by the family before the breakdown of the marriage; (e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained; and the Court shall so exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (1)(a) and (b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him.”

[73] Therefore, the court cannot accept Ms. Dyer’s argument that in exercising its powers to vary the Consent Order made on ancillary relief proceedings, that the Court must have regard to the question of what is fair and equitable in all the circumstances. The concepts of fairness and equity have no place in the formulation used in sections 26 and 30 of the MPPA. In other words, the court finds itself constrained not to apply the test in the English decision of **Thwaite v Thwaite**.

[74] The Court is fortified in this view by the decision in **Persad v Persad**,<sup>20</sup> a decision of the Court of Appeal of Trinidad and Tobago, not cited in argument by counsel. In

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<sup>20</sup> CA Civ 130/2008

the case of **Persad v Persad** the Court of Appeal started from the premise that of primary importance is that financial provision for a party and/or the settlement and transfer of property upon a divorce is regulated by statute and the courts are limited in their jurisdiction, duties and powers accordingly. According to the Court of Appeal in **Persad v Persad**, the MPPA is therefore the source of authority and the overarching context for any analysis of the issues raised about separation agreements and by extension settlement agreements made in the course of ancillary relief proceedings.<sup>21</sup>

[75] It appears from the reasoning of the Court in **Persad v Persad** that the Court of Appeal drew a distinction between the principle applied in the case of **MacLeod v MacLeod** and the principle and approach set out in the statutory regime under the MPPA. In **MacLeod** it was held that the court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement. But, the circumstances of the present case are dissimilar to that in **MacLeod**. The court in the present proceedings is concerned not with a post nuptial settlement agreement but instead a settlement agreement entered into by the parties in the course of ancillary relief proceedings subsequently incorporated into a consent order.

[76] Therefore, it appears from the reasoning in **Persad** that the Court of Appeal was dissatisfied with the applicability of the approach set out in **MacLeod** which seemed to have adopted the test for change of circumstances set out in **White v White** which essentially decided that the objective must be to achieve a fair outcome.

[77] The Court of Appeal in **Persad** disagreed with the formulation espoused by Lady Hale in **MacLeod** and found that the decision in **MacLeod** and subsequent decisions in England were not strictly applicable in Trinidad and Tobago in determining how the courts treat with separation agreements in ancillary

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<sup>21</sup> Per Jamadar, V.A. at para. 9

proceedings for financial provision and property settlement brought after a decree nisi.

[78] In **Persad**, the Court held, that in Trinidad and Tobago, applications that are provided for by sections 24, 25 and 26 of the MPPA are to be determined in accordance with section 27 of the Act (the equivalent to section 26 of the MPPA). It was said that this was the statutory and only basis for the courts' jurisdiction and powers.<sup>22</sup> It appears that in **Persad** the Court found that it is unequivocal and explicit that the aim and objective of the Court when exercising its wide and discretionary powers conferred on it by section 27 of the MPPA must be confined to the statutory provision itself. The court should exercise its powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards each other.

[79] In delivering the judgment of the court in **Persad** Jamadar, V.A. said:

“The consequence is that the proper approach under section 27 is to ask, having had due regard to all the circumstances of the case including the eight considerations listed, how is the court to exercise the court's powers in a practical and common sense way, having due regard to all relevant circumstances and conduct and in a manner that is just and equitable, so as to place both husband and wife and where relevant a child in the financial position they would have enjoyed if the marriage had not broken down and each party had properly discharged their financial obligations and responsibilities...”<sup>23</sup>

[80] Although the approach adopted by the Court in **Persad** related to the question of the effect and validity of a separation agreement entered into between the parties prior to the divorce proceedings, this same approach is applicable to the exercise of the Court's power to vary orders made under section 23, 24 and 25 of the MPPA by virtue of the provisions of section 30 of the MPPA. This is the approach clearly prescribed by the provisions of section 30(7) of the MPPA.

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<sup>22</sup> At paras. 51 – 52

<sup>23</sup> At para. 58

- [81] The Court has formed the view, that it is in applying the provisions of sections 26 and 30(7) of the MPPA that fairness and equity can be achieved in a manner consistent with the clean break principle.

