Neutral Citation Number: [2021] CA (Bda) 4 Civ

Case No: Civ/2020/10

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 2008: No. 221

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 12 April 2021

Before:

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

- -

Between:

MICHAEL WOODROFFE

Appellant

- and -

PAMELA WOODROFFE (NEE COLLINS)

Respondent

Mr. Cameron Hill of Westwater Hill & Co. for the Appellant

The Respondent appeared in person

Hearing dates: 11 and 12 March 2021

- -

APPROVED JUDGMENT

BELL JA:

Introduction

1. This appeal is concerned with the ability to enforce arrears of maintenance which have accrued more than 12 months before the attempt at enforcement. Any such enforcement application is governed by section 36 of the Matrimonial Causes Act 1974 ("the Act"), which provides as follows:

> *"**Payment of certain arrears unenforceable without the leave of the court***
> *36 (1) A person shall not be entitled to enforce through the court the payment of any arrears due under an order for maintenance pending suit, an interim order for maintenance or any financial provision order without the leave of the court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.*
>
> *(2) The court may refuse leave or may grant leave subject to such restrictions and conditions (including conditions as to the allowing of time for payment or the making of payment by instalments) as the court thinks proper or may remit the payment of the arrears or of any part thereof.*
>
> *(3) An application for the grant of leave under this section shall be made in such manner as may be prescribed by rules of court."*

2. The starting point is the Consent Order ("the Order") made by the Supreme Court on 1 December 2008, at which time both parties were represented by experienced family law counsel. The Order dealt in detail with the financial arrangements between the parties following their divorce, both in relation to their assets and the arrangements for their children, through to the completion of their education.

3. The following provisions of the Order are relevant for the purposes of this appeal:

> *2. The Respondent shall pay to the Petitioner a lump sum of $200,000 to be paid in the following manner:-*
>
> *(i) $50,000 shall be paid upon the execution of this Consent Order;*
>
> *(ii) Within 30 days of the Respondent receiving his annual bonus in 2010, and thereafter on the anniversary day of receiving his bonus in succeeding years, the Respondent shall pay to the Petitioner a sum equal to 10% of his annual bonus, but in any event, a sum not less than $25,000 until the sum of $150,000 has been paid in full.*

3. Should the Respondent's employment position change, or should he fail to receive an annual bonus in any given year, the Respondent shall pay the minimum annual sum of $25,000 to the Petitioner out of his other financial resources/savings until the said sum is paid in full.

7. The Respondent shall pay the private educational expenses of the two children of the family until they complete their secondary education and the parties shall jointly pay on a 50/50 basis the cost of the children's tertiary educational expenses to the conclusion of their first degree at college/university. "Educational expenses" is defined to mean private school fees, tuition, room and board when applicable, books, airfare, pocket money and other necessary incidentals, including but not limited to the purchase of a computer and other necessary educational equipment. The Petitioner shall consult with the Respondent on all matters regarding the children's education and the costs incidental thereto in a manner designed to facilitate agreement between the parties in relation to such matters. In the event of disagreement either party shall have liberty to apply to the Supreme Court of Bermuda for determination of the issue(s) in dispute.

9. The Respondent shall pay to the Petitioner periodical payments for the children of the family in the sum of $1,100 per month, per child. The said sum will be reviewed on the 1st January 2010 and each year thereafter and shall be adjusted in accordance with the US Consumer Price Index for the previous year. The said periodical payments shall be paid until each child shall have completed his or her secondary education, or until varied by agreement between the parties or until further order of this Court. Upon completion of their secondary school education and the continuation of the children at tertiary education, the parties shall agree the level of maintenance to be paid by the Respondent towards the children's reasonable maintenance needs, failing which there shall be liberty to apply.

10. The Respondent shall pay to the Petitioner a sum of $400 per month as ongoing provision to enable the Petitioner to employ a nanny and/or housekeeper, but no such monthly sum will be due when no nanny and/or housekeeper is employed.

11. The Respondent shall pay for the children's airfare to Bermuda or elsewhere on those occasions when the children are travelling in order for the Respondent to exercise access to them. When the children will be accompanied on such trips by the Petitioner, she shall book and pay for the children's tickets and the Respondent, when called upon to do so shall reimburse to the Petitioner the cost of the children's tickets. When the children travel with the Respondent or such other third party as the parties may mutually agree upon, the Respondent shall make the travel arrangements and shall pay the cost of the children's tickets.

12. Any sums due to the Petitioner pursuant to paragraphs 9, 10 and 11 above, shall be paid directly to the Petitioner's US Dollar account by standing order or wire transfer. The Petitioner will provide the Respondent with her bank account details upon execution of this Consent Order. Any other sum payable to the

> *Petitioner pursuant to the terms of this Consent Order shall also be paid to the Petitioner's said account.*
>
> *13. The Petitioner shall continue to provide at her sole expense major medical and dental health insurance for the children of the family, and any medical or dental expense not otherwise covered by the said insurance shall be paid for on a 50/50 basis between the parties for any sum in excess of $100.*

4. The judgment under appeal followed from competing applications made by the parties, in the form, first, of a summons by the Appellant (I shall hereafter refer to the parties, as the judge did, as the Husband and the Wife) dated 5 April 2019, in which he sought a declaration that the Wife should not be able to enforce those arrears of maintenance which had accrued prior to 1 April 2018. This summons also sought the variation of clauses 6, 7, 9 and 11 of the Order, and the deletion of clause 10. The summons was mis-dated 2018 instead of 2019, and also stated that the declaration was sought pursuant to section 41 of the Act, instead of section 36. While strictly the date beyond which the payment of arrears could not be enforced should be calculated with reference to the Wife's application for enforcement, Mr Hill indicated during the course of argument that he was content to have the court treat 1 April 2018 as the relevant date.

5. The Wife, in response to the Husband's application, sought leave to enforce the arrears which had accrued pursuant to paragraphs 7, 9, 10, 11 and 13 of the Order from 1 December 2008 through June 2018. As part of the educational expenses contained in clause 7 of the Order, this summons also sought the determination of the Husband's contribution towards the costs of an apartment deemed necessary to ensure that the child M was able to attend a particular public school in Decatur, Georgia, and the fixing of the parties' contributions towards the costs of the children's tertiary education, which has now commenced for one child and is imminent for the other.

6. Both parties swore affidavits in support of their respective positions. Perhaps unsurprisingly, the Wife's affidavit of over 40 pages led to an equally lengthy reply affidavit from the Husband, filed notwithstanding an order that no further affidavits should be filed, and which in turn led to an application to redact portions of that affidavit. In making that application the Wife sought to prohibit the Husband from being heard, on the basis that he was in breach of orders of the court, and there were further orders relating to the future conduct of the hearing. The Wife filed some 70 pages of documents in December 2019. The basis for such filing is not clear from the record. But suffice to say that the judge had a very considerable volume of material before her.

7. The parties gave evidence before the judge at hearings which took place on 3, 4 and 5 February 2020, which evidence has helpfully been transcribed. I will not at this stage review that evidence, but will instead turn to the judge's judgment, which is dated 8 July 2020, some five months after the hearing.

The Judgment

8. The judge started by setting out the background, referring to the material parts of the Order, noting at paragraph 12 of her judgment that section 36 of the Act mirrors section 32 of the equivalent English act. She summarised the positions of the parties, the Husband's being that the Wife was seeking to vary the terms of the Order some nine years after it came into effect, that a significant portion of the arrears claimed by the Wife related to expenses that were never contemplated by the Order, and contending that it had been agreed that the Wife would assume all additional or ad hoc expenses and that he would not have to make any payments beyond the fixed obligations provided for in the Order. I pause to note that clause 7 of the Order sets out those items to be treated as part of the educational expenses, which are necessarily not fixed items. Finally, the judge noted that the Husband contended that the Wife had made no, or at least very few, demands for reimbursement, and now wished to bring the Wife's financial demands to an end once and for all.

