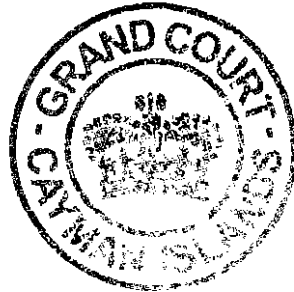


1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**  
3 **FAMILY DIVISION**

4  
5 **CAUSE NO: FAM 86 OF 2002**

6 **BETWEEN:**



7 **DR**

**Petitioner**

8  
9 **AND:**

10 **KR**

**Respondent**

11  
12  
13  
14 **Appearances: Petitioner in person**  
15 **Mr. Conor Fee of Samson and McGrath for the Respondent**

16  
17  
18  
19  
20 **Before: Hon. Mr. Justice Richard Williams**

21  
22 **Heard: 5<sup>th</sup> November 2014**

23  
24 **Ex tempore Ruling: 5<sup>th</sup> November 2014**

25  
26 **Draft transcript circulated: 6<sup>th</sup> November 2014**

27  
28 **Perfected Transcript Judgment provided: 11<sup>th</sup> November 2014**

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34 **HEADNOTE**

35 *Application to vary ancillary relief- child maintenance and payment of school fees –*  
36 *Agreement in relation to application to vary – Agreement reached at arm's length with*  
37 *parties separately represented - Petitioner resiling from agreement –Whether the Court*  
38 *has jurisdiction to make order in agreed terms- factors court should consider when*  
39 *exercising discretion- Whether Petitioner has shown cause why agreement should not be*  
40 *made an order of court- Principle enunciated in Edgar v Edgar (1981) 2 FLR 19.*



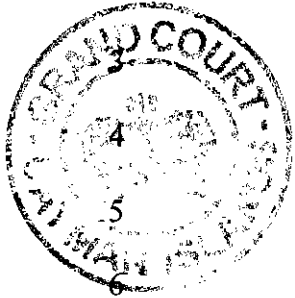
## JUDGMENT

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1. This is an ex tempore ruling, which will enable the parties to have my immediate decision and my reasons for making it. A copy of the transcript of this ruling will be made available to them after it has been perfected. It is not intended to read as a formal written judgement.

2. This is an application, brought by way of Summons dated 6<sup>th</sup> June 2014, for the Petitioner, DR, to show cause why a purported agreement reached by the parties through their attorneys on 12<sup>th</sup> February 2014 and perfected in June 2014 should not be made an order of the Court. The Respondent, KR, also seeks an order for DR to pay child maintenance to her at the rate of US\$1,625 per child in accordance with the terms of the parties' agreement from the March 2014 date set out in the agreement. KR contends that if the agreement is approved then arrears of maintenance for SR amount to US\$4,625 and for BR amount to US\$10,875. DR does not dispute the level of payments that he has actually made, but he does not agree that he is liable to make monthly payments at the rate of US\$1,625 for either child.

3. The purported agreement was reached in proceedings dealing with KR's Summons dated 3<sup>rd</sup> June 2013. KR had brought that Summons as she felt DR was failing in his obligations to properly provide for the children. In that Summons KR sought:



1 (i) an order that DR pay to her monies owing towards the children's school  
2 fees and educational expenses from 2007 to present and pursuant to  
paragraph 9 of the Order of 2<sup>nd</sup> July 2003; or in the alternative an order that  
he pay to her all costs outstanding pursuant to paragraph 9 of the Order  
dated 2<sup>nd</sup> July 2003 in respect of the children's school fees and educational  
expenses since the end of any forbearance by her;

7 (ii) an order that DR recommence forthwith payment of all costs in respect of  
8 the children's school fees and education expenses in accordance with  
9 paragraph 9 of the Order dated 2<sup>nd</sup> July 2003;

10 (iii) a variation of the level of child maintenance provided for in the Order of 2<sup>nd</sup>  
11 July 2003 up to US\$1,750 per child or to any figure the Court deems  
12 appropriate;

13 (iv) a variation of paragraph 10 of the Order of 2<sup>nd</sup> July 2003 to make DR  
14 responsible for paying all of the children's uninsured medical, dental and  
15 optical expenses; and

16 (v) an order for DR to deliver up all historical tapes, recordings, surveillance  
17 reports, transcripts, electronic records and any other materials relating to  
18 KR. Also an undertaking from DR that he will not distribute, disclose or  
19 otherwise use any of the above reference materials relating to KR.