### **The Present Case**

- [82] The Court is now tasked with applying the abovementioned principles and approach to the present case in determining whether to allow the application for leave to enforce the Settlement Agreement incorporated in the Consent Order pursuant to section 31 of the MPPA or vary the same in accordance with section 30 of the MPPA.
- [83] In making its determination, the Court has considered the matter on its merits by having regard to both the affidavit and vive voce evidence of the parties at the hearing.

### **The ANGLEC Shares**

- [84] Mr. Rogers, in his written arguments raised the question of whether the Court can exercise its power under section 30 of the MPPA to vary orders made pursuant to sections 25(1) (b) of the MPPA. Mr. Rogers argued trenchantly that the Court has no jurisdiction to vary the Consent Order in the case of an order made pursuant to section 25(1)(b) in relation to the settlement of property for the benefit of the children of the family, albeit the ANGLEC shares. According to Mr. Rogers, section 30(4) of the MPPA prohibits the Court from exercising its power to vary an order subsequent to a decree of divorce. According to Mr. Rogers, this power simply does not exist on the grant of a decree of divorce.
- [85] It is the Court's view that Mr. Rogers' interpretation of section 30(4) of the MPPA is misconceived. The section states specifically that the Court shall not exercise the power conferred by section 30 in relation to any order made by virtue of section 25(1)(b) on or after granting a decree of judicial separation. However, the Court is empowered to exercise its powers under section 30 where an application is made in proceedings for the rescission of a decree of separation or for the dissolution of

the marriage of the parties where a decree of separation has been made. When section 30(4) is read in conjunction with section 30(2)(d) it is obvious that the Court's powers to vary can be exercised at or after a decree of divorce is granted.

- [86] The Court is fortified in this view by the provisions of section 33(1) of the MPPA, which provides that "Where a petition for divorce, nullity of marriage or judicial separation has been presented, then, subject to subsection (2), proceedings under section 22, 23, 24 or 25 may be begun subject to and in accordance with rules of court, at any time after the presentation of the petition, save that, (a) no order under section 23 or 25 shall be made unless a decree nisi of divorce or of nullity of marriage or a decree of judicial separation, as the case may be, has been granted; and (b) without prejudice to the power to give a direction under section 34, no such order made on or after granting a decree nisi of divorce or of nullity of marriage, and no settlement made in pursuance of such an order, shall take effect unless the decree has been made absolute."

### **Child Maintenance**

- [87] The provisions of paragraph 1(b) of the Settlement Agreement incorporated in the Consent Order are captured by the provisions of section 24(2)(a) of the MPPA. Therefore, the power to vary an order made under section 24(2)(a) of the MPPA is exercisable by the Court pursuant to section 30(2)(d).
- [88] However, section 30(5) of the MPPA stipulates that no such order as mentioned in section 23 shall be made on an application for the variation of an order made by virtue of section 23(1)(a) or (b) or section 24(2)(a) or (b). Section 23 of the MPPA deals with financial provision for a party to a marriage and includes orders for periodical payments or lump sum payments by one party to the marriage to another. Therefore, it is plain that section 30(5) of the MPPA merely prohibits the making of an order for periodical payments or lump sum payments to a party to the marriage on an application for variation under section 30 in relation to orders made under section 23(1)(a) or (b) or section 24(2)(a) or (b).



- [89] The Respondent claimed that the Petitioner is indebted to her in the sum of US\$76,250.00 for arrears of maintenance contributions for the children of the family, namely, Rodney and Cheryl.<sup>24</sup> It appears from the evidence that Rodney, the older of the two minor children, ended his formal education on or about December 2018 and is now over the age of 18 years.
- [90] It also appears from the evidence presented, that during the currency of the Consent Order, the Petitioner had unilaterally and without any variation of the Consent Order under the liberty to apply provision, reduced the monthly maintenance contributions stipulated by paragraph 1(b) of the Settlement Agreement.
- [91] Although the Respondent claimed not to have acquiesced in the reduction in contribution towards maintenance for the children of the family, she nevertheless took no immediate action to enforce the Consent Order. The Petitioner, on the other hand, also took no action to vary the terms of the Consent Order under the liberty to apply provision in the Consent Order.
- [92] In any event, the Respondent's solicitors wrote to the Petitioner by letter dated 28<sup>th</sup> November 2016 demanding payment of the sums due and owing by the Petitioner under paragraph 1(b) of the Settlement Agreement.<sup>25</sup>
- [93] In response, the Petitioner claimed that he started making payments of the reduced sum of US\$700.00 towards maintenance of the children of the family at the Respondent's suggestion.<sup>26</sup>
- [94] The Petitioner further contended that Rodney graduated from high school in June 2013 and left college in in 2017 and went to work with the Respondent. The Petitioner claimed that Rodney did not advance to higher education after this. In a nutshell, it appears that the Petitioner is claiming that his obligation to contribute to Rodney's maintenance ceased in 2017. Therefore, he reduced the sum to

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<sup>24</sup> At paras. 5-8 affidavit of 18<sup>th</sup> January 2021.