9. The judge summarised the Wife's position as being that she had fulfilled her responsibilities under the Order and had tried desperately to obtain reimbursement from the Husband, something she says he had repeatedly promised, which promises she had believed he would keep.

10. The judge then turned to the law, noting the terms of section 36 of the Act, and noting further that both counsel had agreed that there did not seem to be many authorities on the legal principles to be applied in the exercise of the court's section 36 discretion. She started by referring to *H v H* [1993] 2 FLR 35, in which Thorpe J had similarly commented that there did not appear to be much English authority on the principles to be applied. Further cases referred to by the judge were *N v V* [2015] EWCH 514 (Fam) and *Arif v Anwar* [2014] EWCH 4669 (Fam). The case of *N v V* included a quotation from the case of *R v Cardiff Magistrates ex parte Czech* [1999] 1 FCR 721 to the effect that "it is trite law that arrears becoming due more than one year before the commencement of enforcement proceedings are not enforced unless there are special circumstances".

11. At paragraph 28 of the judgment, the judge set out the reasons given by the Wife to explain why she had not brought any application to enforce the arrears in the earlier years, which the judge summarised in the following terms:

> *i) That she met with the Husband on various occasions over the years to discuss such expenses.*
>
> *ii) The Petitioner had to raise the children, from the time the children were 5 years and 6 years old, as a single parent; leaving no time to chase the former husband and father of the children for arrears;*
>
> *iii) That she was unaware of Section 36 of the Matrimonial Causes Act 1974 and assumed that similar to the USA there was typically a much longer time to enforce arrears;*

> *iv) She had no money to bring legal proceedings as she has borrowed money from friends, withdrew monies from her 401K and took out a second mortgage on her house in order to provide for the two children;*
>
> *v) The Husband never indicated that he would not pay her what he owed. Instead, he always reassuringly indicated that she should ensure all details of expenses were provided to him. As soon as the former husband indicated that he had no intention of reimbursing her for any sums incurred by her prior to 1st April 2018 on behalf of the children pursuant to the Consent Order, she had no money to commence legal proceedings."*

12. The judge then asked herself how the exercise of the court's discretion should be approached, noting the point made by counsel for the Husband that the absence of a written demand for arrears for a period in excess of ten years was very telling, and setting out the Husband's case generally. In paragraph 34, the judge commented that counsel for the Husband had provided no explanation for his failure to seek a variation of the Order "when he found himself unable to meet the obligation" of the Order. With respect to the judge, this mis-states the Husband's position, which was that he had complied with the obligations imposed on him by the Order (see, for instance, paragraph 13 of his first affidavit).

13. The judge then moved on to make findings, referring again to the authorities, before turning to the non-contentious background, and then saying this at paragraph 36 (e):

> *"Against this non-contentious and fair backdrop, it would be entirely reasonable for the Wife to: -*
>
> *i) Genuinely believe that the Husband would actually 'do the right thing' and provide for his children. After all, the Husband agreed to do so in accordance with the provisions of the Consent Order.*
>
> *ii) Be extremely busy raising the children single-handedly and doing right by them, whilst at the same time securing professional business opportunities to meet her portion of the financial obligations owed to the children in accordance with the Consent Order.*
>
> *iii) Assert her right to reimbursement from the Husband by initiating discussions with the Husband (consistent with the spirit of their post-divorce agreement) regarding the children's expenses, instead of launching costly legal proceedings, to enforce terms that the Husband had agreed with the assistance of legal advice.*
>
> *iv) Adopt a conciliatory approach to the Husband's requests for more information, and prepare an aide-memoir with the assistance of an accountant, in the form of a detailed spread sheet.*

> *v) Duly expected the Husband to 'do the right thing' by the children and the Order of the Court."*

Then, at paragraph 37 of the judgment, the judge declared herself satisfied that: *"...somewhere along the way, the Husband, who described himself as a busy reinsurance professional frequently undertaking business travel delivering presentations, had a change of heart in relation to his legal obligations under the Consent Order and thereafter strategically embarked upon a course of action not to reimburse the Wife for his share of the children's expenses, This change of heart occurred after his letter of 16. April 2016 – the date on which he wrote a letter in support of the Wife confirming that he pays child support for a total of $31, 200 per year and that the Wife "elects to defer payment to maintain accounts receivable". It is clear that at this point in time, the Husband admitted to owing the Wife money."*

14. With respect to the judge, this is not an accurate characterisation of the letter in question, at least in regard to the payment of the Husband's share of the children's expenses. The judge reached the conclusion that the Husband had had a change of heart in regard to his obligations after he wrote a letter to the Wife (the correct date is 16 April 2015, not 2016, and the letter is to be found at page 274 of the record), the implication being that the Wife elected to defer payment of the child support maintenance totalling $31,320 per year. In fact, the reference in the letter to deferring payment clearly related only to the lump sums payable pursuant to clause 2 of the Order, and did not constitute an acknowledgement that the Husband owed the Wife money in respect of child maintenance payments. And in any event, the arrears in relation to the child maintenance payments were at that time limited to the adjustment in maintenance called for by the application of the US Consumer Price Index, something which seems to have slipped by both parties, and on which there was no evidence that the Wife had made any claim by this time.

15. The judge regarded the Husband's position as "strategic and selfish" (paragraph 38) and "utterly unsubstantiated and disgraceful" (paragraph 39). She relied upon his admission that he had loaned money to his company as meaning that he could not rely upon lack of funds as a reason for his failure to reimburse the Wife (paragraph 40), concluding that if he believed the Order to be unfair, he had the means to apply to the court.

16. These comments miss the point in relation to the dispute regarding the arrears. The single largest figure in the claimed arrears relates to the Husband's contribution (whether at 50 or 100% of the total cost) towards the expense of an apartment which the Wife rented in March 2016, because it was within the appropriate catchment area for enrolment at the (public) school which the parties' daughter wished to attend, whereas the Wife's home was not. This was put forward by the Wife in an email dated 28 March 2016 as a reasonable expense, as well as being to the Husband's advantage when compared to the cost of private education, for which the Husband would be 100% responsible under the Order. The Wife's proposal included the suggestion that the apartment could also benefit the Husband. The question the judge needed to address in relation to this expense was whether the Husband had in fact agreed to pay for the cost of the apartment as an alternative to the

expense of the private school which he would otherwise have had an obligation to pay, per clause 7 of the Order, and, if so, how that agreement fitted within the terms of clause 7 of the Order. And in this regard, the Wife sent the Husband an email on 25 February 2019, referring to the Husband's agreement to pay 50% of the rent, in an amount of $850 per month. The email said that the amounts due for January and February were $850 for each month, for a total of $1,700. A total reimbursement of $2,294.25 was said to be due, the extra $594.25 being the Husband's share of the cost of surgery for M. Payment was said to be due immediately. This appears to be the first time that the Wife had sought reimbursement in terms for the cost of the apartment, at least so far as the written material before the court is concerned, and, curiously, the email made no reference to the failure on the Husband's part to pay his share of the rent for the previous two and a half years. But in an earlier email of 24 July 2018 the Wife had specified the estimated monthly cost of the apartment, including electricity and an unspecified extra of $63 as being $1,700, and said that "I know that you agreed to pay half" (page 115 of the record). This can properly be taken as a claim that payment of the 50% fell to be made.

