In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2014 No: 141

BETWEEN:-

A

Petitioner

-and-

A

Respondent

RULING

(In Chambers)

Date of Hearing: 23rd November 2015
Date of Ruling: 7th January 2016

Mrs Georgia Marshall, Marshall Diel & Myers Limited, for the Petitioner
Ms Jacqueline MacLellan, MacLellan & Associates, for the Respondent

Introduction

1. This is an application by the Petitioner, Mr A, to vary downwards the child maintenance payments and periodical payments to the Respondent, Mrs A, (together, "the periodical payments") to which he agreed under a

consent order ("the Consent Order" or "the Order") dated 6th February 2015. He alleges the Respondent failed to make full and frank disclosure and that there has been a material change in the circumstances of both parties.

The facts

2. The Petitioner and the Respondent were married for some 19 years, during which he was the breadwinner and she was the homemaker, although she earned a little money on the side. They were domiciled in Bermuda. The Petitioner was Bermudian and the Respondent, who was born in Montreal of Canadian parents, was Canadian. The Petitioner issued a petition for divorce in dated 18th August 2014. Decree Nisi was pronounced on 28th November 2014 and Decree Absolute on 14th January 2015.

3. On 2nd February 2015 the parties' respective applications for ancillary relief came on for hearing with a time estimate of three days. However most of the first day of the hearing was spent in negotiations between the parties, both of whom were represented by their current legal advisors. The negotiations proved fruitful, and at around 4.35 pm on the first day of the hearing counsel for both parties informed the court that agreement in principle had been reached as to the terms of a consent order. Counsel then explained the terms to the Court. Over the next few days the parties finalised the terms of the Order and filed it with the Court. I reviewed the terms and signed the Order on 6th February 2015.

4. The Order, which is evidently the product of careful consideration by both parties and their legal advisors, consists of three recitals and 21 paragraphs and runs to five pages of 1.15 spaced typing.

5. The Order provided inter alia that the Petitioner would retain as his absolute property the former matrimonial home in Bermuda and that the Respondent would retain as her absolute property a property in Montreal, Canada. I note from affidavit evidence filed by the Respondent that the Montreal property was no longer subject to a mortgage.

6. A recital to the Order provided that the Petitioner would undertake various specified repairs to the former matrimonial home. The background to the recital was that, as the parties explained to me on 2nd February 2015, the Respondent would for the time being go on living at the former matrimonial home on a rent free basis, but would vacate it on or before 30th June 2015.

7. The Order dealt not only with ancillary relief but also with the custody, care and control of the parties' five children. It provided that the parties should have joint custody of all the children, with care and control of the two oldest children going to the Petitioner and care and control of the two youngest going to the Respondent. There was to be joint care and control of the middle child who was to be free to spend as much time as he wished in the respective homes of the parties.

8. Under rule 94(2) of the Matrimonial Causes Rules 1974, unless otherwise directed, any order relating to the custody or care and control of a child shall provide for an order prohibiting the removal of any child of the family under 18 out of Bermuda without the leave of the court except on such terms as may be specified in the order. To address this requirement, as Mrs Marshall, counsel for the Petitioner, explained to me at the hearing on 23rd November 2015, paragraph 8 of the Order provided:

> "*Should the Respondent decide to relocate to Montreal she shall have permission to remove [the two youngest children] from Bermuda and subject to the wishes of [the middle child] may remove [the middle child] from Bermuda if he wishes to move to Canada with his mother as opposed to remaining in Bermuda with his father*."

9. The Petitioner was formerly a partner in a consultancy business and had been bought out by his partners. The Order provided that the parties should share equally in the funds due to the Petitioner under the buyout agreement, which were payable in the quarterly sum of approximately $57,300.

10. The Order also provided for the payment of child maintenance and periodical payments. The relevant provisions were to be found at paragraphs 12 and 15:

"*12. With effect from the 1st April 2015 and on the first day of each month thereafter, the Petitioner shall pay to the Respondent by way of maintenance for the children, the sum of BD$1,250 per month for each of [the two youngest children], and the sum of BD$500 per month for the [middle child]. The Respondent will not be required to pay any maintenance to the Petitioner in relation to the [two oldest children].*

. . . .