<sup>25</sup> At para. 12 *infra* Exhibit MHD3

<sup>26</sup> At paras. 4-7 affidavit of 3<sup>rd</sup> February 2021.

US\$700.00 which is more than one-half of what he was obligated to pay with respect to Cheryl. However, he admitted to further reducing this sum to US\$500.00 for the sole benefit of Cheryl.<sup>27</sup>

[95] The Petitioner admitted that maintenance contributions in respect of Cheryl have ceased entirely. The Petitioner attributes this cessation of payment to a substantial change in his financial position due to the intermittent nature of his employment.<sup>28</sup>

[96] In addition, the Petitioner claimed that the Respondent has breached the terms of paragraph 1(d) of the Settlement Agreement by failing to make any contribution towards the maintenance of the children of the family while they were in his custody.<sup>29</sup>

[97] The Petitioner's position appears to be that he and the Respondent had by their respective conduct since the making of the Consent Order impliedly varied the terms of the Consent Order. This implied variation, exemplified by the parties' conduct, the Petitioner contends, bars the Respondent from enforcing the terms of the Consent Order; and instead, provides substantial grounds upon which the Court can vary the Consent Order on an application by the Respondent to enforce the same.

[98] However, the Court is of the view that the parties were not competent to seemingly vary the Consent Order on their own without seeking a variation of the same from the Court. In the circumstances, the original terms of the Settlement Agreement incorporated into the Consent Order remained intact and unaffected by any subsequent agreement made by the parties without the sanction of the Court.

[99] Therefore, in deciding whether to permit the Respondent to enforce the Consent Order, the Court must have regard to all the circumstances of the case, including any change in the matters provided for in section 26 of the MPPA.

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<sup>27</sup> At paras. 8-10

<sup>28</sup> At para. 12

<sup>29</sup> At paras. 11-13

### **The Airplane Debt**

- [100] The issue of the debt related to the airplane is canvassed by paragraph 9 of the Settlement Agreement and falls within the ambit of section 23 of the MPPA which deals with orders for lump sum payments by one party to the other. Section 23(1) of the MPPA provides that, on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute) the Court may, subject to the provisions of section 33(1), make any one or more of the following orders, namely, (a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order; (b) an order that either party to the marriage shall secure to the other, to the satisfaction of the Court, such periodical payments and for such term as may be so specified; (c) an order that either party to the marriage shall pay to the other such lump sum as may be so specified.
- [101] Section 23(2)(b) of the MPPA states that, without prejudice to the generality of paragraph (1)(c), an order under this section that a party to a marriage shall pay a lump sum to the other party may provide for the payment of that sum by instalments of such amounts as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the Court.
- [102] The Respondent claimed that the Petitioner has not paid any instalment on the debt of US\$168,000.00 in the manner stipulated by paragraph 9 of the Settlement Agreement. This fact was readily admitted by the Petitioner.
- [103] In addition, she claimed that the Petitioner sold the aircraft without her knowledge. The Respondent claimed that the Petitioner is now indebted to her in the sum of US\$241,758.28 as at the end of December 2020.
- [104] In addition, she claimed to have never relinquished her interest in the airplane in the manner alleged by the Petitioner, or at all. According to the Respondent, title to the airplane was registered to Island Air Charters Inc. (the 'Company'). The Petitioner

and the Respondent were the sole joint shareholders and directors of the Company. From the evidence presented to the Court, it appears that the Company is no longer trading and carrying on business. In fact, the Company has been struck off the register of Companies and has not been reinstated.