17. The judge then concluded at paragraph 44 of the judgment that the Wife had made numerous genuine efforts through the years to bring the children's expenses to the Husband's attention with a view to reimbursement, and said that she much preferred the Wife's evidence in relation to the accrual of the arrears (paragraph 45). This finding led the judge to say that counsel for the Wife had more than persuaded her to exercise her discretion and grant leave to the Wife to enforce the arrears. She reached this conclusion without making any finding regarding the existence or otherwise of special circumstances, although the judge did cover this question in paragraphs 48 and 49.

18. The judge then went on, in my view unfortunately, to comment in paragraph 47 that she accepted a suggestion put forward by counsel for the Wife that section 36 of the Act represented an archaic provision which unfairly put the onus on the parent, in this case the Wife, to bring enforcement proceedings in the event of a failure to pay maintenance in full, such that arrears accrued. The task of the judge is to apply the law as it stands and not to be influenced by one's view of the appropriateness of the law. And a 1974 law can hardly be described as archaic.

19. And the judge then commented in the following paragraph that where a father with income deliberately chooses not to pay amounts ordered by the court, that in and of itself constitutes sufficient special circumstances for the purpose of section 36, seemingly applying the test from the *Cardiff Magistrates* case. That begs the question whether the Husband did indeed have an obligation to pay one half of the rent for the Decatur apartment, representing his share of an agreed educational expense, the main issue which fell to be determined in this case.

20. This approach was maintained by the judge in paragraph 49 of her judgment, where she pointed out that the majority of fathers complied with orders of the court, continuing by saying that it constituted a special circumstance when a parent chooses not to do so. Presumably the judge intended to draw a distinction between those who were unable to comply with orders of the court, and those who could comply but chose not to do so. But she carried on to say that the Husband

should contribute to those expenses which he had agreed to pay pursuant to the terms of the Order, without addressing the real point in issue, which is whether the Husband had indeed agreed to pay the particular expenses which had accrued as arrears, and consequently whether he had an obligation, subject to the exercise of the section 36 discretion, to pay the sums in question.

21. The judge then rightly asked herself the question as to what sums had actually accrued under the Order, and she set out the Wife's updated claim. However, the judge then stated, at paragraph 51, "I do not propose to go through each and every expense", the very task with which she was charged in these proceedings. She did immediately follow that with the important finding that the Husband had confirmed in his evidence that he had agreed to pay 50% of the apartment costs and that the parties equally shared the children's travel costs. But she did not address the fact that by this time the Wife was claiming 100% of the cost of the apartment. Nor did she explain how any agreement to pay the expense of the apartment fell within the terms of the Consent Order. In the paragraphs which followed the judge set out the Wife's position, and referred then to the Husband's evidence that the Wife had tricked him into paying for 50% of the apartment rental, which position the judge rejected. And when she set out the Wife's position in relation to these expenses, she did not give the corresponding detail as to the Husband's position, instead characterising his approach as part of a strategy not to pay, without making any finding as to what his obligations actually were under the Order, before moving on to consider what arrears had accrued pursuant to those obligations, and then to consider whether those arrears should be enforceable pursuant to section 36. Instead, the judge concluded this part of her judgment by saying that the Husband had failed to produce any evidence to show that he could not afford to pay the expenses in question.

22. The judge closed by dealing with the future expenses of the children's tertiary education, and next dealt with costs, including the making of a wasted costs order in relation to a hearing on 22 January 2020, when it was said that the hearing had been adjourned because Mr Hill did not have a practising certificate.

The Grounds of Appeal

23. The first three grounds of appeal make complaint about the judge's language in paragraphs 47 and 48 of the judgment, maintaining that her decision should be set aside because of the judge's criticism of the legislation alone. The grounds next accept that the judge correctly set out the principles to be applied to an application under section 36, while contending that the judge fell into error, and that the circumstances identified by the judge were neither exceptional nor special; they did not, it was said in ground 7, amount to a proper basis for concluding the existence of special circumstances, and argued that the judge had relied only upon the improper reasons given in paragraphs 47 and 48. Ground 8 contends that the judge failed to distinguish between those arrears to which special circumstances should apply and those where they should not. The ground then addresses the table of arrears produced by the Wife at the hearing, set out in paragraph 50 of the judgment, which in broad terms claimed $53,314 for maintenance and the expense of the housekeeper, $125,767.15 for educational expenses, of which $91,246 represented the cost of the Decatur apartment, $7,474 for medical expenses, and $30,044 for travel expenses. On the medical

expenses, there is a reference to an item of $1,188.50 said to have been paid, but that credit does not appear to have been taken into account. The total of $216,599.35 listed by the Wife seems to have been accepted by the judge as the amount of arrears owing, although the judge does not say in terms in the judgment that she accepted that figure. However, in the formal order, the judge uses this figure as representing the total of the arrears, before excluding the amount of maintenance payable in respect of the child A from August 2017 onwards, after A had gone to live with the Husband in Bermuda. In her submissions (paragraph 11.2), the Wife put that figure at $31,428, and seemed to accept that this deduction was appropriate. In any event, there was no Respondent's notice disputing the deduction.

24. The grounds then contend that the Order was not apt to cover further accommodation obtained on the basis that such accommodation was necessary for the child to go to one school, in preference over another school in the same school district, and did not fall within the definition of Educational Expenses as defined in the Order. The grounds next make complaint as to the failure to apply to the court in the event of disagreement. This ground ignores the fact that the Husband accepted that the parties had reached agreement as to the change to the terms of the Order, albeit that such agreement was an "in principle" one only, from which the Husband resiled after he had seen the apartment. The grounds continued (ground 10) to make complaint of the judge's "trenchant criticism" of the Husband throughout her judgment, finding him to have pursued a 'manipulative 6 step strategy' (para 52) and being guilty of 'perceived superiority'. The grounds contend that the evidential basis for these views is not adequately set out in the judgement.

25. The grounds next contend that, having identified, correctly, the principles upon which a court should exercise any discretion under section 36 the learned judge failed to apply those principles to the matter at hand and made a blanket order for which there was no justification.

26. Finally, complaint is made that the learned judge made an order for wasted costs against counsel for the Husband, Mr Hill, without giving him an opportunity to put his position to the court, depriving him of an ability to put his case, and thereby breaching the rules of natural justice. I should note that such an application was made by Ms MacLellan for the Wife, during the course of her closing submissions, and the transcript shows that Mr Hill responded to the application, albeit relatively briefly. So Mr Hill certainly had the opportunity to, and did, object to the making of a wasted costs order against him. Ms MacLellan's application was made in respect of a hearing on 22 January 2020, before the Registrar, sitting as an acting judge, and was based on the fact that Mr Hill did not have a practising certificate at the material time. The application started without Mr Hill being present, and when he did appear and appreciated that the Registrar was to deal with the matter, he made an application that she recuse herself, on the basis that she had been an associate attorney with the firm that had acted for the Wife at the material time. Having heard argument, the Registrar did recuse herself the following day, so it is not at all clear how the issue of Mr Hill's practising certificate or lack thereof affected the hearing of 22 January. Rightly or wrongly, in terms of whether he ought properly to have been heard, the fact is that he was heard, and the recusal had nothing to do with the practising certificate issue.

The English Authorities

27. There are no Bermuda authorities which deal with the basis upon which the court should grant an application for leave to enforce arrears more than 12 months old. Hence it is instructive to have regard to the English authorities dealing with equivalent legislation.

