Neutral Citation Number: [2022] CA (Bda) 8 Civ

Case No: Crim/2021/017

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL DIVORCE JURISDICTION
THE HON. MRS. JUSTICE STONEHAM
CASE NUMBER 2014: No. 063

Sessions House
Hamilton, Bermuda HM 12

Date: 25/03/2022

Before:

THE LORD PRESIDENT SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

- -

Between:

PHILIP ELLSWORTH BAILEY JR.

Appellant

- and -

JOYCELYN LAVONNE BAILEY

Respondent

Mr. David Kessaram of Cox Hallett Wilkinson, instructed by Jacqueline MacLellan, for the Appellant

The Respondent in person

Hearing date: 15 March 2022

- -

APPROVED JUDGMENT

BELL JA:

Introduction

1. The parties to these proceedings, to whom I shall refer as the Husband and the Wife, were married for some 13 years, and are the parents of three children, of whom the Wife had care and control. The dispute between them concerns the appropriate level of maintenance to be paid by the Husband to the Wife, given the changed circumstances since the original order for maintenance was made. Particularly, there is a disagreement whether the level of maintenance fixed by the judge originally should be regarded as child maintenance or spousal maintenance. It should be noted that when maintenance was originally set, it was payable in respect of all three children, whereas now only one child is in full time education and the two older children have finished full time education and are working. The position regarding mortgage payments has also changed. The judge who had first fixed the level of maintenance, Hellman J, gave a judgment dated 3 August 2016, and signed an order on the same date, in which he referred to both of the two payments of maintenance which he had fixed in his judgment ($1,500 per month and quarterly top up payments of $5,200 each), as being payments of "*child maintenance*". Paragraph 1 of the order provided for the payment of $1,500 per month; paragraph 2 provided for the top up payments. In her ruling on the Husband's application to reduce the level of maintenance, dated 23 July 2021, Stoneham J first referred to the Wife's case that Hellman J had been clear that the monthly payments of $1,500 were "*spousal maintenance*", and then held in terms (paragraph 13 of the ruling) that, having regard to the applicable principles regarding awards of spousal maintenance *"There is no doubt in my mind that Hellman J applied these principles and took great care in allocating the Wife spousal maintenance in the sum of $1,500 per month to meet her and the children's expenses."*

The judgment of Hellman J dated 3 August 2016

2. The starting point, therefore, is the judgment of Hellman J. In his judgment, the learned judge dealt firstly with the length of the marriage and the educational status of each of the three children of the family. The oldest child was then aged 20, and studying at university in England, where she had completed the first year of a three year course. The middle child was then aged 19, and at university in the United States, where she had completed the first semester of a four year programme, with seven semesters remaining. The youngest child was 9 years old and attending school in Bermuda. The judge dealt with the expenses incurred on behalf of each child, the respective earnings of the Husband and the Wife, and the family circumstances generally, which included the fact that the youngest child lived with the Wife in the former matrimonial home ("the FMH"), as did the two older children for such time as they were back in Bermuda during their vacations. Not surprisingly, the majority of the children's expenses related to the two older children, who were pursuing their education abroad. The judge dealt in some detail with the mortgage on the FMH, and referred to an earlier order - dated 31March 2015 - pursuant to which the Husband had been ordered to pay half the mortgage in the sum of $1,750 per month and

maintenance in the sum of $400 per month. The Husband had not paid the $ 1,750 since August 2015.

3. Next, the judge dealt with two businesses which the parties had operated to augment their earnings from full time employment. He then turned to the statutory framework governing ancillary relief, contained in the Matrimonial Causes Act 1974 ("the MCA"), and thereafter applied the law to the facts of the case before him. He noted and took into account that the Husband's income was less than the Wife's, and set out the Wife's submission that the Husband should pay $4,175 per month, whereas the Husband was offering $1,500 per month. It is hard to determine exactly how great the disparity between their respective incomes was, because it is not clear what income the Husband may have earned from the businesses, or what the Wife may have received from them, but without such extra income the Wife's income including her annual bonus was approximately 50% higher than the Husband's. By way of aside, I note that the Wife is no longer in her previous employment, something which occurred after Stoneham J's ruling, and her changed circumstances have led to the Wife making her own application for a variation, a matter which is not for consideration by this Court. But that application by the Wife does highlight the reality that any order which might be made by this Court would in short order be the subject of consideration by a first instance judge. Mr Kessaram recognised the practical problem that this set of circumstances created.

