In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2018 No: 109

BETWEEN:

C. A.

Petitioner

and

M. A.

Respondent

RULING

Interim Spousal Maintenance; Interim Child Maintenance; Variation of Consent Order; Change in Financial Circumstances; Reliance on Without Prejudice Correspondence; Failure to Provide Full and Frank Disclosure

Date of Hearing: 14 October 2020
Date Draft Circulated: 5 March 2021
Date of Ruling: 12 March 2021

Simone Smith Bean of Smith Bean & Co for the Respondent
Alma Dismont of Marshall Diel & Myers Limited for the Petitioner

RULING of Registrar, Alexandra Wheatley

INTRODUCTORY

1. The Petitioner and the Respondent were married on 27 October 2006. The Decree Nisi was pronounced on 25 January 2019 and made absolute on 11 March 2019. The parties had a long marriage of almost 13 years. There are three children of the family.

2. The Respondent filed her Notice of Application for Ancillary Relief on 3 June 2020 along with a Summons ("the Application"). The Petitioner also filed a Notice of Application for Ancillary Relief dated 17 August 2020 and was consolidated with the Respondent's Application for Ancillary Relief as per paragraph 1 of the Order dated 25 August 2020.

3. A hearing had previously been set down for interim spousal and child maintenance which was listed for hearing on 21 October 2019. However, the parties were able to reach an agreement; the terms of which are set out in the Consent Order dated 29 November 2019 ("the Consent Order"). The Consent Order provided the following sums to be paid by the Petitioner to the Respondent:

    (i) $3,173 monthly representing the following expenses: mortgage of the former matrimonial home ("FMH") where the Respondent resides with the children of the family ($2,300); Belco ($350); land tax ($31); landscaping ($200); house insurance ($167); water ($50); and doctor's co-pay ($75).

    (ii) $2,500 for child maintenance. This was backdated to 1 July 2019 and to continue to be paid on the 1st of each month until further order of the Court.

    (iii) $1,000 for spousal maintenance. This was backdated to 1 September 2019 and to continue until 1 November 2020.

    (iv) The sum of child maintenance was subject to review upon the Respondent "*becoming gainfully employed*".

4. The Respondent is seeking the following relief:

    "*(a) That the Petitioner shall pay interim spousal maintenance to the Respondent in the amount $1,500 per month.*

    (b) That the Petitioner shall pay interim maintenance for the three minor children of the family [names left out for anonymization purposes] in the amount of $1,500 per month this equates to $500.00 per month per child.

    (c) That the issues of ancillary relief be set down for hearing forthwith.

    (d) Costs of the application to the Respondent."

5. However, during the hearing Mrs Smith Bean clarified the Respondent is actually seeking for all payments to continue as per the Consent Order, save for the interim spousal maintenance which the Respondent is seeking to be increased to $3,500 per month. Therefore, in total, the Respondent is seeking payments from the Petitioner in the sum of $9,173 per month for her and the children's financial support.

PRELIMINARY ISSUE

6. Mrs Dismont for the Petitioner wished to rely on "without prejudice save as to costs" correspondence during the hearing. She submitted the reliance of these documents was to show not only the sums of monies which had been proposed during negotiations which resulted in the parties entering into the Consent Order, but also to evidence the Respondent negotiated in "*bad faith*". The allegation being the Respondent had negotiated in bad faith as she had not disclosed her employment during the negotiations. Further, Mrs Dismont submitted as the matter had been concluded as an agreement was reached, the correspondence could be considered by the Court.

7. Mrs Dismont relied on *Atkin's Court Forms (Volume 15), Disclosure and Inspection*. She drew my attention to the following excerpt:

> "*…There are various exceptions to the without prejudice rule, such as where there is unambiguous impropriety or where a party has been negotiating in bad faith, or where without prejudice communications would form part of the factual matrix in construing a concluded agreement…*" [Emphasis added]

8. The principles of "*bad faith*" and the facts forming part of the "*factual matrix*" are the principles which Mrs Dismont submitted went to the crux of being able to rely on the without prejudice correspondence. She stressed a large portion of the negotiations leading to the agreed terms of the Consent Order was directly surrounding the Respondent's employment position. At the time the parties were negotiating, the Respondent was in fact employed without the knowledge of the Petitioner.