20

21 4. Although no formal application has been made by DR, he argues that any order  
22 grounded on an agreement that is found to have been reached between the parties  
23 should be "*varied*". Although phrasing it as being a variation application, in reality

1 what DR seeks is the setting aside of any order based on the agreement or to  
2 persuade the Court not to approve the agreement and not to make it into an order.

3

4 5. I hope that the parties will not be offended if from now on I refer to them for  
5 convenience as DR and KR.

6

7

## BACKGROUND

8

### THE PARTIES

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### THE PROCEEDINGS

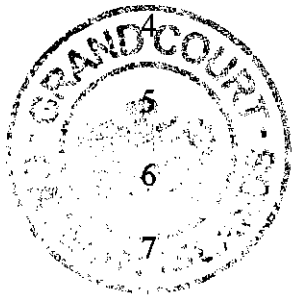
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7. On 24<sup>th</sup> May 2002 the husband filed his Petition for the dissolution of the marriage.  
On 3<sup>rd</sup> April 2003 an order was made proving the Petition.





1 8. The hearing to resolve the issues surrounding ancillary relief came before  
2 Henderson J. on 2<sup>nd</sup> July 2003. Following an oral ruling, a comprehensive order  
3 was made and perfected. For the purposes of this hearing I need not set out the full  
4 terms of that Order. However, I highlight that paragraph 8 of the Order required  
5 DR to pay child maintenance of US\$1,250 per child per month until the relevant  
6 child reached the age of 16 or completed full-time education (up to the age 21).  
7 Paragraph 9 of the Order required DR to pay all of the costs in respect of school  
8 fees and education expenses until the relevant child reached the age of 16 or  
9 completed full-time education (up to the age 21). Paragraph 10 of the Order  
10 required DR to keep KR and the two children and beneficiaries on his health  
11 insurance policy and pay all premiums.

12  
13 9. The Decree of Dissolution of Marriage was certified by Henderson J. on 21<sup>st</sup> July  
14 2003. Thereafter, DR remarried in 2006 and KR remarried in 2007.

15  
16 10. It appears that in 2007, KR began to pay towards child education expenses. KR's  
17 case is that BR had to change school because she was being bullied. The  
18 background concerning this change of affairs is not agreed between the parties, but  
19 each party was aware of the other's position at the February 2014 hearing.

20  
21 11. On 19<sup>th</sup> January 2012 DR filed a Summons seeking an order that the parties now  
22 equally share the payments due for children's school fees. In that Summons he also  
23 sought an order that paragraphs 1 to 6 of KR's Summons dated 12<sup>th</sup> October 2011



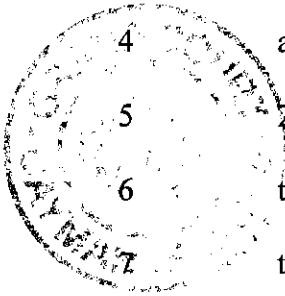
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be dismissed. It is important to note that the dismissal application was grounded on a contention by DR that KR had failed to give full and frank disclosure, the particulars of which were set out in his affidavit sworn on 7<sup>th</sup> February 2014. The content of that affidavit is significant as it clearly outlines the contentions being made by DR at the time of the February hearing, and which he had in mind when any agreement was thereafter reached. DR now seeks to rely again on concerns about KR's disclosure, but this time to set aside any agreement or order that may have resulted from the February 2014 hearing.

12. KR states that she is currently employed on a commission only basis with a property management company, and that in 2013 her income was CI\$30,000. DR contends that her income is greater. DR is a Managing Director of an international bank and in 2003 his annual income was US\$277,000. He has informed the Court during today's hearing that his current base salary is US\$299,000 per annum and that he has received no bonuses this year. DR stated that his position with the bank is uncertain.