4. In paragraph 39 of his judgment the judge held that the Husband should pay "*what he can reasonably afford towards child maintenance while the children are in full time education and, irrespective of whether he remains a co-owner, the mortgage on the FMH. It would make no sense to sell the FMH at present as the amount outstanding on the mortgage is substantially greater than the market value of the property".* The judge then set out his view of what the Husband could afford, before making an order that the Husband should pay $1,500 per month with the top up payments of $5,200 per quarter referred to, which he ordered because the Husband's take home pay fluctuated from month to month. The judge made it clear that the Court would review the overall maintenance when the oldest child had completed her undergraduate degree.

5. The judge then carried on to make this comment in paragraph 42 of the judgment:

> *"Although the division is somewhat arbitrary, for purposes of classification I shall treat the monthly $1,500 payments as maintenance to W, which is available to apply towards the mortgage, and the quarterly $5,200 payments as child maintenance. However, precisely how these payments are allocated between the various expenses relating to W and the children is a matter for W."*

6. Those words from the judge understandably led the Wife to believe that the judge had ordered spousal maintenance. She relied upon them in her affidavit dated 11 June 2021 sworn in opposition to the Husband's application to reduce maintenance, again in her submissions before Stoneham J, and, finally, she quoted them in her affidavit of 5 October 2021, sworn in opposition to the Husband's application for leave to appeal the judge's ruling. But as I have indicated, the judge's signed order referred clearly to "*child maintenance*" in respect of both the monthly and quarterly

payments, and given the Wife's greater earnings, it is not surprising that Hellman J should have approached the dispute between the parties in this manner. Everything in the judgment and order, except paragraph 42, indicates that both the $1,500 and the $ 5,200 were to be child maintenance. The headnote of the judgment includes "*quantum of child maintenance payments*" and has no reference to spousal maintenance; and $5,200 per quarter would not begin to pay the educational costs of all three children. But paragraph 42 appears to say the opposite.

The subsequent orders

7. The order signed by Hellman J on 3 August 2016 was amended by him on 9 March 2017, but so far as I can tell the only change from the earlier order is in relation to the party having the obligation to pay the mortgage, (it specified the Husband in the order as originally signed and the Wife in the version which included both the date of 3 August 2016, and that of 9 March 2017). The references to child maintenance were not changed. However, there was an intervening amendment, which seems to have arisen in the context of an application by the Husband for an enlargement of time within which to appeal Hellman J's judgment. In the order dated 30 September 2016 giving directions for that hearing the judge ordered that "Paragraph 1 of the Order of 3rd August 2016 is amended so that "*child maintenance*" reads simply "*maintenance*". It is perhaps surprising that the change should have referred to one aspect only of the child maintenance, the monthly maintenance payments of $1,500, and not the quarterly payments, and surprising also that the judge should subsequently have reiterated that both payments were in respect of child maintenance when he amended and signed his order on 9 March 2017, a few days after he had dealt with other disputes between the parties.

8. The matter had come before Hellman J again in relation to an ongoing dispute between the parties regarding the financial affairs of one of the companies referred to in paragraph 3 above, as well as a dispute as to what should happen in relation to the FMH. In his order the judge had clarified the period for which the sale of the FMH should be suspended, namely until the youngest child of the family should have completed full time education, and his order dealt with other aspects of the companies which owned the businesses already referred to. But the judge ordered that the Husband was to pay maintenance in accordance with paragraph 42 of his judgment of 3 August 2016, although that was, obviously, not an order of the court, and also dismissed the Husband's summons of 20 February 2017, which presumably was his application for leave to appeal.