9. Further, Mrs Dismont relied on the case of *A* v *A* [2016] Bda LR 2. A principle set out in *A* v *A* is that without prejudice correspondence can be relied on when the matter has been concluded as an agreement was reached. At paragraph 30, Hellman J, stated as follows:

> "*30. In the present case, in order to investigate whether the Petitioner's allegations of material non-disclosure are well founded it was necessary for the Court to examine various items of correspondence between the parties which were sent prior to the ancillary relief hearing and were marked "without prejudice save as to costs". As this was not a costs hearing, I could not rely on the "save as to costs" qualification to do so. However, the parties acquiesced to this course. And in any event, the correspondence was admissible for this purpose by analogy with the principle that evidence of without prejudice negotiations is admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. As authority for that principle, see Unilever Plc v Procter & Gamble Co [1999] EWCA 3027 per Robert Walker LJ at 2444 E.*" [Emphasis added]

10. Mrs Dismont reiterated there is a provision in the Consent Order for child maintenance to be reviewed upon the Respondent "*becoming gainfully employed*". She emphasized this wording can only be interpreted as being necessary as it was believed the Respondent was unemployed at that time. Mrs Dismont argued it was essential not only for the without prejudice to be relied on as evidence to support the position there was not full and frank financial disclosure, but also in order to compare the amounts previously being sought by the Respondent. Ultimately, Mrs Dismont submitted the without prejudice correspondence shows there was no disclosure of the Respondent's employment; i.e. there was misrepresentation.

11. Mrs Smith Bean for the Petitioner was able to do little to challenge the authorities presented by Mrs Dismont. She argued the Respondent was merely attempting to use the without prejudice correspondence to make an application "*through the back door*" to set aside the Consent Order. Mrs Smith Bean further submitted the Respondent should not have actually have been considered to be engaged in "*gainful*" employment as she was employed on a fixed term contract which did not fall within the definition of being "*gainfully*" employed.

12. I accepted it was necessary to have sight of the correspondence given the purported misrepresentation/financial non-disclosure of the Respondent. There was no other way to make this determination which is a key proponent in the legal principles which need to be considered in this application. Therefore, I ruled Mrs Dismont was able to rely on the without prejudice correspondence.

THE FACTS

Respondent's position

13. The Respondent relies on her first affidavit and corresponding exhibit sworn on 2 June 2020 ("the Respondent's Affidavit"), her affidavit sworn on 25 August 2020 ("the Respondent's Second Affidavit") as well as her Third Affidavit and corresponding exhibit sworn on 8 September 2020 ("the Respondent's Third Affidavit") as her evidence in this application.

14. The principle which the Respondent relies on to support a variation in the Consent Order is there has been a change in her financial circumstances. The Respondent was employed on a twelve month employment contract which came to an end on 31 August 2020. Therefore, if she were not to receive an increase in spousal and/or child maintenance she would be unable to support herself and the children of the family.

Income

15. The Respondent's income was a substantial point of contention. Mrs Smith Bean confirmed the Respondent was no longer receiving any income as her employment contract dated 1 October 2019 ("Employment Contract") came to an end on 31 August 2020. Therefore, the only income the Respondent is receiving is the payments made by the Petitioner in accordance with the Consent Order.

16. The Respondent was earning approximately $3,900 per month from her Employment Contract. Mrs Smith Bean contended the increased sum of spousal maintenance by $2,500 to $3,500 per month was being sought as it was more representative of the Respondent's previous salary.