15. With effect from the 1st April 2015 and on the first day of each month thereafter for a period of 2 years, the Petitioner shall pay to the Respondent by way of periodical payments for herself the sum of BD$1,000 per month. There will be a review of the Respondent's maintenance with the decision to take effect thereafter, with a view to determining when the Respondent's maintenance will come to an end. Either party may apply by letter for a review date."

11. The periodical payments were substantially less than the monthly sum of $15,616 which in her affidavit dated 19th September 2014 the Respondent had originally sought. Admittedly, that figure included maintenance for all five children and $5,000 for rent. In an affidavit dated 20th November 2014 the Respondent calculated her reasonable expenses for the next three months at the more modest rate of $12,740, or $4,246.66 per month. This figure did not include any provision for licensing or insuring her car, maintenance of the former matrimonial home, land tax, entertainment or travel. As the Respondent was living at the former matrimonial home the figure did not include any provision for rent.

12. On Friday 13th February 2015 the Respondent emailed the Petitioner to say that on Sunday (ie 15th February 2015) she would be heading to Montreal on vacation with the three youngest children "*to collect our thoughts and heal*". She added:

"*While there we will decide where it is best for us to reside. You can do renovations as soon as we leave. If we choose to reside in Bermuda we will find other accommodations.*"

13. The Respondent decided to remain in Montreal. Indeed she had travelled there with the children on one-way tickets. In an affidavit sworn on 11th June 2015 she explained that the decisive factor was the discovery on 4th February 2015 that health care would cost her a minimum of $1,500 per month. Previously she had been covered by the group health care plan which the Petitioner had at work, which provided cover for the parties

and their children for $500 per month, but she was no longer eligible for this once decree absolute was pronounced. The cost of private health care in Canada was considerably cheaper and public health care there was free. Nonetheless, she stated in that affidavit that if, after some time, Montreal had not been right for the children and her they would have returned to Bermuda and perhaps have made an application to the court for upward variation of maintenance.

14. Mrs Marshall invites me to treat the Respondent's evidence on health care with scepticism. It is, she submits, surprising that if the cost of health care was of such importance but had not been factored into the Consent Order the Respondent did not, when the issue came to light, raise it immediately with her attorneys, before the Order was finalised. Neither was there any mention of the cost of health care in the 13th February 2015 email. Indeed it was mentioned for the first time in the Respondent's 11th June 2015 affidavit. Mrs Marshall submits that the Respondent's decision to relocate to Canada was made not as a result of something that was not discovered until after the Order had been agreed in principle but was made before any such agreement and irrespective of the health care position.

15. The implementation of the Order did not run smoothly. On 23rd April 2015 the Respondent issued a judgment summons alleging that the Petitioner had failed to make any of the payments due under the Order, including the payments required by paragraphs 12 and 15.

16. On 27th May 2015 the Respondent countered with a summons seeking an order that paragraphs 12 and 15 of the Consent Order be varied downwards to reflect the Respondent's allegedly changed circumstances since the date of the Order. The circumstances relied upon were the Respondent's relocation to Canada. Although the Petitioner has not sought to amend his summons, he has filed affidavit evidence alleging that during settlement negotiations the Respondent deliberately failed to disclose her alleged intention to move to Canada. The Petitioner alleges that this failure was in order to get him to agree to higher child maintenance and periodical payments than he would have been likely to

agree to had he known of her true intentions, as the cost of living is substantially higher in Bermuda than it is in Montreal.

17. The Respondent filed evidence in reply. As to her living expenses in Canada, she stated in an affidavit dated 20th August 2015 that from 15th February 2015 through 31st May 2015 the monthly average had been CI$7,324.33 (= c $5,250). Going forward, she stated in that affidavit that her estimated monthly expenses would be CI$6,911.63 (= c $4,955). The Petitioner submits that these figures are exaggerated.