**THE AGREEMENT**

13. The parties appeared before Henderson J. on 12<sup>th</sup> February 2014. Both parties were legally represented by experienced Counsel. Henderson J.'s Minute of Order prepared and signed by him after the hearing notes "*order- struck off; counsel will present a Consent Order.*"



1 14. At the outset of today's hearing, DR conceded that the "bones" of an agreement  
2 had been reached by the parties at the February hearing and that the agreement had  
3 thereafter been finalised following further negotiations between the parties. He  
4 accepted, with one proviso, that the draft consent order sent to his attorneys in June  
5 2014 and exhibited to KR's affidavit sworn on 24<sup>th</sup> July 2014 accurately reflected  
6 the terms of the agreement reached. The only issue he had with the draft order was  
7 that it provided that payment of child maintenance would be made into KR's bank  
8 account no later than the first business day of each month, rather than on the second  
9 business day each month. In Court today, KR agreed that the order should read the  
10 second business day of each month. Therefore, based on DR's concession, I find  
11 that a comprehensive agreement had been reached by the parties which was  
12 intended to dispose of the matters raised in the parties' Summonses before the  
13 Court.

14  
15 15. Mr. McGrath represented KR at the February hearing. An affidavit sworn by him  
16 on 8<sup>th</sup> August 2014 has been filed. Mr. McGrath recognises that his status is now as  
17 a witness in these proceedings and quite rightly has handed over the reins of  
18 representation for KR to Mr. Fee. DR does not take issue with the contents of Mr.  
19 McGrath's affidavit and he indicated to the Court at the outset of today's hearing  
20 that, although available to attend, he did not require his attendance at Court for  
21 cross-examination. DR informed the Court that, reading the contents of Mr.  
22 McGrath's affidavit and the documentation outlining the negotiations subsequent to

1 the February 2014 hearing, had led him to now accept that an agreement had been  
2 reached.

3  
4 16. Mr. McGrath stated that the husband had been represented by Mr. Hampson, a  
5 Senior Partner in the firm of Hampson and Company and Ms. McLaughlin an  
6 attorney with the same firm. Mr. McGrath says that discussions had taken place  
7 between Counsel in the lead up to the February 2014 hearing and that these  
8 continued at Court to see if a compromise agreement could be reached on the  
9 outstanding issues. He states that at 9:30 AM both Counsel obtained further time  
10 from the Judge to negotiate to see if agreement could be reached. Mr. McGrath  
11 states that those negotiations occupied the parties for the remainder of the morning,  
12 the parties being located in the two separate conference rooms situated outside of  
13 the Judge's Chambers. The discussions took place between the attorneys in the  
14 corridor and in one of the conference rooms. Mr. McGrath notes that the  
15 negotiations were "*lengthy, protracted, and fairly detailed.*" Mr. McGrath states  
16 that the parties' instructions were taken during the negotiations and the issues were  
17 gradually narrowed. He states at paragraph 7 of his affidavit that the discussions  
18 "*resulted in the parties compromising the various issues in terms of the written*  
19 "*heads of terms which I drew up at court and in the presence of the parties.*" He  
20 said that the document was drafted partly in the presence of KR but primarily in the  
21 conference room in the presence of DR and his attorneys. After that draft document  
22 had been prepared, Mr. McGrath stated that he took his client's instructions on the  
23 same and that she signed it. He then returned to the conference room and read out

1 the contents to DR and his attorneys. Mr. McGrath exhibits to his affidavit a copy  
2 of the handwritten manuscript which has since been typed up and on the whole it  
3 contains terms similar to those set out in the consent draft order exhibited to KR's  
4 affidavit sworn on 24<sup>th</sup> July 2014.

5

6 17. Mr. McGrath indicates that when he read the document to DR that the only aspect  
7 that DR sought to comment on was the mechanics of the payment and repayment of  
8 medical insurance claims.<sup>1</sup> Mr. McGrath recalls that there was a need to clarify  
9 whether KR or DR should submit the claims to the insurance company or how the  
10 reimbursement would be dealt with.