9. There was then an application made to the acting Registrar, which led to her making an order dated 31 July 2018. The Registrar's judgment dealt fully with the parties' financial circumstances, and varied the maintenance, at a time when it seems that the oldest child had completed her full time education. Paragraph 1 of the Registrar's order was in the following terms:

> *"The Respondent shall pay to the Petitioner $1,156 per month in child maintenance for the two children of the family who remain in fulltime education. This represents $578 per child, per month and shall be effective from 1 August 2018."*

Paragraph 3 of the Registrar's order provided:

> *"The periodical payments payable by the Respondent to the Petitioner in the sum of $1,500 per month as per the Order dated 3 August 2016, amended on 9 March 2017 ("the Previous Order") shall not be varied."*

And then paragraph 4 of that order provided:

> *"The said child maintenance payments and periodical payments in paragraphs 1 to 3 above shall be paid by way of an attachment of earnings payable to the Magistrates' Court Collecting Office. For the avoidance of doubt, the said total sum of monthly payments with effect from 1 August 2018 is $2,656."*

10. So the effect of the Registrar's order was to adjust the level of maintenance from a total annual payment of $38,800 in respect of three children to an annual amount of $31,866 in respect of two children[1]. And she varied the manner of making payments so that there was only one monthly payment made and no amount to be paid by way of quarterly top up.

11. Stoneham J made no reference whatsoever to this order in her ruling of 23 July 2021. The Husband's application to vary maintenance was supported by an affidavit sworn on 27 May 2021, in which he had accurately set out the terms of the Registrar's variation order, although by this time he was apparently no longer paying maintenance of $578 for the second child, probably in consequence of her own order referred to below. He was paying the monthly maintenance of $578 for the youngest child, together with the original figure of $1,500 per month which the Registrar had ordered should be continued. Yet Stoneham J dealt with the Husband's application for a reduction of maintenance without making any reference at all to the Registrar's order, or to the payments of $578 per month.

12. There is one final order to which I should refer, this being an order made by Stoneham J on 4 July 2019, in which she ordered that there was at that time only one child of the family for whom the Husband continued to be responsible. I presume that there was an application which led to that provision, although the order refers only to the Wife's summons, and there is nothing in the record to clarify matters. However, the figures set out in paragraph 10 above show an increase of maintenance per child from $12,933 per annum when there were three children being maintained, to $15,936 per child when there were two, while that figure increased to $24,936 per annum when there was just the one child being maintained. And these increasing payments per child have to be looked at bearing in mind the substantial education expenses being incurred when the two older children were pursuing education abroad.

[1] These calculations are made on the basis that both the $ 1,500 per month and the $ 5,200 per quarter are child maintenance.

The Husband's application

13. Against that background, I now turn to the manner in which the Husband made his application for a reduction in maintenance, referred to by Mr Kessaram as the Discharge Application. This was supported by his affidavit of 27 May 2021. The summons itself characterised Hellman J's order of 30 September 2016, changing "*child maintenance*" to "*maintenance*", as having meant that the sum of $1,500 per month was thereafter maintenance to the Wife, and sought an order that such payments be terminated retroactively to 1 February 2021. The Husband treated the Registrar's order of 31 July 2018 as terminating the maintenance payment of $578 per month for the second child when such child completed her university education.

14. In relation to the payment of $1,500 per month, the Husband pointed out that this sum was intended to be used as a contribution to the monthly mortgage payments on the FMH when all three children were living with the Wife[2]. He referred to the current position when the two older children had graduated from university and both were working. The oldest child lived separately, and while the second child lived with the Wife, since she was working, the Husband presumed that she contributed to the household expenses.

15. He then referred to the position in relation to the mortgage. This was that because arrears had built up, the Wife had been informed by the bank that she needed to vacate the FMH, she had done so, and the bank had taken possession. Given his view that the $1,500 maintenance was originally payable to the Wife to be applied to the mortgage; that there was no longer any mortgage to contribute to[3]; and that there was by then only one child living with the Wife, for whom he was paying $578 per month, the Husband asked that the terms of the original order requiring payment of $1,500 per month be terminated.

The Wife's response affidavit

16. The Wife filed an affidavit sworn on 11 June 2021 in opposition to the Husband's application. At an early stage, she referenced paragraph 42 of Hellman J's judgment, and the quotation from it which is set out at paragraph 5 above. She then pointed out that the quarterly payments of $5,200 did not come close to covering the expenses of one child, let alone three.