- [105] On the other hand, the Petitioner claimed that on or about the year 2011, the Respondent indicated that she no longer required him to pay her the sum of US\$168,000.00 since she had already taken out all of her equity in the airplane. According to the Petitioner, he did not pay the instalments mandated by the Consent Order because he was made to labour under the impression, as a result of the conversation with the Respondent, that the debt had been forgiven.<sup>30</sup>
- [106] The Petitioner admitted to selling the airplane on or about 2014 and 2015 for the sum of US\$90,000.00 payable by instalments. It appears that prior to this the airplane was grounded for some time owing to maintenance issues which rendered the operations of the Company non-existent. The Petitioner also admitted to not having consulted with the Respondent prior to the sale of the airplane because, according to him, the Respondent had already declared to him that she had no interest in the airplane.
- [107] It appears that the financing for the purchase of the airplane was secured by the Respondent partly by a loan from Caribbean Commercial Bank Limited ('CCB') which was secured by certain commercial property to which the Respondent was entitled to a share as beneficiary under her parents' estate. According to the evidence presented to the Court, the charge on the airplane was discharged when the commercial property was sold. The payoff amount was in the sum of US\$128,000.00. It appears that the Petitioner made no contribution towards the acquisition and purchase of the airplane.<sup>31</sup>

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<sup>30</sup> At paras. 14-17

<sup>31</sup> At paras. 18-19 affidavit filed 4<sup>th</sup> February 2021

- [108] The Respondent denied ever having relinquished her interest in the airplane in the manner described by the Petitioner or at all. The Respondent claimed that she agreed to relinquish her interest in the Company to the Petitioner but not her interest in the airplane. She affirmed that the airplane was not owned by the Company but rather she owned it in her own right. It is necessary to point out at this stage, that paragraph 9 of the Settlement Agreement describes the airplane as “presently owned in the name of Island Air Charters Inc.”.
- [109] Relying on this fact, Ms. Dyer appeared to argue that what the Respondent was seeking to enforce was a debt and not the securing of any interest in the airplane. In other words, all that the Respondent was entitled to claim was the debt and that she no longer had any interest in the airplane itself. Therefore, assuming Ms. Dyer’s argument to be correct, the Petitioner was at liberty to sell the airplane without the need to consult with the Respondent or to seek her approval. The Court has also paid regard to the provisions of paragraph 4 of the Settlement Agreement which seems to have imposed an obligation on the Petitioner to discharge the existing charge that secure the existing bond on the airplane.
- [110] It is not in dispute that the Respondent paid for the airplane. At the hearing, the Respondent testified that the down payment for the aircraft was paid for from her personal dividends from CCB and the remainder financed from a loan from CCB using estate property to which she was entitled to a share as collateral.
- [111] The evidence presented points to the fact that the charge on the airplane was paid out of the Respondent’s share in the proceedings of the sale of the inherited property. It is more than passing strange, that this being the case, the Respondent would either not have been consulted by her siblings prior to their undertaking this venture or that the Respondent would have registered no objection to this course of action. The only inference which the Court can draw from this state of affairs was either the Respondent acquiesced in this course of action or that she had the hopeful expectation of recovering and recouping any loss she may have suffered on the sale of the inherited property from the Petitioner.

### **The Effect of Delay on the Enforcement Proceedings**

- [112] The delay in bringing the proceedings for the enforcement of the Consent Order is a relevant factor that the Court ought to consider in determining whether to exercise its power to vary the order or to grant leave to enforce the order. It seems that the greater the length of time since the agreement was entered into and the consent order was made, the more likely it is that later events will have overtaken it.
- [113] It appears that the Respondent made no complaint and took no action in relation to the Petitioner's failure to adhere to the relevant parts of the Consent Order not until her solicitor's letter to the Petitioner. The Respondent took no further action thereafter, whether under the liberty to apply provision under the Consent Order or otherwise, not until the commencement of the present enforcement proceedings.

### **Conduct of the Parties**

- [114] The conduct of the parties during the existence of the Consent Order is also one of the circumstances that the Court ought to consider in the exercise of the powers conferred by section 30 of the MPPA.
- [115] Ms. Dyer has relied on the provisions of section 27 of the Limitation Act<sup>32</sup> for the proposition that the Respondent, having acquiesced in the breach of the terms of the Consent Order, the Court ought to deny her leave to enforce it. Section 27 of the Limitation Act provides that nothing in the Limitation Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.
- [116] On the contrary, Mr. Rogers argued that the Respondent's delay in enforcing the Consent Order ought not to be equated with her acquiescence in the Petitioner's breach of the same. According to Mr. Rogers, the Respondent is well within her right to bring the enforcement proceedings by virtue of section 3(4) of the Limitation Act<sup>33</sup>

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<sup>32</sup> R.S.A. c. L60

<sup>33</sup> An action shall not be brought upon any judgment after the expiration of 12 years from the date on which judgment became enforceable, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

which prescribes a period of 12 years for bringing an action for the enforcement of any judgment.