11

12 18. Mr. McGrath contends that, in light of the time of the day, and the limited issue  
13 which needed to be clarified, the parties agreed that he would draft something  
14 which would reflect the parties' understanding about the insurance claim  
15 procedure.

16

17 19. The parties did not attend before Henderson J., as he had retired for lunch. Mr.  
18 McGrath stated that both Counsel informed the Judge's clerk that the issues have  
19 been resolved and that a consent order would be prepared and submitted for the  
20 Court's approval.

21

---

<sup>1</sup> Provision for medical insurance payments is set out in paragraph 6 of the manuscript of the heads of terms.

1 20. On 13<sup>th</sup> February 2014 the first draft of the order was sent to DR's attorneys.  
2 Thereafter a number of "*drafts, re-drafts and related correspondence*" flowed  
3 between the legal representatives. Having regard to DR's concession, there is little  
4 value in my now setting out the detail contained in the correspondence. The draft  
5 order, which DR accepts reflects the terms of the parties' agreement, was provided  
6 to his attorneys on 9<sup>th</sup> June 2014. That order provided for a variation or clarification  
7 of Henderson J.'s Order from 2<sup>nd</sup> July 2003. It provided that:

8 *"2. The parties shall henceforth share equally the cost of the*  
9 *children's school trips.*

10 *3. The parties shall share equally the cost of SR's after-school*  
11 *tuition, the Petitioner will settle his share of such cost by online*  
12 *payment within seven days of the presentation to him of an invoice*  
13 *by the Respondent."*

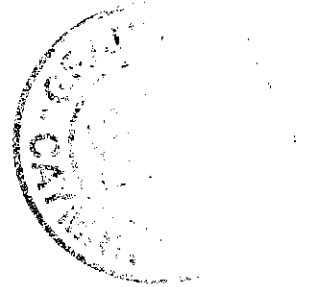
14 *4. Paragraph 9 of the order is varied by the deletion of the*  
15 *following wording:*

16 *"the Petitioner do pay all the costs in respect of*  
17 *school fees and educational expenses. Such fees*  
18 *include clothing, educational costs and books"*

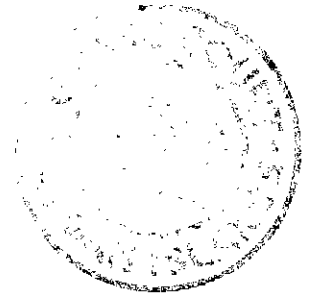
19 *and such shall be replaced with the following:*

20 *"the Petitioner will henceforth pay all of the*  
21 *children's' reasonable education expenses and*  
22 *costs, such expenses and cost to include tuition,*  
23 *books, accommodation (if the children are*  
24 *attending an educational establishment overseas), 2*  
25 *return flights to the Cayman Islands and all*  
26 *reasonably necessary ancillary educational*  
27 *expenses"*

28 *Paragraph 9 of the Order is further varied by the addition of the*  
29 *following clause at the end thereof:*



1                   *“the parties shall decide jointly, and in conjunction*  
2                   *with the respective child, the appropriate*  
3                   *educational establishment that the child shall*  
4                   *attend. In the event that the petitioner is of the view*  
5                   *that the chosen establishment is unreasonably*  
6                   *expensive the parties agree to resolve such issue(s)*  
7                   *by way of mediation with an appropriately qualified*  
8                   *family mediator. If mediation is unsuccessful, either*  
9                   *party is at liberty to set such issue down for*  
10                   *determination by the Grand Court.”*



11                   5. *Within 28 days of the date hereof the Petitioner shall pay to the*  
12                   *Respondent the sum of CI\$30,000 in full and final settlement of all*  
13                   *and any claimed past educational costs.*

14                   6. *Paragraph 8 of the Order is varied by the deletion of the*  
15                   *following figure:*

16                               *“US\$1,250” and the same is replaced with:*  
17                               *“US\$1,625” such sum being payable from 2 March*  
18                               *2014.*