17. The Wife then went into considerable detail to explain how the mortgage arrears had accumulated, contesting the Husband's claim that the $1,500 monthly payments were intended to be used as a contribution to the mortgage payments. She characterised the monthly payments as being payable to her for expenses. Referring again to paragraph 42 of Hellman J's judgment, which she referred to as the order, she noted that it stated that maintenance was to be paid to the Wife for expenses. She contended that the Husband had received a promotion and was capable of meeting the $1,500

[2] What he said was that "I *was ordered to pay maintenance in the sum of $ 1,500 to the Petitioner and she was judicially encouraged to apply it towards the monthly mortgage payment."*

[3] There was, in fact, a mortgage to contribute to, because, although the Bank had taken possession, the outstanding debt under the mortgage remained.

monthly payments. She maintained that the level of child maintenance does not cover the actual expenses of the youngest child. She also referred again to her own change of employment (see paragraph 3 above), and said that Stoneham J had advised that Hellman J's order could not be amended and was final. I suspect that the Wife may have misunderstood the position, because Hellman J clearly envisaged that his order could be varied as the family circumstances changed, and particularly when the older children completed full time education.

Overview

18. Since the application to Stoneham J was an application to vary the order of Hellman J, it is important to consider what he decided, and what he did not decide, and I say that bearing in mind that the Registrar did vary Hellman J's order in July 2018. First, by the terms of his order he was clearly dealing with child maintenance, and not spousal maintenance; but paragraph 42 of his judgment treats the payment of $1,500 as if it were spousal maintenance, by saying the $1,500 should be treated as maintenance to the Wife. What the judge intended by making an order for child maintenance but treating it as spousal maintenance is unclear. It may be that he was treating the $5,200 per quarter as a payment which clearly related to some of the expense of the children's education, whereas the $1,500 covered expenditure, in particular on the mortgage, which kept a roof over the family, including the Wife. Secondly, he appreciated that not all the expenses of raising children can be identified and segregated, and in this regard the major item to which he had regard was the cost of the mortgage on the FMH, by which means the family had a roof over its head. And thirdly, he recognised that the two older children would be completing their education within a relatively short time frame, at which point the position would need to be looked at again, and changes made to his original order on the basis of the circumstances at the relevant time.

19. And of course this happened after the oldest child had completed her education, and the Registrar had then made a substantial variation to the original order. It should be noted that when she did so, the Registrar divided the total maintenance payable of $2,656 per month in respect of the two children into an amount of $1,156 per month for what she described as "*child maintenance*", and the amount of $1,500 per month ordered to be paid by Hellman J on 3 August 2016, which she left untouched, and which she referred to as "*periodical payments*" payable by the Husband to the Wife. The figure of $1,156 was reached by taking the quarterly top up figure of $5,200, dividing it by three to produce a monthly figure, and taking two thirds of that figure to reflect the fact that there were now two, not three, children in respect of whom maintenance was payable.

20. In so ordering, it might be thought that the Registrar was taking Hellman J's words in paragraph 42 of his judgment, set out in paragraph 4 above, to mean that the quarterly payments of $5,200 per quarter, which equated to approximately $577 per child per month, represented child maintenance, and the balance of $1,500 per month some other form of periodical payment to the Wife. The problem with that is that Hellman J had described both payments as representing child maintenance in the formal order, and when considering the fact that the Wife earned substantially more than the Husband at the material time, although it does of course have to be recognised that Hellman J had by his order of 30 September 2016 amended his original order so that the $1,500

payment was to be treated as "*maintenance*" as opposed to "*child maintenance*". This interpretation would require treating the reference to "*child maintenance*" in the amendment order of 9 March 2017 as having been an uncorrected slip. If such were indeed the case, one might have expected the point to have been addressed at some stage. So that is the somewhat confusing procedural background against which the present appeal must be viewed. And the Wife can certainly be forgiven for having thought that the $1,500 figure represented spousal maintenance.

Stoneham J's ruling dated 23 July 2021

21. I have already referred to the fact that the Wife had characterised Hellman J's award of $1,500 per month as representing spousal maintenance. This submission found favour with Stoneham J despite the less than clear position which I have identified in paragraphs 7 and 8 above. She said in paragraph 13 of her judgment that there was no doubt in her mind that Hellman J had applied the applicable principles regarding awards of spousal maintenance and had taken great care in allocating the Wife spousal maintenance in the sum of $1,500 per month to meet "*her and the children's expenses*". She did not set out what the parties' respective income and expenditure were, and she made no reference whatsoever to section 35 of the MCA, the section which governs variation applications. Neither did she make any reference to the quarterly top up payments of $5,200, which by then had been reduced, firstly by the Registrar in July 2018 to reflect that the oldest child was no longer pursuing full time education, and her own order of 4 July 2019 to the effect that there was now only one child of the family for whom the Husband continued to be responsible. It was no doubt this order which led to the Husband being able to say in his affidavit of 27 May 2021 that he was by then paying $578 per month by way of child support.