[117] In the Court's view, the provisions of section 3(4) of the Limitation Act are qualified by the provisions of section 27 of the same Act. Therefore, notwithstanding the provisions of section 3(4) of the Limitation Act, the Court still retains an equitable jurisdiction under section 27 of the Limitation Act. The question that arises, is whether there is acquiescence on the part of the Respondent or any other matter which the Court ought to take account of, that would trigger the Court's equitable jurisdiction to refuse the grant of leave to enforce the Consent Order.

[118] In light of the evidence lead in the proceedings, it is fair to conclude that the parties conducted their affairs in an ad hoc manner during the subsistence of the Consent Order, seemingly without full adherence to the terms of the Consent Order. Both parties appear to have sat on any right that either of them may have had to either seek a variation of the order under its liberty to apply provision or to enforce the same. It is anyone's guess why after such a substantial period of time, and in light of what may be considered to be a flagrant breach by the Petitioner, the Respondent permitted a substantial period of time to elapse prior to commencing the present proceedings. The answer is not immediately apparent from the evidence.

[119] However, the only other inference that may be drawn from the conduct of the parties is that they seemed quite comfortable continuing with the state of affairs that bore no resemblance to the terms of the Consent Order now sought to be enforced by the Respondent. Therefore, it is safe to conclude that the Respondent by her conduct clearly acquiesced in the Petitioner's conduct.

[120] The other question to be determined is whether the Court ought, in the circumstances of the present case, to exercise any equitable jurisdiction that it has, by refusing to grant leave to enforce the Consent Order. To answer this question, the Court has considered whether a change of circumstances relative to the matters which the Court ought to have by virtue of section 26(1) of the MPPA which would make it just to enforce the Consent Order.

### **Whether Change of Circumstances Exist**

- [121] The circumstances of the present case hold true the old adage that circumstances alter cases. For all intents and purposes it can fairly be said that the underlying basis upon which the parties had formulated the Settlement Agreement has changed dramatically.
- [122] Rodney turned eighteen and did not advance to higher education. Hence maintenance payments stipulated by paragraph 1(b) of the Settlement Agreement in respect of Rodney would have ceased on or about the year 2017.
- [123] Therefore, the Petitioner would have been obligated to pay a sum equivalent to one-half of the stipulated payment in respect of Cheryl. Therefore, any arrears in respect of the maintenance payments would have to be calculated from the period when the Petitioner's obligation in respect of Rodney ceased.
- [124] From the evidence presented, it appears that there has been a downward shift in the Petitioner's financial position and income earning capacity. There appears to have been no comparative and noticeable change in the Respondent's financial position and income earning capacity.
- [125] Based on the evidence presented, it must have been driven home to the Respondent that the Petitioner's income and earning capacity had dwindled significantly over the years.
- [126] It appears that when the Settlement Agreement was entered into and the Consent Order made, the Company was being operated at as relatively thriving concern from which much of the Petitioner's and the family income was derived. The Petitioner's income seemed to have been derived substantially from his occupation as a charter flight pilot particularly on behalf of the Company. The Petitioner is now employed intermittently for a minimal number of days monthly.



- [127] In any event, the main source of income, being the airplane is no longer in existence and was not operative for some time as appears by the evidence of mechanical failure and service requirements for the airplane presented by the Petitioner.
- [128] The Petitioner and the Respondent have now both remarried. On the evidence presented, it is safe to assume that there is an apparent divergence between the incomes and earning capacities of both parties. This divergence in the relative income and earning capacities of the parties is dissimilar and more pronounced from what hitherto existed at the time that the Consent Order was made.
- [129] In this regard the court has also considered that the financial needs and obligations of the parties must have changed during the intervening period. Also, the needs of the children of the family in so far as their welfare is concerned was bound to change over time. The Court has formed the view that it has.
- [130] The court has recognised, based on the evidence presented by the parties, that they still enjoy relatively the same standard of living before the breakdown of the marriage. Although, this may not necessarily be fully accurate in the case of the Petitioner. However, it appears that the Petitioner has suffered some diminution in his standard of living when one considers that the Respondent, for all intents and purposes, was the major contributing party to the financial welfare and standing of the family.
- [131] Therefore, in light of what the Court has considered to be a change of circumstances augmented by the inordinate delay in bringing the enforcement proceedings, the Court has taken the position that, in all the circumstances of the case, it would not be just to enforce the Consent Order in its present terms.