19                   *In addition the following words shall be deleted: “made through*  
20                   *the Court Funds Office” and shall be replaced with: “paid online*  
21                   *to the Respondent’s bank account no later than the first business*  
22                   *day of each month.”*

23                   *The following wording shall be added at the end of paragraph 8 of*  
24                   *the Order: “in the event that a child attends college or university*  
25                   *overseas, the Petitioner shall pay two thirds of this figure directly*  
26                   *to the child’s bank account and one third to the Respondent’s bank*  
27                   *account.”*

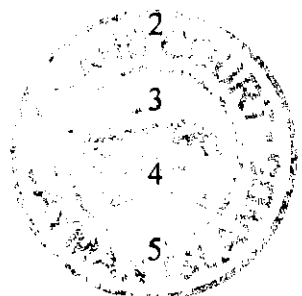
28                   *For the avoidance of doubt, all monies paid to a child under this*  
29                   *Paragraph are deemed to be applied towards the costs detailed in*  
30                   *paragraph 9 of the order.*

31

1           7. Henceforth the parties shall share the uninsured portion of  
2           medical, dental and optical costs for the children as to 75% to the  
3           Petitioner and 25% to the Respondent. If the Petitioner settles a  
4           medical, dental or optical cost for the children, he shall institute  
5           an insurance claim and provide the Respondent with an invoice for  
6           the fee paid, a copy of the cheque provided by the insurance  
7           provider and a copy of the insurance provider's statement of claim  
8           and reimbursement, and a request for 25% of the uninsured  
9           portion. If the Respondent settles a medical, dental or optical  
10          charge for the children, she shall provide the Petitioner with the  
11          invoice and he shall forthwith institute the insurance claim. Upon  
12          receipt of any insurance documentation and a cheque from his  
13          insurance provider, he shall immediately upon receipt, provide the  
14          Respondent with the insurance funds and a cheque for 75% of the  
15          uninsured portion. If there is an unforeseen, major medical, dental  
16          or optical cost, the parties agree to review the terms of this  
17          provision. Upon such review, and if they are unable to agree how  
18          such costs should be apportioned, the parties agree to mediate in  
19          the first instance and if unsuccessful, either party shall be at liberty  
20          to set the matter down in the Grand Court.

21          8. No order as to costs of this summons or the Respondent's  
22          summons dated 12 October 2011.

23  
24   21.   I have outlined the circumstances leading to the agreement and the terms of the  
25          agreement in such detail because DR contends that he felt pressurised and under  
26          duress at the hearing, at a time that he says he was under medication for stress. He  
27          indicated that his attorney may have had personal issues at the time of the hearing  
28          and he was not sure whether his attorney had a "clear head". What is clear from  
29          the above analysis is that the agreement was one carefully reached. The terms of



1 the agreement are very specific and are clearly a consequence of careful  
2 negotiations at Court in February 2014, coupled with further negotiations based on  
3 clients' instructions thereafter. The great detail in paragraph 7 of the draft order  
4 shows that suitable thought was given to resolving the only issue that Mr. McGrath  
5 said needed clarification after the February 2014 hearing. At paragraph 6 of his  
6 affidavit sworn on 25<sup>th</sup> July 2014 DR stated "after some months of negotiations,  
7 the terms of a potentially finalised draft were submitted to Samson and  
8 McGrath....." It is clearly not a rushed agreement, I am not satisfied that it was an  
9 agreement reached under duress. It is an agreement reached by clearly intelligent  
10 litigants, DR holding a very senior position with an international bank, who had the  
11 benefit of experienced Counsel throughout the relevant time.

12  
13 22. As I have mentioned, DR's challenge is not based on whether or not there was an  
14 agreement, for he accepts that there was one. His challenge is grounded on his more  
15 recent belief that the agreement reached is an unfair one. At paragraph 4 of his  
16 affidavit sworn on 25<sup>th</sup> July 2014 he states that "*the truth of the situation is that I*  
17 *have considered my position and I do not want to consent to the order attached to*  
18 *the summons.*" At paragraph 7 of his affidavit DR says that since the hearing he has  
19 "*had a chance to reflect on a number of things recently: the children, what the*  
20 *Respondent previously agreed to (school fees), the Respondent's frivolous and*  
21 *vexatious claims, the Respondent remaining unemployed or even part – time*  
22 *employed, the unnecessary stress caused by this application, legal costs, lack of*  
23 *cordiality, the lack of proper disclosure by the Respondent and my own current*

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<sup>2</sup> My emphasis by underlining.