28. The starting point is the judgment of Sir John Donaldson MR in the case of *Russell v Russell* [1985] 1 FLR 465. He made it clear that "the mere fact that the person liable to pay the maintenance is an irregular or reluctant payer is not an unusual circumstance justifying departure from the rule", citing *R v Camberwell Justices ex parte Pattison and Dickens*, a 1984 judgment of Sir John Arnold P. Although the judge made the comment appearing at paragraph 48 of her judgment, referred to in paragraph 19 above, in the context of a person with the ability to pay, who chose not to do so, this passage would suggest that the judge's conclusion that failure to pay in and of itself can represent "special circumstances" cannot be supported. Referring to the philosophy underlying the rule, the Master of the Rolls commented (page 473) that where a complainant had waited for a period before seeking enforcement of the order, the courts should take account of the extent to which the complainant had sought to assert her rights. That paragraph was quoted in the judgment of Thorpe J in *H v H* [1993] 2 FLR 35, a case to which the learned judge was referred, and is significant in the light of the judge's comments in paragraph 36 (e), set out in paragraph 13 above.

29. The case from which the judge set out the governing principles, at paragraph 35 of her judgment, is *Charilaou v Charilaou* [2000] WL 1212893, in the judgment of Munby J. He remitted the case to the justices, saying at the end of his judgment that it would no doubt be helpful for the justices to ask themselves these three questions:

> *(i) How should we exercise our discretion to enforce these arrears? In particular,*
> *(ii) Are there any special circumstances which would justify our enforcing arrears that became due more than one year prior to the commencement of the enforcement proceedings? Only if the answer to this question is Yes can arrears more than one year old be enforced.*
> *(iii) Is there evidence which satisfies us that the appellant can now properly pay off the arrears (whether the arrears are more or less than a year old) the particular sum which we have it in mind to order him to pay? Only if the answer to this question is Yes can any of the arrears be enforced.*

30. Finally, I would refer to *Mann v Mann (No2)* [2016] EWHC 314 (Fam), a case in which Roberts J described her first task as being to establish what sum or sums were due. The judge used other phrases beyond "special circumstances" to describe the relevant test, saying at page 318 that there had long been a policy in the courts administering a matrimonial jurisdiction which prevents the enforcement of "stale" arrears unless there is a **sound reason** to allow enforcement, and at page 319 saying that the English equivalent to section 36 "reflects a policy decision that, if a maintenance creditor has not taken steps to enforce arrears which are more than 12 months old, he or she must provide a **good reason** to reach back beyond a year" (emphasis added).

Argument on the Appeal

31. Mr Hill for the Husband referred early on in his submissions to the largest item of arrears in respect of which the judge had permitted enforcement, namely the expense of an apartment in Decatur, Georgia, for which the rent payments from April 2016 onwards led to a claim totalling $91,246. This formed part of the total claim made by the Wife of $216,599.35 to which the judge had referred at paragraph 50 of her judgment, where she said that the Wife had updated the arrears which she had originally claimed in her affidavit, at the hearing. It was then, as I have said, that the judge said at paragraph 51 of her judgment:

> *"I do not propose to go through each and every expense. The largest expense relates to the apartment. During his cross examination the Husband confirmed that he agreed to pay 50 % of the apartment costs and that the parties equally shared the travel costs of the children."*

32. Before explaining the competing positions of the parties in relation to the apartment, it is necessary to explain in a little more detail than contained in paragraph 16 above the reason for the apartment having been leased. The child M had expressed a strong wish to attend a school named Decatur High School. The evidence shows that attendance at this school by M was also advised by a guidance counsellor as being in her best interests. Although the Wife had at one stage believed that the family home was within the necessary catchment area for attendance at Decatur High, this turned out not to be the case, leaving as the alternative (excluding private school, which M did not wish to attend) a school named Druid Hills, which ratings showed was not of the same calibre as Decatur High, and which was, in addition, considerably further away from the family home. The solution which the Wife came to (referred to by Smellie JA in argument as "a necessary fiction") was to rent an apartment within the catchment area. She sent an email to the Husband on 28 March 2016, in which she set out the comparative costs of the private school for which the Husband would be 100% responsible under the Order, and the cost of an apartment which the Husband could use on his visits to see the family. In the email, the Wife put the cost of private education at $19,000, estimated the cost of an apartment in Decatur at $12,000 to $18,000, and estimated the potential savings to the Husband by reason of avoiding the expense of hotels, and a saving in respect of the storage of some of his personal possessions, at between $4,200 and $6,500. On this basis, the Wife estimated the net savings when comparing the cost of the apartment to the cost of private school fees as between $7,500 and $11,200. The principle was that by the stratagem of renting an apartment, M would be able to attend the school she wished, and there would be a significant saving to the Husband, at least when compared to the cost of private education. And while there was no contemporaneous documentation to memorialise the agreement, both parties were clear in their evidence that there had been an agreement made at about the time when the apartment was rented that the cost of the apartment should be divided 50 / 50.

33. The email which the Wife sent to the Husband referred to securing a suitable apartment "with his blessing". Although the Husband was said to have initially agreed to the scheme "in principle", Mr Hill submitted that what was agreed was dependent on his blessing, and this was never given. In due course I will come to the parties' positions in the written and oral evidence, but suffice to say at this stage that M has attended Decatur High until now, when she is in her final year. The cost of the apartment which the Wife originally secured is not immediately clear, no doubt because,

as the Wife explained, not all of the exhibited material made its way into the record. Paragraph 23 of the Wife's affidavit of 23 September 2019 referred to the cost of this apartment being $69,450 for the first three years, or approximately $2,000 per month. The document at page 248 of the record indicates a very similar figure of $69,457 for the period from April 2016 to March 2019 (including a charge for electricity). There were in fact three more apartments rented with a view to achieving some reduction in rent (note, for example the figure of $1,700 per month referred to in the February 2019 email), but the Husband did not at any stage make any payment towards the cost of the apartment. The document at page 248 of the record indicates that the monthly charges for the second, third and fourth leases were estimated to total $1,650, $1,700 and $1,800 respectively. Neither the Husband nor M ever used the apartment as once envisaged.

34. In the event, when the Husband went to Georgia for the first time since the apartment had been rented, on or about 12 April 2016, he was not happy with the apartment, principally, it would seem, because he believed that the Wife was using it for her business. He also felt it was much more than was required, even though the cost was not a great deal more than the top of the range which the Wife had given in her email. It was on this basis that Mr Hill submitted that there was no agreement which could be characterised as an educational expense under the provisions of the Order. He emphasised that there was no documentation supporting this expense on a contemporaneous basis (the first documents referencing any payment for the apartment were the 9 January 2019 claim for expenses, and the Wife's email of 25 February 2019 – see pages 24 to 30 and 130 of the record). As noted in paragraph 16 above, there was in fact an email in July 2018 which stated the monthly cost of the apartment and referred to the Husband's agreement to pay half. The February email referred only to the payments due for January and February of 2019, whereas the January 2019 document lists amounts of $29,625 and $59,250 in respect of an item styled "M School/Apt" in respect of the period from 2008 to 31 December 2018. So the figures in that document were calculated on the basis of both a 50% and 100% contribution towards the apartment's cost. In relation to the sums claimed as due in January 2019 (pages 24 to 30 of the record), Mr Hill submitted that these amounts had never previously been demanded, and that there had been no previous demand for rent. As I have said, there was an email in 2018 which referred to an agreement to pay 50% and which can be treated as a claim that payment should be made in accordance with the agreement.

35. In response to a question from the President, Mr Hill accepted that, assuming special circumstances, the parties could agree a change from the Order, but said that the parties could not change a non-educational expense into an educational one. If, he submitted, there had been an agreement regarding the expense of the apartment, recovery for any amount due would have to be pursued separately from any recovery under the Order. He did not accept that it could be treated as room and board under clause 7 of the Order.