18. As the non-disclosure point was fully argued before me, I shall deal with it in this ruling.

19. The Petitioner has also filed affidavit evidence alleging that there have been material changes in his circumstances. Although I heard oral evidence updating the Court on this point I have deferred consideration of it to a future hearing as, due to developments subsequent to the Consent Order, his employment situation is somewhat fluid. Once it has been resolved I will be in a better position to determine whether his circumstances have materially changed.

Statutory jurisdiction to vary

20. Pursuant to section 35 of the Matrimonial Causes Act 1974 ("the 1974 Act") the Court has a statutory jurisdiction to vary an order made in ancillary relief proceedings. The section provides in material part:

> "*(1) 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.*
>
> *(2) This section applies to the following orders—*
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> . . . . .
>
> *(b) any periodical payments order;*
>
> . . . . .

(7) 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 …"

21. The section gives the Court a broad discretion to vary the original order. In Lewis v Lewis [1977] 1 WLR 409, EWCA, which concerned the power of the court to vary or discharge a periodical payments order under the analogous section 31 of the Matrimonial Causes Act 1973 ("the 1973 Act") in England and Wales, Ormrod LJ, giving the judgment of the Court of Appeal (EW), stated at 412 E – F:

"*I am bound to say that it has always seemed to me, with respect, that the powers of variation, which were given by statute to this court in a series of enactments going right back to 1857, have been, if anything, progressively enlarged, and that the intention of Parliament is that, in handling these family matters where money is concerned, the court should have as unfettered a discretion as possible to deal with the situation as it is when the matter comes before it. I am sure it is not the intention of Parliament in any way to trammel the discretion by any kind of technical reasoning or technical grounds.*

The court here has to provide reasonably for the maintenance of three growing children. In those circumstances, it seems to me that the learned judge was perfectly right to look at the matter as it stood at the time when the case was before him and make an order which was reasonable in the circumstances of that case, both from the point of view of the husband and father and from the point of view of the wife and mother."

22. In Garner v Garner [1992] 1 FCR 529 EWCA the Court of Appeal (EW) gave more concrete guidance as to how to approach the statutory power to vary. Cazalet J, giving the leading judgment, stated at 527 G – 538:

"*Almost invariably an application to vary an earlier periodical payments order will be brought on the basis that there has been some change in the circumstances since the original order was made; otherwise, except in exceptional circumstances, the application will, in effect, be an appeal. If an order is appealed against, or is made by consent, then the presumption must be that the order was correct when made. If it was correct when made, then there will usually be no justification for varying it unless there has been a material change in circumstances. …*

Following Lewis v Lewis, by which decision this court is bound, a court on the hearing of an application to vary is fully entitled to look at all the relevant matters set

out in s.25 of the Matrimonial causes Act 1973. On occasions the court may be slow to accede to an application to vary a consent order; not least because the parties' solicitors might otherwise be deterred from either seeking to negotiate such a provision or to achieve finality. Another factor which may influence a court will be the time that has passed since the original order was made. If an application consequent on an order is brought very soon after the order has been made, the court, in normal circumstances, is likely to attach more weight to the earlier order than if it had been made some years previously. Likewise the court would expect to pay full regard to any special terms agreed between the parties at the time the original order was made – as, for example, when endorsements on briefs or contemporaneous correspondence show that an agreed order has, for some particular reason, been set at an artificially low figure. Shortly stated the court must decide what weight it should attach to the original order and all the surrounding circumstances. However, once an application to vary is before it, the court is fully entitled to make an order considering all the circumstances afresh, paying such regard to the old order as may be thought appropriate."

23. Lewis v Lewis was followed by the Court of Appeal in Bermuda in Robinson v Robinson, Civil Appeal No. 17 of 1988. The Court explained that pursuant to that decision:

"*... it is the duty of a court, when exercising its jurisdiction under Section 31 of the Matrimonial Causes Act, 1973 (Section 35 of the Bermuda Matrimonial Causes Act, 1974) to have regard to the actual means of the parties as they stand at the time when the case is heard by it.*

Thus a court will not take into account only those changes in the means of the parties which have taken place since the original order was made. It must approach the matter as if it were fixing the payments afresh and make an order which is reasonable in the current circumstances.

This does not, however, mean that an earlier order should be ignored when assessing the proper order to be made on the basis of current circumstances."