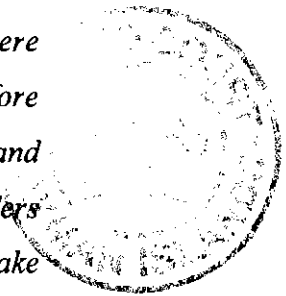
1           *concerns at my place of employment.*” He contends at paragraph 9 of his affidavit  
2           that the children should be taking on more responsibility by finding vacation or  
3           part-time employment and says that “*under the circumstances I have decided not to*  
4           *sign what is put forward as an agreement as at the end of the day I am not happy*  
5           *with it. I do not think it is fair or reasonable and it is clearly very one sided. I also*  
6           *believe that the academic expectations of and for the children are unrealistic and I*  
7           *really do not want to pay for an expensive education, which is most likely not be*  
8           *completed, based on past performance.*” He goes on to say at paragraph 10 “*I*  
9           *understand and respect the Court has discretion to vary an Order provided it is fair*  
10           *and reasonable. In order for an Order to be fair and reasonable one would expect*  
11           *proper disclosure by the respondent, which I submit has not been provided. Critical*  
12           *information is missing, is irrelevant or simply misleading.*”

13  
14   23.   DR appears in person today. Despite this, I have ensured that he has been able to  
15           make full submissions. At the outset of the hearing DR made it clear to the Court  
16           that he wished and was content to represent himself. He also informed the Court  
17           that his former attorneys had been “*fired.*” I note for completeness sake that, even  
18           if he were to contend (which he has not specifically done) that he has received bad  
19           or negligent legal advice leading to the agreement or consent order, that was not  
20           viewed in *Harris v Managhan* (1997) 1 FLR 205 to be a ground for setting aside  
21           the capital elements of the order made in that case.  
22

1   **THE LAW**

2   24.   I accept DR’s submission that the Court, when considering this matter, should have  
3       regard to its statutory function set out in s.19 of the Matrimonial Causes Law  
4       (“s.19”). The Court is not to ‘rubberstamp’ consent ancillary relief orders and is  
5       not, when considering the agreement, to do so in isolation without any  
6       consideration of s 19 factors. As has been aptly observed by Balcombe J. in  
7       *Tommey v Tommey* [1983] Fam 15 (at 21):

8               *“A judge who is asked to make a consent order cannot be*  
9               *compelled to do so: he is no mere rubber stamp. If he thinks there*  
10              *are matters about which he needs to be more fully informed before*  
11              *he makes the order, he is entitled to make such inquiries and*  
12              *require such evidence to be put before him as he considers*  
13              *necessary. But, per contra, he is under no obligation to make*  
14              *inquiries or require evidence. He is entitled to assume that parties*  
15              *of full age and capacity know what is in their own best interest,*  
16              *more especially when they are represented before him by counsel*  
17              *or solicitors.”*



18  
19   25.   This does not mean that the Court must conduct a full-blown ancillary relief  
20       hearing when there is an agreement, but the Court should remind itself that the  
21       agreement should be considered against the backdrop of the s.19 factors. In fact,  
22       during the hearing I brought s.19 to DR’s attention and invited his submissions on  
23       the same.