36. In relation to special circumstances, Mr Hill submitted that the only special circumstance found by the judge was contained in her finding at paragraph 48 of the judgment, to the effect that:

> *"I will go further and say that, in a case such as this where a father, with income, deliberately chooses not to pay such amounts ordered by the Court, is in and of itself a sufficient special circumstance for the purposes of Section 36."*

37. In relation to the deduction of maintenance in respect of A, Mr Hill said that although the judge had said that she would give the Husband credit, she had not done so. In fact, this does seem to have been accepted by the judge – see paragraph 23 above. Paragraph 1 of the order signed by the judge and dated 8 July 2020 gave leave to the Wife to enforce arrears of maintenance from 1 December 2008 through June 2019 in the sum of $216,599.35 and to enforce the arrears that accrued for A from June 2019 to date "excluding the arrears accrued from August 2017 to date which is the period that A resided with the Husband in Bermuda". I take it that the judge intended that exclusion to apply to such of the $216,599.35 as fell within that description.

38. In relation to the claim for medical expenses in the sum of $7,474, Mr Hill said that this amount had not in fact been paid and that the Husband would now do so. He did not accept that any other monies were due.

39. When it came to payment of the arrears, Mr Hill submitted that there needed to be evidence that the Husband had funds with which to pay the arrears, and submitted that the judge was wrong to have concluded that he had in fact loaned money to his company, since there was no evidence to support this finding. But Mr Hill did concede that the affidavit which the Husband swore on 28 August 2020 when seeking a stay of execution demonstrated that he did have funds with which he could make payment, if such were properly ordered.

40. Mr Hill finally dealt with the wasted costs order, about which there is no need to go into detail at this point.

41. Ms Collins, in her submissions, explained the meetings which she had had with the Husband, and said that she had met with him at the Vermont Captive conference over many years. She specifically referred to meetings in 2015 and 2016, although the evidence as to those occasions when she had gone through the spreadsheets with the Husband was limited to August 2017 in Vermont and June or July 2018 in Bermuda, and when her counsel cross-examined the Husband, she started with the meeting in Vermont in August 2017 which the Husband had described in his evidence in chief. So the reference to meetings in 2015 and 2016 appears to have been made in error. She described how those exercises had been undertaken, with her showing the Husband the spreadsheet from her computer, and advised that she had not supplied the spreadsheet figures to the Husband before 2019, when she sent the Husband a document headed Expense Reimbursement Demand, dated 9 January 2019, which document purported to list the arrears. However, on looking at the document one immediately sees (page 25 of the record) that there are two columns, with substantially different figures. The Wife explained that this document had been prepared for settlement negotiation purposes. She confirmed that she did not supply the spreadsheets to the Husband before 2019.

42. In relation to the expense of the apartment, the Wife confirmed that the agreement that she had with the Husband was that he would pay 50%, and that he had never agreed to pay 100%. She went through the items which appear on pages 247 to 261 of the record, which appear to be some of the material put in as Tab 3, see page 191 of the record, which cross refers to paragraph 30 of the Wife's affidavit of 23 September 2019. The Wife confirmed in terms that, as set out between pages 248 and 250 of the record, her claim was for 100% of the cost of the apartment, as the claim appeared at paragraph 50 of the judgment, where the judge repeated the figure of $91,246 in respect

of the cost of the apartment as part of the educational expenses, all as part of the Wife's claim of $216,599.35, which the judge accepted, and which is the figure contained in paragraph 1 of her formal order, albeit subject to the deduction for the period when A had moved to Bermuda and was living with the Husband.

43. In relation to the claim for the apartment expense the Wife referred to the Husband's evidence regarding the 2017 meeting at Tab 9 page 29 of the transcript, when the Husband confirmed that he had agreed with what was being presented, saying "Tidy it up, send all the papers out, and I will pay it." But the Husband's agreement has to be read in context. He carried on to say that when the Wife had arrived in Bermuda for the 2018 meeting "the whole game had changed", because, he said, there were "loads of things" which had not been in the spreadsheet in 2017. The Husband indicated in his evidence in chief (Tab 8 page 16) that "the demands in 2017, plus or minus, were around $30,000 which was the medical bill, a little bit of uplift which was de minimis, it's not a huge amount of money, and a few educational costs which, generally, was fine". And he confirmed that he had agreed to pay that. The Wife also relied upon the fact that the Husband had confirmed (Tab 8 pages 25 and 26) that he had agreed to the apartment arrangement, so that M could attend Decatur High.

44. In relation to special circumstances, the Wife relied upon her repeated attempts to persuade the Husband to settle his obligations, and the fact that she had not been in a financial position to instruct attorneys, a matter to which the judge had referred in paragraph 28 of her judgment (see paragraph 11 above).

45. This may be the appropriate time to refer to post hearing events. The Court had asked both parties to identify where in the evidence on both sides the parties' positions in regard to the apartment had been given. The Wife did so promptly, but also produced a 24 page document which repeats much of the history to be found in other documents in the Record, combined with further submissions. In the event, I did not find anything helpful in this document. Nothing was received from counsel from the Husband.

Findings

46. The starting point, as identified by Roberts J in *Mann* (see paragraph 30 above), is to determine what sums are properly due, a task that the judge should have undertaken. I would propose to undertake this exercise with respect to each of the heads of claim relied upon by the judge in paragraph 50 of her judgment.

Maintenance / Housekeeper - Paragraphs 9 and 10 of the Order

47. The amount claimed for these two items totals $53,314, which figure comes from paragraph 14 of the Wife's affidavit of 23 September 2019, although this is the figure calculated without reference to the deduction which the judge made in respect of the period when A resided with the Husband in Bermuda. The Wife's attorneys calculated the relevant figure to be $31,143 – see the judgment summons at page 354 of the record. I will use that figure. The Wife was careful to apply the US Consumer Price Increase uplift only to the child maintenance and not to the contribution towards the expense of the nanny/housekeeper. The Husband's practice was to combine the two, and make

two payments per year to cover the total due. As indicated in paragraph 14 above, the CPI uplift was something that both parties appear to have overlooked initially, so the question which will arise for the purpose of considering whether special circumstances arise in relation to this head of claim is to ascertain when the first demand for payment in respect of this adjustment came to be made. As the Wife indicated, the spreadsheet which she had shown to the Husband in 2017 on her computer was not sent to him, and neither we nor, apparently, the judge were ever shown this, or indeed the spreadsheet which was shown to the Husband in 2018. As I understand it, the 2018 document was simply the 2017 document with the figures updated, although apparently substantially so, because it was the dramatic increase which caused the Husband to react as he did – see paragraph 43 above. So the total by way of shortfall in the maintenance payments by reason of the failure to make the CPI adjustment amounts to $22,171, ie $53,314 minus $31,143. Of this total, $12,156 appears to have accrued between 2010 and 2015. Thereafter the numbers are hard to follow, since adjustments were made to reflect the fact that the Wife did not claim the full amount for the nanny/housekeeper in the subsequent years, and maintenance for A ceased in mid 2017. But it is worth noting that by 2018 the original annual maintenance of $13,200 per child had risen to $15,480. And so far as I can see, the number of $22,171 appears to be the correct figure for the Wife's claim for the child maintenance shortfall occasioned by the Husband's failure to adjust the maintenance upwards to reflect the CPI adjustment.

