

# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION

2015 No: 15

TANYA MCELROY

Appellant

-v-

MONTGOMERY NEARON

Respondent

## EX TEMPORE JUDGMENT

(In Court)

Date of hearing: June 26, 2015

Mr. Jai Pachai, Wakefield Quin Limited, for the Appellant  
The Respondent in Person

### Introductory

1. The Appellant appeals by Notice of Appeal dated May 15, 2015 against the decision of the Magistrates' Court on December 19, 2014 whereby the Family Court (Wor. Nicole Stoneham, Chair) following a hearing on November 4, 2014 made An Order in material terms as follows:

“

(1) *The Order of this Court dated the 26<sup>th</sup> February 2014 is hereby varied in that paragraphs 3 and 4 are hereby discharged;*

(2) *Mr. Nearon shall hereinafter pay, via an Attachment of Earnings (Bermuda Monetary Authority), the sum of three thousand dollars (\$3000) per month directly into the Collecting Office of the Magistrates' Court, until further Order. This shall commence 1<sup>st</sup> January 2015....”*

2. The Order that was varied was an Order that was made under the Maintenance Orders (Reciprocal Enforcement) Act 1974 by way of enforcement of Orders granted by the Circuit Court of Montgomery County, State of Maryland, USA dated 14<sup>th</sup> August 2013, 5<sup>th</sup> December 2013 and 14<sup>th</sup> January 2014 respectively. Those Orders, or certainly the last of those Orders which was the relevant payment Order of the Maryland Court, was registered in Bermuda on or about January 24, 2014.
3. The February 26, 2014 Order, seemingly by consent, ordered, again so far as is material:

“

(1) *The sum of \$7,084.00 representing the maintenance sum for February 2014 shall be paid directly into the Collecting Office of the Magistrates' Court on or before 7<sup>th</sup> March 2014;*

(2) ....

(3) *The maintenance sum of \$7,084.00 per month, representing half of the Respondent's current gross monthly earnings, shall be paid via an Attachment of Earnings Order (Bermuda Monetary Authority) directly into the Collecting Office of the Magistrates' Court...*”

4. The Respondent to the present appeal applied to vary that Order in May 2014 and the application was heard in the family Court on or about December 19, 2014. The issue which was joined, with Mr. Sanderson appearing at that hearing on behalf of the Appellant, was whether or not the Family Court had power to vary an order registered under the 1974 Act.

### **The Family Court Ruling**

5. The Learned Magistrate made the following Ruling which was set out in the Record which was only finalized just before the hearing of the present appeal:

*“...This Court has the power to vary its own Orders. As a matter of law I find that (1) the Order of the Circuit Court, Montgomery County, Maryland, USA dated 14<sup>th</sup> January 2014 (Judge Steven G. Salant) was properly registered in Bermuda; (2) This Court's power to enforce the said Order is provided for in section 7 of The Maintenance Orders (Reciprocal Enforcement) Act 1974; (3) The relevant paragraph of the USA Order provides that 'The Defendant is obligated to pay spousal support to the Plaintiff equal to one-half of any salaries, wages, bonuses, earnings, settlements, commissions, stocks, bonds, pensions or income, including from his current employer, the Bermuda Monetary Authority, for a period of 10 years from the date of separation of the parties' ...”*

6. The Learned Magistrate went on to accept that the Respondent had made out, on evidence, a case for variation of the Order due to a change in his circumstances and proceeded to make the Variation Order to which I have earlier referred.

### **The Relevant Law**

7. The question of the jurisdiction of the Court is an entirely new one to me, and Mr. Pachai confirmed my instinct that these applications are not ones which come before the Court on a regular basis. In fact, prior to hearing argument from Mr. Pachai today and being referred to various authorities (at least one of which had not been placed before the Learned Magistrate, I was of the strong provisional view that she had jurisdiction to vary the Order made by the Maryland Court. However, a closer analysis shows that she erred in reaching that conclusion.
8. The crucial section is section 8 of the 1974 Act and section 8, so far as is relevant, reads as follows:

*“8.(1) Subject to this section, the registering court —*

- (a) shall have the like power, on an application made by the payer or payee under a registered order, to vary or revoke the order as if it had been made by the registering court and as if that court had had jurisdiction to make it; and*
- (b) shall have power to vary or revoke a registered order by a provisional order.*

*(2) The registering court shall not vary a registered order otherwise than by a provisional order unless —*

- (a) both the payer and the payee under the registered order are for the time being residing in Bermuda; or*
- (b) the application is made by the payee under the registered order; or*
- (c) the variation consists of a reduction in the rate of the payments under the registered order and is made solely on the ground that there has been a change in the financial circumstances of the payer since the registered order was made or, in the case of an order registered under section 6, since the registered order was confirmed, and the courts in the reciprocating country in which the maintenance order in question was made do not have power, according to the law in force in that country, to confirm provisional orders varying maintenance orders.”*

9. The other provision of the Act which is crucial is the definition section of 1(1) where the following definition of “*provisional order*” is set out:

“*provisional order*’ means (according to the context)—

(a) *an order made by a court in Bermuda which is provisional only and has no effect unless and until confirmed, with or without alteration, by a competent court in a reciprocating country; or*

(b) *an order made by a court in a reciprocating country which is provisional only and has no effect unless and until confirmed, with or without alteration, by a court in Bermuda having power under this Act to confirm it...*”

10. And so the scheme of section 8, and indeed the Act as a whole, appears to clearly be that the Bermuda Court only has jurisdiction to vary a foreign order that has been registered under the Act in very limited circumstances. Subsection (2) of section 8 sets out two very straightforward circumstances, neither of which applies:

(1) “(a) *both the payer and the payee are for the time being residing in Bermuda*”: here the position is that the payee resides outside of Bermuda;

(2) “(b) *the application is made by the payee under the registered order*”: here the application is made by the paying party.