24  
25   26.   With this in mind I note that in *Xydhias v Xydhias* [1999] 1 FLR 683 Thorpe L.J.  
26       stated at page 691:

1           *“An even more singular feature of the transition from*  
2           *compromised order in ancillary relief proceedings is that the court*  
3           *does not either automatically or unbearably grant the application*  
4           *to give the bargain the force of an order. The court conducts an*  
5           *independent assessment to enable it to discharge its statutory*  
6           *function to make such orders as reflect the criteria listed in section*  
7           *25 of the Matrimonial Causes Law 1973 as amended.”*

8  
9       27.     In *Dean v Dean* [1978] 3 All ER 758 at 767G, Bush J. offers helpful guidance as  
10           to the appropriate balanced approach stating:

11           *“...the court must, in performing its duty under s 25<sup>3</sup> in*  
12           *circumstances where there is an agreement between the parties,*  
13           *adopt the broad rather than the particular approach, on the one*  
14           *hand, the court has a duty under s 25, but at the same time the*  
15           *court has a duty to uphold agreements validly arrived at....”*

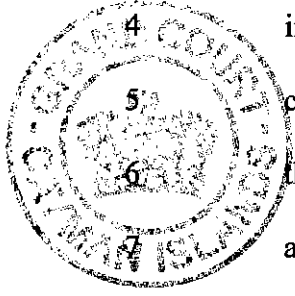


16  
17       28.     When I take a broad approach, having regard to the parties’ respective financial  
18           positions and the circumstances of the case, the terms of the agreement cannot be  
19           said to fall outside of the bands of reasonable orders the Court could possibly have  
20           made in relation to the two summonses. I remind myself that the disputed arrears of  
21           school fees were in the region of \$80,000 and that the parties settled on a figure of  
22           \$30,000. DR’s income has not reduced, in fact it has to a limited degree (in light of  
23           inflation) increased. It is clear that the agreement is one that is in the best interests  
24           of the children, their welfare being my first consideration under s.19.

25  

---

<sup>3</sup> A section with some similarity to s. 19 of the Matrimonial Causes Law.



1 29. KR contends that the Court should rely on the principle enunciated in the seminal  
2 decision of the English Court of Appeal in *Edgar v Edgar* (1981) 2 FLR 19 that,  
3 other than in unusual circumstances, courts will uphold agreements freely entered  
4 into at arm's-length by parties who were properly advised. That if there is a  
5 concluded agreement, it would be wrong for the Court to impose on one or other of  
6 the parties different terms from those which have been incorporated within the  
7 agreement. The Court may of course consider whether there are circumstances  
8 which vitiate that agreement and *Edgar* makes clear that there must be good and  
9 substantial grounds and that there would be an injustice caused if the parties were  
10 held to the agreement.

11  
12 30. In *Edgar* the parties and their solicitors had negotiated an agreement in a  
13 separation deed which contained a clause whereby the wife agreed that if there was  
14 a divorce she would not claim a lump sum or property transfer orders. The husband  
15 did not put pressure on the wife to accept the terms of the deal and did not exploit  
16 his position as an extremely wealthy man. The wife later petitioned for divorce and  
17 applied for financial settlement claiming a substantial capital sum. The judge at  
18 first instance felt able to go behind the agreement and order a substantial lump sum.  
19 However, the Court of Appeal found that the wife had failed to show any reason  
20 why the Court should go behind the agreement set out in the separation deed and  
21 the wife's claims were dismissed.

22

1 31. I do not accept DR's submission that the fact that he is not anywhere near as  
2 wealthy as the husband in *Edgar* means the general principles set out therein carry  
3 less weight in this matter.

4  
5 32. In *Edgar* Oliver L.J. stated:

6 *"...the court must, I think, start from the position that a solemn*  
7 *and freely negotiated bargain by which a party defines her own*  
8 *requirements ought to be adhered to unless some clear and*  
9 *compelling reason, such, for instance, as a drastic change of*  
10 *circumstances, is shown to the contrary."*

11  
12 Oliver L.J. also stated that:

13 *"Men and women of full age education and understanding, acting*  
14 *with competent advice available to them, must be assumed to know*  
15 *and appreciate what they are doing and their actual respective*  
16 *bargaining strengths will in fact depend in every case upon a*  
17 *subjective evaluation of the motives for doing it. One may, of*  
18 *course, find that some unfair advantage has been taken of a*  
19 *judgment impaired by emotion, or that one party is motivated by*  
20 *fear induced by some conduct of the other or by some*  
21 *misapprehension of a factual or legal position, but in the absence*  
22 *of some such consideration as that- and these are examples only –*  
23 *the mere strength of one party's desire for a particular result or*  
24 *the mere fact that one party has greater wealth than the other*  
25 *cannot, I think, affect the weight to be attributed to a freely*  
26 *negotiated bargain."*