### **Conclusion**

- [132] Having arrived at the conclusions that it has, the Court is now tasked with determining which of the powers conferred by section 30(1) of the MPPA it should apply.

- [133] It is evident that the Court before whom the Consent Order was made must have given due consideration to the matters contained in section 26 of the MPPA; and having been satisfied that the financial arrangements and maintenance agreement contained in the Settlement Agreement satisfied the purpose and intent of section 26 of the MPPA, went on to endorse the same by virtue of the Consent Order. This is made explicit by the wording of paragraph 1 of the Consent Order.
- [134] How then, should the Court exercise its powers pursuant to sections 30(7) and 26 of the MPPA, having regard to all the circumstances of the case, including any change in circumstances to which the court was required to have regard when making an order for ancillary relief under section 26 of the MPPA that would achieve the purpose of placing the parties, so far as is practicable, and having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.
- [135] In the Court's view, applying the abovementioned formulation to the circumstances of the present case, it would not be appropriate to grant the Respondent's application to enforce the Consent Order. Instead, it would seem more appropriate to vary the Consent Order in a manner that would achieve the objective of a clean break.
- [136] Nevertheless, in applying its powers in varying the Consent Order, the Court must give due consideration to the welfare of any children of the family. Therefore, in exercising its powers of variation under section 30 of the MPPA, in relation to orders made in respect of a child of the family under sections 24 or 25 of the MPPA, the court ought to have regard to all the circumstances of the case including, the financial needs of the child, the income, earning capacity (if any), property and other financial resources of the child, any physical or mental disability of the child, the standard of living enjoyed by the family before the breakdown of the marriage; the

manner in which he or she was being and in which the parties to the marriage expected him to be educated or trained.<sup>34</sup>

- [137] The Court should so exercise its powers as to place the child, so far as it is practicable and, having regard to the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future and the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future,<sup>35</sup> just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him or her.
- [138] This is the approach mandated by section 30(7) of the MPPA as it relates to provisions made in an order with respect to children of the family. In determining whether the Court ought to vary the terms of the Consent Order as it relates to the children of the family, the Court will apply the abovementioned formulation set out in the relevant provisions of the MPPA.
- [139] In the premises, the Court has given considerable thought to the question of whether it ought to apply its powers of variation under section 30 of the MPPA. Under section 30(1) of the MPPA, the Court has the power to vary or discharge an order made in ancillary relief proceedings or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended. In applying the provisions of section 30(1) of the MPPA, and having arrived at the conclusion that there has been a change of circumstances relative to the matters provided for in section 26(1) of the MPPA which would render it unjust to enforce the Consent Order; and also having regard to the conduct of the parties and the provisions of section 27 of the Limitation Act, the Court declines to make any order contemplated by section 30(1) of the MPPA.

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<sup>34</sup> Section 26(2)(a)-(e)

<sup>35</sup> Section 26(1)(a) and (b)

## **Order**

[140] In the circumstances, the Court makes the following order

1. Leave to the Respondent to enforce the terms of the settlement agreement incorporated into the consent order dated 22<sup>nd</sup> January 2021 is refused.
2. With respect to the maintenance of the child of the family, namely, Cheryl Webster, the arrears of maintenance payments due and owing in respect of that child of the family shall be remitted in accordance with section 31(2) of the MPPA. However, the Petitioner shall pay the sum of US\$500.00 monthly towards the maintenance of the said minor child until such minor child has completed her studies at an educational establishment at a tertiary level or up to such level as her abilities shall sustain or until she has attained the age of 18 years, whichever occurs sooner.
3. Each party shall bear their own costs.

**Shawn Innocent**  
High Court Judge

**By the Court**

**Registrar**