17. Mrs Dismont submitted there was no basis for which the Respondent has sought this increase given her lack of disclosure of her income during the negotiations. Additionally, the Petitioner's position is that the varied monthly sum is arbitrary and not based on the Respondent's actual expenses. Mrs Dismont also relied on the fact that during the negotiations between Counsel (via without prejudice save as to costs correspondence) to agree the terms of the Consent Order, the Respondent only sought $350 per month for spousal maintenance.

18. Counsel for the Respondent accepted the Respondent had not disclosed her employment position during the negotiations; however, she pointed out that she was not Counsel for the Respondent at that time. Mrs Smith Bean attempted to validate the Respondent's non-disclosure as the Respondent only considered her employment to be "*temporary*" as it was only a twelve month contract. The conclusion being the Respondent would not have been considered to be "*gainfully employed*" at that time. Mrs Dismont vehemently dismissed this position. She submitted that any employment whether full-time or part-time and for any period would be considered to be "*gainfully employed*". Furthermore, she stressed it would have been nonsensical to include a provision in the Consent Order for spousal maintenance to be reviewed upon the Respondent obtaining "*gainful employment*" if she was in fact already employed at that time. Mrs Dismont also emphasized that any negotiations for financial provision would take into consideration any income earned by both parties. She reiterated the Respondent did not disclose her income at any time during the negotiations.

19. As a consequence of the Respondent's non-disclosure, Mrs Dismont forcefully argued, the only change in financial circumstance since the Consent Order is that the Respondent is no longer positively benefiting from her maintenance payments due to her employment ending. She averred the Respondent has in fact been put in a superior financial position compared to the Petitioner as a direct result of her non-disclosure. Mrs Dismont highlighted various balances in the Respondent's bank accounts:

a.	BNTB as at 3 August 2020	$18,107.60
b.	BNTB as at 3 September 2020	$15,031.41
c.	Clarien as at 31 July 2020	$6,413.65

20. Mrs Dismont noted the Respondent made a transfer to her father in the sum of $9,479.92 on 27 July 2020 (posted on 3 August 2020). Mrs Smith Bean submitted this was repayment of monies loaned to the Respondent by her father. There is no evidence presented by the Respondent to support she obtained a loan from her father. Mrs Dismont highlighted that had the Respondent not transferred the sum of money to her father, as of 3 August 2020, the Respondent's total sum of savings was approximately $33,913. Mrs Dismont further noted it is of paramount significance the Respondent's Application seeking the variation of the Consent Order was filed on 25 August 2020, which was just shortly prior to her having this significant sum of savings. Therefore, the Respondent's position that the

monthly maintenance sums paid by the Petitioner are "*woefully inadequate*" was "*offensive and not made out on the evidence*".

Expenses

21. Paragraph 51 of the Respondent's Affidavit set out her "*personal expenses*" as follows:

Legal Fees	$16,426.87
Medical Insurance	$1,030.00
Dental procedure	$791.00
FMH Painting and Maintenance	$1,210.00
Bates	$1,699.00
One Communications	$745.00
Island Cleaning Service	$105.00
Bermuda Custom Mechanical	$2,913.00
Total:	**$22,737.37**

22. The Respondent further listed her household expenses at paragraph 52 of her Third Affidavit:

Groceries	$4,000.00
Gas	$250.00
Care Items/Clothes	$500.00 (spouse and children)
Cleaners	$150.00
Car maintenance	$250.00
Legal fees	$1,000.00
Medical Insurance	$1,030.00
Household (Misc. Maintenance)	$350.00
Life insurance	$131.00
Cellphone	$100.00
Internet	$95.00
Car insurance ($1,976 p/a pro-rated)	$164.67
Car License ($1,972.00 p/a pro-rated)	$164.33
Total:	**$8,185.00**

23. Mrs Smith Bean noted this list of expenses was not exhaustive as it did not include any of the Respondent's personal expenses. She noted it also did not take into account the Respondent having to pay for her own medical insurance. No evidence was provided as to the monthly sum medical insurance would be or in relation to any other personal costs for the Respondent. Mrs Smith Bean reiterated the Respondent's need for the increase in spousal maintenance to have stability as she is no longer employed.