Educational Expenses – Apartment – Paragraph 7 of the Order

48. The total figure claimed before the judge in respect of the expenses of the apartment was $91,246, a figure calculated on the basis that the Husband had an obligation to pay the full cost of the apartment. I make the point right away that nowhere in the judgment is the change in the claim from 50% to 100% of the cost of the apartment addressed, much less justified with reference to the terms of the Order. In the early part of Ms Collins' evidence, Ms MacLellan stated her client's position to the judge in these terms (Tab 5 page 19 of the transcript): "… since the filing of the affidavit, and since we're now at this court hearing, Ms Collins has amended her claim in that initially she was just seeking for payment of 50% of the apartment-related expenses for Decatur … and now she's seeking the full amount as being an expense pursuant to the court order in relation to education, and Mr Woodroffe is responsible for 100% of the educational expenses and room and board". And nowhere does the judge explain how she could accept the Wife's figures claiming 100% of the costs of the apartment, while noting the terms of the agreement that the Husband should pay 50%. I would reject the claim based on 100% of the apartment costs.

49. I would also reject the argument that the cost of the Decatur apartment can be said to arise from the room and board provision in clause 7 of the Order. The words "educational expenses" are defined to mean private school fees, tuition, room and board when applicable, books etc. The words "room and board" are clearly to be looked at in the context of the cost of private education, when the child in question is attending boarding school, and when a separate charge is made for room and board. This is the clear interpretation, even when read without the addition of the words "when applicable", which put matters beyond doubt. Quite apart from the unattractive shift away from the claim based on the parties' agreement, which was the basis upon which the Husband was cross-examined, it cannot in my view be said to be the meaning of the Order. It was always presented as the "necessary fiction" described by Smellie JA, and even then was dependent on the Husband's agreement. The Husband never agreed to pay 100% of the apartment's cost, and it was

never the Wife's case that he did. And when Ms MacLellan advised the judge of the changed position during the Wife's evidence, it was not based on the parties' agreement, but on an interpretation of clause 7 of the Order which cannot be sustained. The contemporaneous documents in the form of the Wife's email of February 2019 give one example of how it was always the Wife's case that the cost of the apartment would be shared. And despite the attempt to change the nature of the agreement, the Wife's evidence before the judge was that the agreement was that the Husband should pay 50% of the cost, as indeed the judge found at paragraph 51 of her judgment. The proposal first appears at paragraph 23 of the Wife's affidavit, where she says "I verbally offered to pay for 50% of the cost of the apartment suggesting that I could use the space as my office". That office use seems to have been abandoned by the Wife over time. She carried on to say that the Husband verbally accepted the 50% arrangement and exhibited an email of 12 April 2016, which makes no reference to the agreement. The email that did was the one dated 28 March 2016 referred to in paragraph 16 above, which included the words "with your blessing".

50. Interestingly, when addressing the court, the Wife denied that she was using the apartment as an office, although the Husband took a different view in his evidence. He said that he had believed it was to be M's and his apartment, but "it suddenly turned into her office". That said, the Husband did agree in terms that he had agreed to pay the 50% that would enable M to go to the school of her choice. He recognised that an apartment had to be rented for M to get into Decatur High, although he felt that he'd been "conned" into paying for the Wife's new office. He accepted that the apartment was "probably needed", but felt that a small apartment could have been found in a less fashionable neighbourhood at a much lower cost.

51. It is clear to me that the Husband did agree to the expense of the apartment in principle, as a means by which M could attend Decatur High, and Mr Hill's suggestion that the particular apartment was "never blessed", ie the particular apartment not agreed to by the Husband, cannot really be made out. He knew that M continued to attend Decatur High throughout, and that she did so on the basis of the apartment which the Wife had rented. So, having agreed in principle, he allowed the arrangement to continue, and must have known that M's continued attendance at Decatur High was on the basis of the Wife's stratagem, to which he had agreed. He did not ever put anything in writing to advise that he did not agree the expense, and in my view he cannot now be heard to resile from it. There was an agreement in principle, followed by an acquiescence to the arrangement. It is impossible to be certain whether the spreadsheet on the Wife's computer which she showed to the Husband in August of 2017 included a claim in respect of the apartment rent, since the document was never produced, and indeed the first document containing spreadsheet type contents that was produced, that of 9 January 2019, was clearly not a version of the spreadsheet. But the amount of unpaid maintenance of $30,000 or so referred to by the Husband when the parties went through the spreadsheet in 2017, would seem to be consistent with some figure for the cost of the apartment having been included, as seems to me likely. By that time the Husband's share would have been less than $15,000.

52. That still leaves the question as to whether the agreement that the Husband should pay 50% of the apartment can be said to fit within the terms of clause 7 of the Order, or if it is a separate freestanding agreement. In my view, it must have been contemplated that there would be items of education related expense which needed to be the subject of agreement between the parties. An example would be a school trip overseas which was recreational rather than educational. If agreed,

that would to my mind fit within the terms of clause 7, and I do not see why the agreement to rent an apartment so that M could attend Decatur High, as an alternative to the considerable expense of private schooling, should not be similarly regarded, so as to fit within the educational expenses of clause 7. The clause expressly provides that the Wife shall consult with the Husband on all matters regarding the children's education and the costs incidental thereto in a manner designed to facilitate agreement. It must therefore contemplate that when that happens and agreement is reached, it falls within the terms of the Order. The relevant figure is therefore $45,713, ie 50% of $91,426.

Educational Expenses – Electronics

53. The amount claimed under this head is $19,226, which figure is made up in part by items such as computers and phones, with related items, amounting to about half of the total, and a figure of $9,890 being the total of the monthly bills from Verizon of $63.28, dating from 2013, relating to internet service for A. The Wife said in her evidence that the children submitted their homework online. The items covering computers and the like go back to 2010, with the first two items being a computer for the children and miscellaneous items such as keyboard and software. These first two item total $3,118, and there is also an item from 2014 for the cost of further laptops for the children in the amount of $2,874.

54. I would accept that these items fall within the terms of "purchase of a computer and other necessary educational equipment" used in clause 7. Whether all items can be recovered at this point in time is another matter.

Educational Expenses - Other

55. The amounts listed total $14,808.55, but this comes to $15,295.15 when an airfare of $486.60 is added. In any event, the first item claimed is for $8,933.55, said to be for a pre-college course at the College of Creative Studies. Then there is the airfare, and lastly, two items for "evaluation costs" totalling $5,875. These are the figures appearing in the judgment as representing the Wife's updated claim for arrears, accepted by the judge. Unfortunately, different figures appear elsewhere in the record. For instance the claim appearing in Ms MacLellan's letter of 11 July 2019 as "the total owing" pursuant to the Order amounts to $152,614, of which $3,950 is the figure listed for M's evaluation/counselling. The Wife's affidavit says (paragraph 17) that she paid almost $4,000 for M's tutoring, and that she treated M's assessment expense of $3,000 as being a medical expense rather than an educational one, for which $1,500 is claimed. Then in paragraph 18 of her affidavit the Wife claims a half of the evaluation cost of $3,200 in 2017, so $1,600, and next, in paragraph 19 the Wife lists an item of $1,700 for counselling expenses, saying that the Husband's share is $850. She puts the total at $7,900, with the Husband's half share at $3,950.

56. In short, the figures are very hard to follow. It makes more sense to try to follow them from the table the judge set out, and the pages in support to which the Wife referred when addressing the court. I would put the claim at $15,295.15 for the College of Creative Studies items listed at page 261 of the record, including $486.60 for the related airfare, together with $5,875 for the evaluation costs. And I would accept that these items fit within "other necessary incidentals" contained in clause 7 of the Order. I would accept that a private expense which was incidental to a child's

education was not disqualified from counting under clause 7 because the education to which it was incidental was at a public school. I emphasise again that this exercise is concerned only with fixing the amount, and not finding in regard to their recovery.