22. I have already referred to the other notable omission in Stoneham J's judgment in terms of her failure to make any reference to the Registrar's judgment of 31 July 2018. The final provision in her ruling of which Mr Kessaram makes complaint is to be found in paragraph 20, where the judge ordered the $1,500 monthly maintenance to continue until 2031 (the month is not specified). As Mr Kessaram submitted, even if the $1,500 were spousal maintenance as opposed to child maintenance, it was calculated with reference to both the Wife's and the children's needs. The judge had, he submitted, accepted that a large component of the $1,500 was in fact child maintenance, and he noted that Stoneham J had, at paragraph 16 of her judgment, said that Hellman J had provided some clarity in regard to how long spousal maintenance should extend, when he had referred to the sale of the FMH being suspended until the youngest child had finished full time education.

23. So, regrettably, Stoneham J's ruling is deficient in any number of important respects. I might add that Stoneham J refused leave to appeal, which I granted when the application was renewed to this Court.

The parties' submissions

24. Both parties provided helpful skeleton arguments. I would not propose to rehearse these, but would now turn briefly to the argument made before us on the hearing of the appeal.

25. The first point which Mr Kessaram made in his oral argument was with reference to the issue of fresh evidence. There was included in the Record of Appeal a number of documents ("the Transaction History") relating to the accumulation of mortgage arrears, starting from January 2016, which documents had not been before the judge. These showed that there had not been regular payments by the Wife in the discharge of the mortgage obligation, which the Registrar had noted in her judgment were in an amount of $2,275 per month. The Transaction History showed erratic payments, a write off of $15,000 by the bank in August 2020, and confirmed that the last mortgage payment made by the Wife had been in January 2019.

26. The second aspect of fresh evidence was the Wife's application for a variation made by summons dated 27 January 2022, in which she sought an increase in child maintenance to a level of $450 per week. Quite apart from the possible futility of this court adjusting the level of maintenance only to have the Supreme Court look at matters again shortly thereafter, Mr Kessaram recognised that this court was not in a position to fix maintenance. However, he sought a suspension of the payment of the maintenance of $1,500 per month while the Supreme Court dealt with the variation application, on the basis that the Wife had not been full and frank in regard to her affidavit evidence regarding her payments of the mortgage, and particularly the fact that no payment whatsoever had been made since January 2019. He relied upon the case of *Livesey v Jenkins* [1985] 1 All ER 106, regarding the duty to make full and frank disclosure. He also referred to section 35 (7) of the MCA, and the duty imposed on the judge to have regard to all the circumstances of the case, and noted that simply to set aside Stoneham J's ruling would leave the $1,500 per month obligation in place.

27. Mr Kessaram also criticised the judge for referring in her judgment to the Wife's contentions, without setting out those of the Husband, and, more to the point, without actually making any findings based on the evidence, and in this regard was critical of paragraph 13 of the ruling, which held that Hellman J had taken great care in allocating the Wife's spousal maintenance, when what was at issue was whether his order, as subsequently amended by further orders, should be varied in the light of changed circumstances. In relation to the imposition of a ten year term for the payment of maintenance, Mr Kessaram noted that this was not something either side had asked for. In relation to the suspension of the $1,500 per month, Mr Kessaram submitted that if the Court were not to suspend that payment in full, we should consider reducing it substantially. He urged that in sending the matter back to the Supreme Court, this Court should specify that it should be dealt with by a judge other than Stoneham J, with the suspension to operate until the matter had been ruled on below.

28. In her submissions, Mrs Bailey relied on Stoneham J's ruling, and described the difficulties she had faced in supporting three different households in three different countries, when the two oldest children were in the UK and the US respectively. She confirmed the extent of the debt owing to

the bank, and said that if the FMH were to be sold at the appraised price, there would be a deficit of over $200,000. Mrs Bailey did not accept that the Husband was unaware of the true position regarding her failure to make the mortgage payments, referring to a letter of 2 May 2017 which had been sent to her by the bank, and advising that a letter in the same terms had been sent to the Husband. The Husband disputed this. The letter refers to an indebtedness as at 13 April 2017 of $63,283.57 and to the total outstanding amount as $ 642,351.19. The latter figure is presumably the amount due on the basis that the mortgage had been called in; and the former on the basis that it had not. The amount due on the former basis increased considerably after this date. The Husband said that he was aware that there had been a default but not that no payment had been made by the Wife since January 2019.