24. Mrs Dismont referred to without prejudice correspondence between Counsel which led to the agreement of the terms of the Consent Order. In correspondence dated 17 May 2019, she noted the Respondent was only proposing she be paid $350 per month in spousal maintenance. Mrs Dismont questioned why the Respondent would now be seeking to receive $3,500 per month. She submitted there is no rationale and no evidence provided to support the Respondent's obtaining an increase in maintenance.

25. It further highlighted by Mrs Dismont that if the Respondent was granted the relief she is seeking, the Petitioner would be paying the Respondent $9,173 per month which is representative of over three quarters (3/4) of his monthly income. Mrs Dismont further submitted the Respondent has not provided evidence not only to support the monthly expenses she purports to incur, but neither has she provided any evidence to support the $3,500 monthly spousal maintenance she is seeking.

Petitioner's position

26. The Petitioner relied on his affidavit sworn on 16 July 2019 with attached exhibits ("the Petitioner's First Affidavit") as well as his third affidavit sworn on 28 September 2020 ("the Petitioner's Third Affidavit").

Income

27. The Petitioner earns on average, approximately $12,000 net per month. The Petitioner provides major medical insurance for the children of the family. In addition to this salary, the Petitioner jointly owns a property that was purchased prior to the marriage from which he receives (after payment of the mortgage secured against the property) $2,380 per month. This represents half of the surplus rental income. Historically, and throughout the marriage, the Petitioner has not used the surplus rental income for his benefit, but rather leaves this money in the bank account held with the other property owner to cover land tax, insurance and any maintenance costs which may arise. Thus, Mrs Dismont submitted the income the Petitioner receives from this property should not be considered.

28. Mrs Smith Bean argued the Petitioner's rental income should not be excluded despite how he has previously treated this income. She submitted it is income available to him, so there is no reason for it to be excluded as a source of income. Mrs Smith Bean drew attention to the bank account balance for the funds where the rental income is deposited as being approximately $32,000 as of 16 July 2019.

Expenses

29. Paragraph 25 of the Petitioner's Third Affidavit set out his updated current expenses as follows:

Rent	$2,200.00[1]
Loan for Legal Fees (CaribCash)	$1,000.00

[1] This sum was amended in the hearing from $2,500 to $2,200.

Food/groceries	$1,000.00[2]
Legal Fees	$1,000.00
Belco	$200.00
Clothing	$50.00
Home Internet	$100.00
Car gas	$150.00
Life insurance	$434.00
Car insurance	$38.00
Car and bike license	$100.00
FMH expenses (as per Consent Order)	$3,173.00
Child maintenance	$2,500.00
Spousal maintenance	$1,000.00
Total:	**$12,945.00[3]**

30. The Respondent did not challenge the Petitioner's expenses in any of her affidavit evidence. Counsel for the Respondent accepted this was accurate. However, Mrs Smith Bean did challenge the Petitioner's rental expense as being excessive. Mrs Dismont disputed this assertion as the Petitioner also requires to live in accommodation which is suitable to care for the children of the family. He had been inhibited from having the children more often due to his living circumstances and it was unfair for him to continue to do so.

31. Mrs Smith Bean further submitted that the parties experienced a high standard of living during the marriage. She averred the Petitioner has more than enough income to support the Respondent in the quantum which is being sought. It was quickly raised by Mrs Dismont that whilst the Court may take into account the parties' "lifestyle" during the marriage, the reality is that in cases such as this it is nearly impossible to meets the needs of two homes with just one source of income. Further, Mrs Dismont disputed the parties relied solely on the Petitioner's income during the marriage as the Respondent had been employed frequently throughout the marriage.

The law

32. Section 35 of the Matrimonial Causes Act 1974 ("the Act") provides the Court with the statutory jurisdiction to vary an order in relation to ancillary relief applications. Section 35 sets out the following:

> "***Variation discharge, etc., of certain orders for financial relief***
>
> 35 *(1) Where the court has made an order to which this section applies, then subject to this section, the court shall have the power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.*

[2] This sum was amended in the hearing from $1,500 to $1,000.
[3] This was the new total which was accepted based on the amendments.