24. If the Court decides to vary or set aside an existing order, its approach will likely be influenced by the guidance given by Baroness Hale, giving the judgment of the UK Supreme Court in Sharland v Sharland [2015] 3 WLR 1070. The case concerned a successful appeal against a refusal by a district judge sitting in the Family Court to set aside a consent order made in matrimonial financial proceedings but obtained through material non-disclosure and misrepresentation. The guidance is relevant because

Baroness Hale indicated at paragraph 42 that an application of this sort could be made either by way of appeal or to a judge at first instance. In the Supreme Court in Bermuda such an application would be made under section 35 of the 1974 Act. She stated at paragraph 43:

"*Finally, however, it should be emphasised that the fact that there has been misrepresentation or non-disclosure justifying the setting aside of an order does not mean that the renewed financial remedy proceedings must necessarily start from scratch. Much may remain uncontentious. It may be possible to isolate the issues to which the misrepresentation or non-disclosure relates and deal only with those. A good example of this is Kingdon v Kingdon [2011] 1 FLR 1409, where all the disclosed assets had been divided equally between the parties but the husband had concealed some shares which he had later sold at a considerable profit. The court left the rest of the order undisturbed but ordered a further lump sum to reflect the extent of the wife's claim to that profit. This court recently emphasised in Wyatt v Vince (Nos 1 and 2) [2015] 1 WLR 1228 the need for active case management of financial remedy proceedings, "which … includes promptly identifying the issues, isolating those which need full investigation and tailoring future procedure accordingly": para 29. In other words, there is enormous flexibility to enable the procedure to fit the case. This applies just as much to cases of this sort as it does to any other.*"

These observations would apply equally to an order that fell to be varied due to a material change in circumstances.

25. As is apparent from both the language of the statute and the analysis in Garner v Garner, the jurisdiction under section 35 of the 1974 Act and section 31 of the 1973 Act applies to both consent orders and orders not made by consent. As Munby J (as he then was) stated in L v L [2006] EWHC 956 (Fam) at para 113, in which the applications made by the husband included one under section 31 of the 1973 Act to vary, discharge or suspend that part of the consent order which constituted an order for periodical payments:

"*…the jurisdiction under section 31 is exercisable on much wider grounds than the very limited jurisdiction to set aside a consent order*".

26. In summary, the Court has a broad jurisdiction under section 35 of the 1974 Act to vary or discharge an order made in ancillary relief proceedings, including a consent order. Where, as in the present case, the order is very recent, the Court is unlikely to exercise that jurisdiction

unless there is a good reason to do so, eg because there has been a material change in circumstances or material non-disclosure by one of the parties. If the Court does decide to reopen the order, then it may do so in whole or in part, giving such weight to the existing order as it sees fit.

Material non-disclosure

27. The leading case on non-disclosure in family proceedings is Jenkins v Livesey [1985] AC 424 at 435G. For present purposes, the relevant principles were stated by Lord Brandon at 437 H – 438 C and 445 G – 446 A.

> "*I stated earlier that, unless a court is provided with correct, complete and up-to-date information on the matters to which, under section 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection. It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full and frank disclosure in proceedings of this kind has long been recognised and enforced as a matter of practice. The legal basis of that principle, and the justification for it, are to be found in the statutory provisions to which I have referred.*
>
> *My Lords, once it is accepted that this principle of full and frank disclosure exists, it is obvious that it must apply not only to contested proceedings heard with full evidence adduced before the court, but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further inquiry by the court. If that were not so, it would be impossible for a court to have any assurance that the requirements of section 25(1) were complied with before it made such consent orders.*
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> . . . . .
>
> *I would end with an emphatic word of warning. It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications being summarily dismissed …*"

28. As Thorpe LJ stated in Shaw v Shaw [2002] EWCA Civ 1298 at para 44(ii), non-disclosure may be achieved either by active concealment or passive failure to mention.

29. These principles have been applied previously by the courts in Bermuda. See, eg, the judgment of Wade-Miller J in Gibbons v Gibbons [2010] Bda LR 31.