29. She also maintained that the Husband had access to the detail contained in the Transaction History. In relation to the allegation of a lack of full and frank disclosure on her part, Mrs Bailey denied this to be the case, and said that no financial information was given to either the Registrar or Stoneham J. In relation to the former, that was clearly not the case, because she dealt with it in the appropriate level of detail, setting out that detail at paragraph 20 of her judgment. She also noted at paragraphs 16 and 17 that the Wife had not given details of the bonus she received until it was elicited in cross-examination. In relation to Stoneham J's judgment, I would observe that it is impossible for the judge to perform her task on a variation application without knowing all the circumstances of the case, as required by the statute, and identifying them in her judgment as the basis for the findings which she must then make. This did not occur.

Conclusion

30. I could no doubt provide more detail on the submissions, but given that it is recognised that the matter has to go back for determination before another judge, there is limited utility in doing so. I would accept the various criticisms of the judgment of Stoneham J identified by Mr Kessaram, to which I would add my own, identified earlier in this judgment, and for those reasons would set Stoneham J's ruling aside. It cannot stand in light of the errors identified. And I would accede to Mr Kessaram's request that on the de novo hearing which is now necessary, as well as on the Wife's variation application, the two matters should be heard together and should be heard by a judge other than Stoneham J. This Court would add the direction that when reviewing and ruling on matters afresh, the new judge should consider whether any payment of maintenance should have retrospective effect, and if so for what periods, so as to ensure that the interests of justice are met.

31. That leaves the question of whether this Court should suspend the payment of the present maintenance of $1,500 per month as sought by Mr Kessaram for the Husband. The short answer to that question is that this Court would have seriously considered making such an order, were it not for the fact that the Wife lost her employment last September, and has not yet found alternative employment. In those circumstances, I do not think it right to make the suspension order sought, but would highlight that request for the new judge, who will be able to make whatever order seems just.

Costs

32. That leaves the issue of costs, as to which both sides have sought costs in the court below as well as in this Court. Stoneham J did of course award the Wife her costs below, adding the words "if any", no doubt to reflect the fact that she is a litigant in person. I would regard it as appropriate to make no order as to the costs of the appeal, and I say that in recognition of the fact that it can properly be said that neither party has been well served in this case. The difficulties may no doubt be said to have arisen from the language used by Hellman J in his 3 August 2016 judgment, and in particular paragraph 42 thereof. It is always the case that payments to be made by a husband to his former wife for the support of their children have to be calculated to cover the costs of their upbringing generally, and while there are often fixed costs such as school fees and related travel, and others which are calculable with reasonable accuracy, such as the cost of food, there are others which by their very nature are not readily calculable as between a wife and the children of the family, such as rent or mortgage, where the size of the house being occupied by the family will vary in proportion to the number of occupants. Fixing maintenance is not an exact science, and while I do recognise that Hellman J ordered monthly maintenance and quarterly top ups to reflect the fact that the Husband's take home pay fluctuated from month to month, his references to the $1,500 being available to apply towards the mortgage no doubt led to the unusual situation of those payments being regarded as payments of spousal maintenance, when it was clear that the Wife earned substantially more than did the Husband. It would have been preferable to make it clear that the payments were in respect of child maintenance, although, as always, it would be for the Wife as payee to determine how to operate her budget.

33. But the principal reason for making no order for costs in the appeal is to recognise the Wife's difficulties in making sense of Stoneham J's ruling, and it is for that reason that I would not wish to be too critical of her in that regard. And once an appeal was launched, she can be forgiven for taking the judge's comments at face value. As to the costs of the proceedings below, I would leave those to be dealt with by the new judge.

SMELLIE JA:

34. I agree with the detailed judgment of my Lord Bell and with the additional comments and directions given by my Lord President.

35. The regrettable lack of clarity in the orders of Hellman J and oversights in the judgment of Stoneham J, demonstrate the need for a practice by which orders are drawn up by the party applying, presented to the other side for vetting and acceptance, before finally being placed before the judge for approval. The judge is, of course, always ultimately responsible for ensuring that his or her order clearly and comprehensively addresses the issues which should be decided.