Travel Expenses – Paragraph 11 of the Order

57. The medical expenses were the subject of agreement, and so I move to the last item, the travel expenses, where the amount claimed was $30,044. In support of this claim, the Wife referred to the table appearing at page 260 of the record. However, this covers the cost of travel for both children, the Wife, the nanny, and, strangely, one item for the Husband. But the wording of clause 11 of the Order is that the Husband shall pay the cost of only the children's travel, even when accompanied by the Wife or a third party. So the amount properly claimed for travel is limited to the amount of $19,116. That puts the total claimed by the Wife which properly fall within the terms of the Order at $112,095.15.

Special Circumstances

58. I now move to consider which of those items should be recoverable bearing in mind the provisions of section 36 of the Act. It is common ground that the test to be applied is whether there exist "special circumstance" which would justify an order for the payment of stale arrears, the second of Munby J's questions in *Charilaou*. While I note that Roberts J used the terms "sound reason" and "good reason" as being what was needed if the party seeking enforcement of arrears wished to recover arrears which were more than 12 months old, I would prefer to use the special circumstance test, as the judge did, or at least purported to do. There is probably no difference between the two.

59. Mr Hill contended in argument that it was necessary to consider whether special circumstances existed in respect of each item claimed, and I would agree that such an exercise is necessary where, as in this case, the different items claimed accrued at very different times. So I now turn to review the various items listed above, with a view to finding whether it is appropriate to order their recovery.

60. And I bear in mind that the Wife's case was that she had gone through the items making up the arrears with the Husband and he had agreed them, but had failed to make payment. However, the first occasion when such an exercise had taken place was in August 2017. She also said that she did not have the means to take enforcement proceedings at an earlier stage, although it is to be noted that the document produced in January 2019 with a view to enforcing, or at least settling, the claim for arrears was prepared with the aid of a third party who was presumably paid for assisting.

61. Before turning to the different items of claim, I should refer to the manner in which the judge addressed the issue of special circumstances. She had set out at paragraphs 48 and 49 of her judgment those matters that she viewed as special circumstances, without actually saying that that was the test to be applied, but she clearly regarded that as being the case. She said at paragraph 44 of the judgment that she accepted the Wife's evidence in regard to the efforts she had made to secure reimbursement, and concluded that paragraph by saying that she accepted the Wife's

evidence that once it became clear to her that the Husband had no intention of repaying the monies owed pursuant to the Order, she took immediate steps to commence enforcement proceedings.

62. That is not quite correct. The Wife took her enforcement proceedings only following the issue of the Husband's summons of 5 April 2019 in which he sought a declaration that the Wife could not enforce the stale arrears prior to 1 April 2018. The Wife's summons seeking enforcement was dated 25 July 2019. The judge also said that she preferred the Wife's evidence in relation to the accrual of arrears, but she did so without undertaking any detailed analysis of how those arrears had accrued, and as I have indicated above, in regard to the largest item claimed, the reimbursement for the payment of rent on the apartment, the judge did not delve into any detail as to the terms of the agreement between the parties, or how this fitted within the terms of clause 7 of the Order, and did not make any reference to the astonishing change of position when the Wife's claim moved from the 50% of the rent which she had claimed at all times previously, to an amount of 100%, for which there was no legal justification – see paragraph 48 above.

63. The judge then described the provisions of section 36 as being archaic, a word to which Mr Hill understandably took exception. It was in my view quite wrong of the judge to use that word in the context of a relatively recent piece of legislation, and to say, as she did in paragraph 47 of the judgment, that the section "unfairly puts the onus on the parent who is caring solely for the children and receiving child maintenance, to bring enforcement proceedings". As I have said above, the judge's task is to apply the law as it stands.

64. Neither do I think that the judge was right to say, as she did in paragraphs 48 and 49, that where a father with income deliberately chooses not to pay such amounts as ordered by the court, that in and of itself represents special circumstances permitting enforcement beyond 12 months. That not only ignores what the Master of the Rolls said in *Russell*, but it is particularly inappropriate in a case where the Husband was disputing the amount claimed, and the judge herself had not determined what amount was in fact due, and in the end awarded 100% when at most 50% was due.

65. All of that leave this court with no alternative but to address for itself whether special circumstances arise in respect of each of the amount of arrears claimed.

Maintenance and the CPI adjustment

66. It is common ground that the CPI adjustment did not appear in written form until the claim appeared in the document which the Wife produced dated 9 January 2019 which appears at page 27 of the Record, and which appears again in the Wife's affidavit, with a slightly lower claim. But the starting point is the Wife's evidence that she sat down with the Husband in Vermont and went through the spreadsheet she had prepared with him. And for the avoidance of doubt, I reject the suggestion made by the Wife in submissions that these meetings had started in 2015 and 2016. She said in her evidence that when he had visited Atlanta for the purpose of access on previous occasions, he had been unwilling to do the exercise. While the Wife stated in her evidence that one of the items in the spreadsheet was maintenance, she made no express reference to the CPI adjustment until cross-examination, when the Wife said, with reference to the April 2015 letter (see paragraphs 13 and 14 above), that she did not need to get into the details of the increase of the

CPI or other details. Then she said (Tab 6 page 16 of the transcript) that she brought up the CPI increase on multiple occasions, while conceding that she had never done so in writing. She also said that the Husband had said at one point that the CPI was negative.

67. In his evidence the Husband referred to the 2017 meeting in the terms set out in paragraph 33 above, which made a passing reference to the uplift, which was described as being de minimis. Nothing was said about the Husband's failure to apply the uplift on a current basis in his evidence in chief, but in cross-examination the Husband said "We knew there was some (inaudible) with the CPI index, which was very small, because the first three or four years, there was virtually no (uplift), so it wasn't a lot. It was a small amount of money I was quite happy to pay".

68. It does therefore appear to me that by August 2017 the Husband had recognised that his maintenance payments had been short by the amount of the CPI increase. He could very easily have made the necessary calculation, and corrected the position at that time, but he chose not to do so, and indeed he continued to make payments at the unadjusted level. In the circumstances, I would agree that the Wife has made out special circumstances in respect of this head of claim, and would allow her to enforce the sum claimed of $22,171.

The Apartment Expenses

69. I have found these to be $45,713, and they run from the time when the apartment was first rented in or about April 2016. I have found that they are likely to have featured on the Wife's 2017 spreadsheet, but the first breakdown of the amounts claimed appears at pages 248 to 250 of the record. The amounts claimed include electricity, and total approximately $2,300 per month until August of 2017, when they reduce to approximately $1,700. They then reduce again to approximately $1,500 per month in October 2019. The change in 2017 appears to represent a move to a one bedroom apartment.

70. So the claim goes back only two years from the date of April 2018. Given that the Husband must have been aware of the continuing need for an apartment to be rented to enable M to attend Decatur High, and the Wife's evidence of going through spreadsheets with him in 2017 and 2018, I think the Wife's case that efforts were being made to recover these arrears is made out, particularly when the Husband's evidence regarding the 2017 agreement is considered – see paragraph 43 above. In those circumstances, I would hold that special circumstances apply to the recovery of this amount.

The Claim for Electronics and Related Items

71. As indicated in paragraph 53 above, some of these items go back to 2010, and there is a major expense in August 2014, almost 7 years ago. There is no evidence that recovery for these items was sought in the 2017 spreadsheet, and in those circumstances, I would not allow for recovery of any items incurred before 1 April 2018. Three of the remaining four items cover the cost of phones, but given the evidence that homework assignments were sent via phone, I would accept these items, which total $1,708.