30. In the present case, in order to investigate whether the Petitioner's allegations of material non-disclosure are well founded it was necessary for the Court to examine various items of correspondence between the parties which were sent prior to the ancillary relief hearing and were marked "*without prejudice save as to costs*". As this was not a costs hearing, I could not rely on the "*save as to costs*" qualification to do so. However, the parties acquiesced to this course. And in any event, the correspondence was admissible for this purpose by analogy with the principle that evidence of without prejudice negotiations is admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. As authority for that principle, see Unilever Plc v Procter & Gamble Co [2000] EWCA *per* Robert Walker LJ at 2444 E.

31. In an open letter to the Respondent dated 5th June 2014, Mrs Marshall stated that in order to move forward with a proposal it would be helpful to know what the Respondent's intentions were.

> "*Are you intending to move to Montreal or to live in Bermuda? Where you choose to live will obviously impact the finances.*"

32. In a letter marked "*without prejudice save as to costs*" to Mrs Marshall dated 20th January 2015, the Respondent's attorney, Ms MacLellan, stated that her client would continue to live where she was currently, ie the former matrimonial home, provided that the Petitioner carried out certain specified repair works which were said to be necessary whatever the outcome of the settlement.

33. In a letter to Mrs Marshall dated 28th January 2015, Ms MacLellan stated that for the time being, seeing as the Montreal property was full of the Respondent's personal belongings and had items in disrepair, her client could only consider renting the property to a family member who would be willing to pay "*below market rent*". The letter went on to discuss possible rental income from the property.

34. In a letter marked "*without prejudice save as to costs*" to Mrs Marshall dated 30th January 2015, Ms MacLellan set out the Respondent's position in more detail. She repeated her client's complaint about the condition of the former matrimonial home, but stated that provided that the Petitioner carried out a rather shorter list of repair works the Respondent would continue to live in the former matrimonial home with three of the children "*for the time being*". She stated that her client would accept monthly payments for herself and the three children totalling $4,750, although her bare minimum expenses were $6,500 and she would have a shortfall. She further stated that the Respondent would attempt to rent out the Canadian property to a family member which would bring in $800. The letter continued:

> "*Our client believes that it will be very difficult to make ends meet and reserves the right to move to Canada with the three children with such a move not triggering a review of the maintenance and not requiring your client's consent.*
>
> *All maintenance payments should be written net of taxes so that in the event that our client returns to Canada she will not have to pay taxes on the spousal or child support …*"

35. In my judgment the 30th January 2015 letter put the Petitioner on notice that the Respondent's relocation to Canada in the short to medium term was a real possibility. If this was a matter of concern to him, then, through his attorney, he had the opportunity to explore the Respondent's intentions further during the course of the settlement negotiations. I am not satisfied that as of 6th February 2015, when the Consent Order was signed, the Respondent had a settled or even provisional intention to relocate to Canada in the immediate future, although she may well have been giving the matter serious thought. In all the circumstances I find that she was not in breach of her duty of full and frank disclosure.

Material change of circumstances

36. The Consent Order gives effect to the financial settlement agreed by the parties. The legal effect of that settlement derives from the Order and does not depend on what the parties have agreed. See the judgment of the Privy Council given by Lord Diplock in de Lasala v de Lasala [1980] AC 546 at 560 G – H.

37. Both parties submit that I should therefore construe the Consent Order as I would any other court order rather than as a contract. In support of this proposition Mrs Marshall has referred me to Thwaite v Thwaite [1982] Fam 1 EWCA. In that case the question arose as to whether the court at first instance had jurisdiction to vary a consent order providing that the husband should convey his interest in a house to the wife. Ormrod LJ, giving the judgment of the Court, held at 8 E – F that the answer flowed from the fact that consent orders were not contractual:

> "*If their legal effect is derived from the court order it must follow, we think, that they must be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders. So, if the order is one of those listed in section 31 (2) of the Act of 1973, it can be varied in accordance with the terms of that section: see Brister v. Brister [1970] 1 W.L.R. 664. But if it is not within the list, it cannot be varied by the court of first instance.*"

38. The learned judge in that passage was concerned with the status of the consent order, ie whether it could be varied by a court of first instance, not what it meant, which was not in dispute. Nonetheless I accept that the starting point for construing the meaning of a consent order is that it is a court order and not something else. As we shall see, however, that does not necessarily mean that contractual principles of construction are irrelevant.