(2) This section applies to the following orders:

...

(b) any periodical payments order;

....

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates."

33. In the case of *A v A* [2016] Bda LR 2, Hellman J summarized at paragraph 26 of his judgment set out the legal principles which must be given consideration for an application to vary as follows:

> "*26. ...Where, as in the present case, the order is very recent, the Court is unlikely to exercise that jurisdiction unless there is a good reason to do so, e.g. because there has been a material change in circumstances or material non-disclosure by one of the parties. If the Court does decide to reopen the order, then it may do so in whole or in part, giving such weight to the existing order as it sees fit.*" [Emphasis added]

34. If it is accepted there has been a material change in financial circumstances, there is statutory obligation to have regard to all the components set out in Section 29 of Act. When deciding what financial orders made under Sections 27 or 28 of the Matrimonial Causes Act 1974 ("MCA"), regard should be had to all the components set out in Section 29 of the MCA. The first consideration is given to the welfare of the children of the family. When assessing "needs" courts will have regard, in particular, to the matters set out in section 29(2):

> *"29 ...*
>
> *(2) Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(d), (e) or (f), (2) or (4) or 28 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say—*
>
> *(a) the financial needs of the child;*
> *(b) the income, earning capacity (if any), property and other financial resources of the child;*
> *(c) any physical or mental disability of the child;*
> *(d) the standard of living enjoyed by the family before the breakdown of the marriage;*
> *(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained;*
>
> *and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1)(a) and (b), just to do so, in the financial position in*

which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him." [Emphasis added]

35. The financial means of the parties must also be considered. The factors to be examined are set out at Section 29(1) as follows:

> "*29 (1) It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters -*
>
> *(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
> *(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
> *(c) the standard of living enjoyed by the family before the breakdown of the marriage;*
> *(d) the age of each party to the marriage and the duration of the marriage;*
> *(e) any physical or mental disability of either of the parties to the marriage;*
> *(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contributions by looking after the home or caring for the family;*
>
> *.....*
>
> *and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.*" [Emphasis added]

36. Mrs Dismont submitted if a determination was made that there has been a change in financial circumstances, the Court does not have a duty to carry out the exercise of considering each factor set out in Section 29 afresh. Mrs Dismont relied on the case of *Morris* v *Morris* [2016] EWCA Civ 812 in support of the principles which should be considered in an application for variation as well as there not be a requirement to revisit the statutory factors. Paragraphs 90 and 92 of *Morris* v *Morris*, state as follows:

> "*90. Further, although not referred to during the course of the hearing, the overriding objective requires the court to deal with cases proportionately. Thus, although section 31(7) requires the court to have "regard to all the circumstances of the case", this is not the same as requiring the court to undertake the section 25 exercise de novo…*
>
> *…*

> *92. The court has "enormous flexibility" to determine the "nature" of the substantive hearing. This includes, as Mr Duckworth accepts, focusing on the relevant factors and in my view also, where appropriate, conducting a light touch review. Specifically, to require the court to undertake the exercise de novo would be contrary to the overriding objective and the obligation for a case to be dealt with proportionately…*" [Emphasis added]

37. Counsel further relied on *A* v *A* to show the factors which should be applied where there was alleged material non-disclosure during the period the parties were negotiating the terms of the Consent Order. Paragraph 27 states as follows:

> "*27. The leading case on non-disclosure in family proceedings is Jenkins v Livesey [1985] AC 424 at 435G. For present purposes, the relevant principles were stated by Lord Brandon at 437 H – 438 C and 445 G – 446 A.*
>
> > *"I stated earlier that, unless a court I provided with correct, complete and up-to-date information on the matters to which, under section 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection. It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material to the present case) owed a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full and frank disclosure in proceedings of this kind has long been recognized and enforced as a matter of practice. The legal basis of that principle, and the jurisdiction for it, are to be found in the statutory provisions to which I have referred.*
> >
> > *My Lords, once it is accepted that this principle of full and frank disclosure exists, it is obvious that it must apply not only to contested proceedings heard with full evidence adduced before the court, but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further inquiry by the court. If that were no so, it would be impossible for a court to have any assurance that the requirements of section 25(1) were complied with before it made such consent orders.*
> > *…'"*" [Emphasis added]

Findings

38. This case is unusual in that whilst the Respondent has experienced a change of financial circumstances as she is no longer employed, the Petitioner would have believed there had been no change given the Respondent's non-disclosure of her employment at the time of entering into the Consent Order. It was not until August 2020 the Petitioner received verification from the Respondent of her employment since October 2019. The Respondent's employment contract was fixed to end in November 2020. Therefore, at the time of this hearing, the Respondent was employed.

39. I do not accept the Respondent's position that she did not believe she would have been considered to be "*gainfully employed*" during the term of her twelve month contract (between October 2019 to November 2020). Given the content of the correspondence between Counsel leading up to the agreed terms of the Consent Order, it was clear the intent behind there being a provision to review the terms of the Consent Order when the Respondent obtained "*gainful employment*" meant any employment whatsoever. It is completely irrational that "*gainful*" employment would only mean when the Respondent obtained employment which was not for a fixed term, was only part-time or the like. Furthermore, given the parties continuous correspondence speaking to issues of income and expenses, it is difficult not to come to any other conclusion than the Respondent deliberately hid her employment from the Petitioner.

Conclusion

40. The reality, as is the case when there is a breakdown of any marriage and there are children of the family, the parties now have to financially provide for two separate homes to ensure the needs of the children are met. In this instance, one party is not currently in a long-term employment position which requires the income of the other party to support both households. Having said this, the Respondent has qualifications and employment experience which I believe she can use to obtain employment quite easily. There is no reason why she should not make every attempt to secure employment whether it be short-term or long-term as soon as possible. Indeed, she had secured a twelve month contract subsequent to the divorce proceedings commencing.

41. I fully have considered all of the affidavit evidence and submissions made by Counsel. The law is clear on how to determine an application for the variation of a Consent Order as well as interim maintenance.

42. Applying my findings of fact to the legal principles, I will not grant any increase of interim spousal maintenance payments or child maintenance payments to the Respondent. I do not accept there has been any change in financial circumstances which would justify any variation of the Consent Order. In fact, I accept Mrs Dismont's submission that the Respondent intentionally benefitted from the payments she received in accordance with the Consent Order in a manner which was not intended by the Petitioner. The Respondent deliberately omitted to disclose her true financial position. Her misrepresentation of this clearly demonstrated she negotiated in bad faith. There is little doubt that had the Respondent disclosed her true income position in 2019, the Petitioner would not have agreed the terms of the Consent Order.

43. The payments of interim spousal maintenance being paid to the Respondent as per the terms of the Consent Order, which came to an end on 1 November 2020, shall not be extended any further. Further, the total sum of payments made to the Respondent in the form of spousal maintenance as per paragraph 4 of the Consent Order (a total sum of $14,000), should be accounted for and considered in the determination for the substantive application for ancillary relief.

44. I heard Counsel as to costs at the conclusion of the hearing. I find that given the Respondent's litigation conduct, she shall be responsible for the costs of this application on

a standard basis, to be taxed if not agreed. However, these costs shall be accounted for by way of set off or any such other manner in which the Court sees fit in the final determination of ancillary relief. Failing agreement between Counsel as to the sum of costs to, the Petitioner has leave for the costs to be taxed before the final hearing.

45. I invite Counsel for the Respondent to prepare the order reflecting the terms of this ruling for my review and consideration.

DATED this 5th day of March 2021

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ALEXANDRA WHEATLEY
REGISTRAR OF THE SUPREME COURT