The Other Educational Expenses

72. The Husband's evidence was that he did not support the choice of school which M was attending when she had the earliest of the tests done, and did not consent to the evaluations and reports being undertaken. When cross-examined on the detail, the Husband said that he remembered very little of it, since it was "a long time ago". That is the problem which naturally arises when a parent waits, in the one case, ten years before seeking enforcement. So I would exclude the claim for the 2010 evaluation, in the sum of $2,675, but allow the 2017 claim for $3,200. The next item is for the sum of $8,933.55, which amount was incurred between 2014 and 2018. The Husband's evidence was that he did not find the reports to have any value.

73. But again, many of these items are old, dating back to 2014 and 2015. There is no evidence that any claim was made for them before 2017, even assuming that they featured on the spreadsheet at that time. I would allow only those items incurred since 2015, which items total $3,071.87. I would not allow the airline cost claimed here, which dates back to 2010. So the total sums accepted amount to $6,271.87.

The Travel Expenses

74. These date back to 2008, more than 12 years ago, and run through to 2016. The Husband recognised that the Wife had assisted greatly with the cost of travel with the use of her frequent flyer miles, but I simply do not see how these costs can be allowed on the basis that special circumstances arise for their recovery, when there is no evidence that the Wife sought their recovery before 2017, even assuming that they featured on the spreadsheet at that time. But by the time of the hearing, even the most recent travel expenses were more than three years old. I would not allow recovery of any of these expenses.

Total

75. I calculate the total of those items allowed as being $75,863.87.

Wasted Costs

76. This aspect of matters can be dealt with relatively briefly. The simple fact is that although the proceedings on 22 January 2020 were ultimately of no benefit, so that the costs could be said to have been wasted, the reason for that had nothing to do with whether Mr Hill did or did not have a practising certificate on the day in question. The reason for that day's hearing being lost was because, on finding out that the designated judge was to be the Registrar, in an acting capacity, Mr Hill made an application that she should recuse herself, an application to which the judge acceded. Although the judge made reference in paragraph 60 of her judgment to the Registrar recusing herself, she nevertheless made a wasted costs order. She should have appreciated that the issue of Mr Hill's practising certificate was not the cause of the day's hearing being lost. I would set aside that order.

Conclusion

77. In the circumstances, I would allow the appeal, and substitute an order for leave to enforce $75,863.87 of the stale arrears, in place of the figure of $216,599.35 found by the judge, albeit subject to the adjustment of $31,143 mentioned in paragraph 47. I would also set aside the wasted costs order directed towards Mr Hill. I would invite counsel for the Husband to draw up an order giving effect to this judgment.

Costs of the Appeal and Below

78. It may or not be that offers were made during the course of these proceedings, since there were references made to those, and in those circumstances, I would invite the parties to make written submissions within 21 days in respect of costs, both in relation to the appeal and in the court below.

SMELLIE JA:

79. I agree with the judgment and reasoning of my Lord Bell. I will add only brief comments in relation to perhaps the most topical issue, that relating to whether the expenses for the Decatur Apartments may be regarded as an educational expense within the meaning of paragraph 7 of the Order.

80. This, as Bell JA explains at paragraphs 51 and 52, depends on whether the husband had agreed that the acquisition of an apartment was necessary to allow for M's attendance at Decatur High.

81. To my mind, it is clear from the husband's evidence that he had agreed to the arrangement but sought subsequently unilaterally to resile from it out of displeasure at learning that W was using the apartment as an office (transcript Tab 8 pp 26-28):

> Page 25 lines 5 – 10 "*I had agreed, sight unseen, that we had some place that would get M to go to that school and I had agreed to do so…*
>
> *I wanted the best for my daughter …*"
>
> Page 26 lines 2 – page 28 line 19 (in cross-examination): Q: "*I'm putting this to you.. that an apartment of some sort needed to be rented in order for M to get into Decatur…*
>
> *A: "My answer is yes, I agree."*
>
> ……
>
> Q: *So the fact that you could live there was a bonus. It needed to be paid for. And what research did you do to see what other options there were available before this apartment was rented in what you said was a tight timeframe?*
> *A: Uh, none because I lived in Bermuda and, uh, (the Wife) takes charge of almost everything as you might have noticed.*
> *Q: Right. Because you live in Bermuda and you're a busy reinsurance broker, and you don't have a lot of time, correct --- is what you said?*
> *A: Yes.*

> *Q: Right. So - - so, in fact what happened when you got (to) Decatur and you saw the place, and you saw office furniture in it, you decided that you did not agree with that choice of apartment, and you decide you would not pay for any rent. That's what happened. So you left (the Wife) to pay for the full apartment rental for M to return to Decatur High School.*
> *A : I believed that I'd been suddenly (conned) into paying for (the Wife's) new office. The - - all the office had moved, um, this place, it had a fashionable address, her business card suddenly said this on it, and I'd been set up yet again to pick up the tab .. for her company…*
> *Q: Right, So, did you have that discussion with, uh (the Wife) , I didn't think you were gonna be using it as an office? I think it should – I could have found somewhere cheaper, I will pay one half of what I think is an appropriate amount. Did you have - - did you do that – say that to her?*
> *A: I certainly showed my displeasure at the time .. and left and never spent a night there.*
> *Q: Right. And never paid a penny –*
> *A: No.*
> *Q: .. for an apartment for your daughter to attend a high school*
> *A: That's true."*

82. Those questions and answers must be considered in the context of paragraph 7 of the Order which provided that "*the Respondent (ie: the Husband) shall pay the private educational expenses of the two children of the family until they complete their secondary education.*." And "*Educational expenses is defined to mean private school fees, tuition, room and board when applicable, books, airfare, pocket money and other necessary incidentals… The Petitioner shall consult with the Respondent on all matters regarding the children's education and the costs incidental thereto in a manner designed to facilitate agreement between the parties in relation to such matters " [emphasis added]*.

83. Thus, it was within the contemplation of the Order that the parties could agree a further necessary incidental educational expense such as the acquisition of an apartment and that there would be reasonable consultation between them to that end.

84. There is no suggestion that the requirements of paragraph 7 of the Order were not satisfied. The Wife consulted with him and the Husband agreed to the acquisition of the apartment "*sight unseen*"; albeit he asserts that this was only "*in principle*" and subject to his "*blessing*". The apartment was a necessary incidental educational expense. He left the acquisition to her as he was away in Bermuda and too busy to engage in that process himself. At the time there was no objection that the apartment was too expensive, this was left to her discretion. And the 50/50 split of the cost as proposed by the Wife was accepted by the Husband.

85. It was after the event of its acquisition (it is unclear how long after), and upon his arrival at the apartment that the Husband sought to resile from the agreement, out of what must fairly be described as a sense of umbrage at being "*set up again to pick up the tab*".

86. In circumstances where he was called upon to pay only one-half the rent in an amount which would have, in any event, resulted in significant net savings to him, this was not a reasonable response. The Husband was obliged at least to attempt to renegotiate the arrangement with which he had already agreed. His daughter's place at Decatur High, deemed essential both by himself and her mother as necessary for her education, depended on a reasonable outcome. He was aware, despite his show of displeasure, that the arrangement would continue and that the Wife would be obliged to continue to meet the expense.

87. In my judgment, it would simply be unconscionable to allow the Husband, on the basis simply as he asserts, that he had agreed only *"in principle*", to renege upon the commitment he had given. This, as Bell JA has found, was a commitment to meet the expenses of an apartment on the 50/50 basis. The Husband's agreement to do so, "*sight unseen*", allowed the Wife to acquire the apartment which in turn enabled the enrollment of M at Decatur High. This was an arrangement which he knew required a commitment for four (4) years while M would attend there. It required more than a mere "show of displeasure" to have relieved him of an obligation which affected not only his own interests (in the outcome positively) but those too of his daughter, M, whose best interests he was obliged to consider.

CLARKE P:

88. I agree with the judgments of my Lords.