39. As to the interpretation of court orders, Mrs Marshall has referred me to Gordon v Gonda [1955] 1 WLR 885 EWCA. This was an appeal in a partnership action. Although the appeal lay against the order of one judge, Roxburgh J, its outcome depended upon the correct construction of an order made earlier in the proceedings by another judge, Danckwerts J (as he then was).

40. The leading judgment was given by Lord Evershed MR. He stated at 890 that at first sight it appeared to him plain what the effect of Danckwerts LJ's order was. He went on to test and confirm this construction by considering other factors. Thus he stated at 892 – 893:

"*The question is: When regard is had to the pleadings and to the history which I have stated and to the fact that the pleadings were read in this order and the evidence was referred to, does the declaration in the order assume some different aspect? Is what I have called its prima facie meaning thereby altered? I cannot think that it is.*"

41. Hodson LJ stated at 896 that he agreed entirely. Romer LJ stated at 897 that he too agreed although he expressed his approach to construing Danckwerts J's order differently.

"*It is only if the order is open to some other construction, that it is ambiguous in its terms, that it appears to me to admit of the argument which Mr. Shelley addressed to us, that in the circumstances which existed, namely, the pleadings in the action and the acceptance by the judge of the view that there was a partnership and in view also of the general law which is applicable as between partners, the judge cannot have intended to hold that the defendant was a trustee of the shares which were allotted to him. In my opinion, there is no such ambiguity as to render that argument permissible, because this order, as I have already said, proceeds (and, in my opinion, proceeds only) upon the footing of a trusteeship.*"

42. If, as Mrs Marshall submits, Romer LJ was saying that it is only permissible to have regard to the surrounding circumstances of an order when that order is on its face ambiguous then his position was inconsistent with that of the majority.

43. Mrs Marshall is to be commended for unearthing Gordon v Gonda for, as Mr Recorder Edward Murray sitting as a Deputy High Court Judge stated in Business Secretary v Feld [2014] 1 WLR 3396 at 3402 F, there appears to be surprisingly little authority on the proper approach to interpretation of a court order. Although Gordon v Gonda was not cited to him, there is much good sense in the observations at paras 27 and 28 of his judgment:

"*27 In a court order one is concerned with the intention of the court in making the order, and this is closer to the exercise involved in construing the intention of the legislature when enacting a statute than it is to construing the intention of parties to a contract. On the other hand, it would be a rare and unusual case where a person to whom a statutory provision was to be applied (in a civil or criminal proceeding where*

the meaning of the statutory provision was at issue) had been involved in the drafting of that provision. But where a court order is to be applied to a person … who had a hand in drafting the terms of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what that person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court.

28 The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent on the facts of the specific case."

44. The point of construing an order is, as the learned Deputy High Court Judge indicated, to give effect to the intention of the court. Thus, as stated in the commentary to Order 20 rule 11 in the 1999 edition of the White Book in England and Wales, which rule corresponds to Order 20 rule 11 in the Rules of the Supreme Court 1985 in Bermuda:

"*Apart from the rule, the Court has an inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain (Thynne v. Thynne [1955] P. 272, CA; Pearlman (Veneers) S.A. (Pty.) v. Bernhard Bartels [1954] 1 W.L.R. 1457; [1954] 3 All E.R. 659, CA; Lawrie v. Lees (1881) 7 App. Cas. 19 at 34, 35; Milson v. Carter [1893] A.C. 638; Kay & Lovell [1941] Ch. 420; City Housing Trust [1942] 2 Ch. 262.*"

45. My intention when making the Consent Order was to give effect to the intention of the parties. When construing that Order I must therefore ascertain what the parties' intention was. Specifically, I must ascertain whether they intended that the Respondent relocating to Montreal should count as a material change of circumstances.