11. Sub-paragraph (c) is the somewhat wordy subsection which, on careful analysis, provides that a variation based on a change of circumstances in respect of an order which is registered under section 7 can only be varied if the additional requirement is met, namely that the court in the reciprocating country itself has no power to vary the maintenance order which it has made.

12. In this case I am satisfied that the Maryland Court under section 10-312.2 of its Family Law Annotated Code has the power to vary, from time to time, its own maintenance orders. The relevant provision states as follows:

“(a) *Continuing exclusive jurisdiction.-A tribunal of this State issuing a spousal support order consistent with the law of this State has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation...*”

13. Interpretation of the terms of section 8(2)(c) of the Bermuda Act was further elucidated by reference made by Mr. Pachai to the United Kingdom legislation upon which our Act is based. The Maintenance Orders (Reciprocal Enforcement) Act 1972, section 9(2)(c), is in identical terms to our own section 8(2)(c). When one looks at the commentary on this UK statutory provision, which is found at paragraph 591 of ‘*Halsbury’s Laws of England*’, Volume 19 (2011), one sees the following explanation of the effect of these statutory provisions:

*“The court may vary a registered order by means of a provisional order, and must do so unless:*

*(1) both payer and payee are residing in the United Kingdom;*

*(2) the application is made by the payee; or*

*(3) the variation is a reduction in the rate of payments made solely on the ground of a change in circumstances of the payer since the order was made or confirmed, and the courts of the reciprocating country in which the maintenance order in question was made do not have the power under their own law to confirm a provisional order varying maintenance orders.”<sup>1</sup>*

14. The final authorities which were referred to by Mr. Pachai sought to fortify those very forceful submissions and to rebut any suggestion found in the Learned Magistrate’s reasons for decision that the Bermuda courts have the power to do indirectly what the statute does not permit them to do directly. Those authorities do not bear any detailed consideration. But they included *Deane-v- Clayton* (1817) 7 Taunt. 487, and the *dictum* of Burrow J at 507, and also the Lord Chancellor’s observations in *Madden-v- Nelson* [1899] A.C.626 at 627.
15. It seems to me that the Learned Magistrate was not seeking to do indirectly what the statute forbade but merely expressing the view, which accorded with my own provisional view, that in the circumstances of the present case she had the power to vary finally the terms of the registered order.

### **Disposition of Appeal**

16. It follows that the Order which was made must be set aside and it only remains to consider precisely on what terms. Mr. Pachai conceded that there was no justification for seeking to set aside the Order in its entirety. I find no basis for second-guessing the Family Court’s assessment, having heard the parties that grounds for varying the Order do in fact exist. Indeed Mr. Nearon himself, who was not in a position to challenge the legal analysis arrayed against him, did very passionately impress upon the Court the genuineness of the financial difficulties which he has in meeting the existing Order.
17. And so in these circumstances, it seems to me that the only aspects of the Order which need to be set aside are those aspects which purport to be variations of the earlier February 26, 2014 Order. And so the relief which I grant in this case is to set aside paragraphs 1 and 2 of the Order of the Family Court dated December 19, 2014, but

---

<sup>1</sup> This highly persuasive commentary was not apparently referred to in argument in the Court below.

only so far as those aspects of the Order purport to take effect as a final Order and to remit the matter, so modified, back to the Family Court to be dealt with according to law. Section 8(5) of the Act provides as follows:

*“(5)Where the registering court makes a provisional order varying or revoking a registered order the prescribed officer of the court shall send in the prescribed manner to the court in the reciprocating country which made the registered order a certified copy of the provisional order together with a document, authenticated in the prescribed manner, setting out or summarising the evidence given in the proceedings.”*

18. That is a matter which the Family Court will have to take in hand, assuming of course that the parties are not, as might be hoped, able to reach an out of court settlement of the present matter.
19. The final matter I believe is to direct when the Attachment of Earnings Order in the original February 16, 2014 Order should take effect from. I believe the appropriate direction to make is that it should take effect from today, although as a practical matter I am not sure whether that will have any real force. Because in my experience it takes some time for modifications to attachment of earnings orders to ‘bite’, as it were. But that was the direction which was sought by Mr. Pachai and I see no reason to resist it.
20. I will hear counsel as to costs.

[After hearing the counsel and the Respondent]

21. The Appellant is awarded her costs of the appeal.

Dated this 26<sup>th</sup> day of June, 2015 \_\_\_\_\_  
IAN R.C. KAWALEY CJ