CLARKE P:

36. I agree. The appeal should be allowed. The order of the judge that the payment of maintenance by the Husband of $1,500 per month should continue until 2031 shall be varied so as to provide that the payment of maintenance by the Husband of $1,500 per month shall continue until further order of the Supreme Court. The Husband's application dated 3 June 2021 shall be reheard by a judge of the Supreme Court other than Stoneham J, at the same time as the Wife's application for variation of the maintenance order in her favour. The judge hearing the applications is to consider whether or not the interests of justice require that any order that he or she may make should operate retrospectively. There shall be no order in respect of the costs of the appeal. The order that the Wife shall have her costs, if any, before Stoneham J shall be set aside. The incidence of costs in respect of the hearing before Stoneham J shall be determined by the judge hearing the applications to which I have referred. The order of this Court should be drawn up and the Husband's attorneys shall provide a draft to the Court and to the Wife within 7 days.

37. I cannot leave this case without commenting on several unsatisfactory aspects of it. First, the confusion over what Hellman J meant should never have been allowed to arise. We are faced with a judgment which is headed "*quantum of child maintenance payments*", in paragraph 39 of which the judge finds that H should pay what he can reasonably afford towards child maintenance (sic), and where the orders made refer to child maintenance and nothing else. But paragraph 42 of the judgment says that the judge will treat the $1,500 per month payments as maintenance to the Wife. What exactly he meant by that is unclear. This is followed by an order which excises the word "*child*" from paragraph 1 of the original order. We have no explanation of what led to that. If the judge gave a ruling which explained that, we should have been provided with it. The 3 August 2016 order was then amended on 9 March 2017 without any alteration to paragraph 1 of that order. It may well be that neither the judge nor counsel spotted this problem. But they should have done; and, if the judge did not do so, counsel should have drawn his attention to it.

38. Then the judgment of the Registrar varied the child maintenance order in Paragraph 2 of the 3 August 2016 order but continued what her order described as "*the periodical payments payable by the Respondent to the Petitioner in the sum of $ 1,500 per month as per the order dated 3 August 2016, amended on 9 March 2017".* Whilst her reference to "*periodical payments*" might suggest that, understandably, she thought of those as different from the child maintenance payments in Paragraph 2, her reference to the payments being payable as per the order amended on 9 March 2017 meant that her order referred to the child maintenance payments to which the amended order unquestionably refers.

39. The difference between spousal maintenance payable and child maintenance, each payable to the Wife does not, up to a point, matter. The Wife receives the total sum. But where it does matter is when section 33 of the MCA applies, so as to impose a time limit on orders in favour of children. Some expenditure, of which expenditure on the mortgage of the FMH is a prime example, enures for the benefit of the Wife and the children and may, therefore, perhaps, appropriately be treated as spousal maintenance, even though the basis on which the FMH is intended by the Court to be

financed is that the FMH will be sold when it is no longer needed for the children. This would avoid the potential problem that it may be argued by counsel for the Husband that the child maintenance order should be (or should have been) made with an amount applicable to each child, which amount should cease to be payable at the very moment when the education of each child was at an end, and that, insofar as it does not do so, it is defective and cannot apply once the relevant child's education comes to an end.

40. Next, the judgment of the learned judge simply did not engage with the relevant provisions of the MCA (section 35) and the need to have regard to all the circumstances of the case including any change of the matters to which the court was required to have regard when making the order to which the variation application related, including in particular, the fact that the Bank had taken possession of the FMH and that the children's university education was at an end.

41. At the hearing of the variation applications the judge will need to be presented with all the relevant evidence and to have regard to it. That will include, but may not be limited to: (a) what amounts have been paid by each of the parties towards the mortgage of the FMH: (b) the amount outstanding under that mortgage; (c) the likely amount which can be obtained for the FMH: (d) the Wife's present rental arrangements and the costs thereof; (e) the amount, if any, received by the wife in bonus payments during her employment in recent years and the amount of any payment made on the termination of her employment: (f) the Wife's prospects of re-employment; (g) the Husband's current salary and (h) the significance, if any, of the Husband's refusal to consent in 2017 to an arrangement acceptable to the bank whereby the Wife would take on the mortgage of the FMH with reduced payments until the children had left university or to arrange for the youngest child to be added to his health insurance. The parties have a duty to ensure that all relevant evidence is placed before the judge.