46. In undertaking this exercise it is in my judgment appropriate to construe the Consent Order as I would a contract although I appreciate, of course, that it is not one. That was the approach taken by Mostyn J in O v J [2015] EWHC 2616 (Fam) at para 9, when he construed a consent order in light of "*the normal tenets of contractual interpretation*". I note in

passing that neither Gordon v Gonda nor Business Secretary v Feld concerned the construction of a consent order.

47. There are numerous decisions of the House of Lords and UK Supreme Court on the construction of contracts, some of which were reviewed recently by this Court in Kingate Global v Kingate Management [2015] SC Bda 65 (Com) at paras 83 – 90. Although these cases relate to the construction of commercial contracts, the principles which they have developed are of general application. I find some observations of Lord Hoffmann in one of the older cases, Investor's Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL, at 912 – 913, particularly apposite:

> "*(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> . . . . .
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. … The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. …*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. …*
>
> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."*

48. Where the parties reach written agreement as to the terms of a consent order the Court can examine the correspondence which constitutes that agreement in order to determine what it is that the parties have actually agreed. That is what the House of Lords did in Jenkins v Livesey. See the speech of Lord Brandon at 432 B and D. But, as stated by Lord

Hoffmann in the Investor's Compensation Scheme Ltd case at point (3), what the Court cannot do is have regard to the negotiations which led up to the agreement. In the present case, however, the correspondence is not material.

49. As to the present case, Ms MacLellan submits that it is to be inferred from paragraph 8 of the Consent Order that when entering into the Order both parties contemplated that the Respondent might move to Montreal. Consequently, she submits, any such move would not count as a material change of circumstances. Mrs Marshall disagrees. She submits that paragraph 8 is a technical provision with a specific, limited purpose, and that it was not intended to render immaterial what would otherwise, she submits, be a highly material change of circumstances.

50. In my judgment the relevant factors when construing the Consent Order are as follows. Under the Order the Petitioner got to keep the former matrimonial home and the Respondent got to keep the property in Montreal. It was, the Court was told, agreed that the Respondent could go on living at the former matrimonial home until 30th June 2015, but after that she would have to make alternative arrangements for accommodation for her and three of the children. Thus if she remained in Bermuda she would have had to rent or purchase another property. It is not clear from the Order how this would have been funded.

51. One obvious solution would have been for the Respondent to return to Montreal, where she could live in a property which she owned free and clear of mortgage. The possibility of her return to Montreal at some stage was expressly contemplated by paragraph 8 of the Order.

52. There was no provision in the Order providing for a review date at or around the end of June 2015. Indeed the Order provided at paragraph 15 that with respect to periodical payments to the Respondent there would be a review after two years.

53. In the circumstances, had the parties intended that the Respondent's relocation to Montreal would provide a ground for reviewing the financial provision made by the Order I would have expected the Order to say so in

express terms. Just as I would have expected it to if the parties had intended that, if she remained in Bermuda, the Respondent's accommodation costs after 30th June 2015 would provide such a ground. But the Order said neither of these things. That is because the maintenance which the Petitioner agreed to pay the Respondent was a compromise figure which the parties intended should stand irrespective of whether the Respondent chose to live in Bermuda or Canada.

54. In my judgment, therefore, the Respondent's relocation to Montreal, albeit prior to June 2015, does not constitute a material change of circumstances. In reaching this conclusion I have focused on the language of the Consent Order, but have also taken into account, to the extent indicated above, the submissions made by counsel when explaining the terms of the Order to the Court and the evidence filed by the parties before the Order was made. These contextual features confirm the provisional view which I formed of the parties' intentions based on the wording of the Order alone. I would have taken the same factors into account, and arrived at the same construction, had I ignored contractual principles of interpretation altogether and simply followed the approach of the majority in Gordon v Gonda.

Summary

55. The Respondent has not failed to make full and frank disclosure and there has been no material change in her circumstances. As matters stand, therefore, I am not prepared to reopen the Consent Order. However I shall consider whether there has been a material change in the Petitioner's circumstances at a future hearing. If there has, then the Consent Order will fall to be reconsidered.

56. I shall hear the parties as to costs.

Dated this 7th day of January 2016

Hellman J