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28 33. In the oft quoted passage from the decision. Ormrod L.J. stated:



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*“Under s.25(1) it is the duty of the court to have regard to all the circumstances of the case, and, in particular, to the matters detailed in paragraphs (a) to (g), and to exercise its powers so as to place all parties, so far as practicable, and having regard to their conduct, just to do so, in the financial position they would have been in had the marriage not broken down. The ideal, of course, is rarely if ever, attainable; so, inevitably, in most cases, the phrase “so far as practicable” dominates the issue, modified, where relevant, by conduct.*

*To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.”*

1 34. In *X v X (Y and Z Intervening)* [2002] 1 FLR 508 Munby J. considered the great  
2 weight to be placed on formal agreement freely reached with parties with  
3 competent legal advice. At paragraph 103 he stated that “*the court will not lightly*  
4 *permit parties who have made an agreement between themselves to depart from it.*”  
5

6 35. In *Soulsbury v Soulsbury* [2008] 1 FLR 90 Ward L.J. went further stating at  
7 paragraph 45:

8 “...I accept that if there are negotiations to compromise a claim  
9 for ancillary relief, then there is a duty to seek the court’s approval  
10 as is stated in *Smallman*<sup>4</sup>. But as *Smallman* states, and I do not see  
11 how that authority of this court can be ignored by me, even in  
12 agreement is subject to the approval of the court is binding on the  
13 parties to the extent that neither can resile from it.”  
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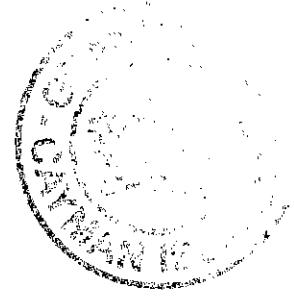
15 Although I do not necessarily adopt Ward L.J.’s observations, it is clear that they  
16 are a further illustration of the importance that the Court of Appeal places on such  
17 agreements.

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20 36. In *Xydhias* Thorpe L.J. at 693B gave policy reasons why agreements should  
21 ordinarily be upheld:

22 “It is well recognised by all experienced practitioners, whether  
23 solicitors or counsel, that contested ancillary relief proceedings  
24 are expensive and by far the most expensive stage of the process is  
25 the trial, preceded by delivery of briefs. There have been  
26 innumerable examples over more than the last decade of cases in

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<sup>4</sup> Refers to the case of *Smallman v Smallman* [1971] 3 All ER 717.

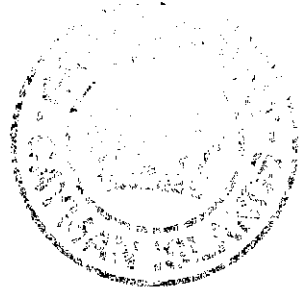


1           *which the legal costs incurred have been quite disproportionate to*  
2           *the assets available for division. This perception has engendered*  
3           *the Caldberbank procedure and more recently the interdisciplinary*  
4           *development of modern procedures designed to excise much of the*  
5           *elaboration and waste that have become the hallmarks of the old*  
6           *procedure. Litigants in ancillary relief proceedings are subjected*  
7           *to great emotional and psychological stresses, particularly as the*  
8           *date of trial approaches. In my opinion there are sound policy*  
9           *reasons supporting the conclusion that the judge is entitled to*  
10           *exercise a broad discretion to determine whether the parties have*  
11           *agreed to settle. The pilot scheme depends on judicial control of*  
12           *the process from start to finish. The court has a clear interest in*  
13           *curbing excessive adversariality and in excluding from trial lists*  
14           *unnecessary litigation. A more legalistic approach, as this case*  
15           *illustrates, only allows the inconsistent or manipulative litigant to*  
16           *repudiate an agreement on the ground that some point of drafting,*  
17           *detail, or implementation had not been clearly resolved. Ordinarily*  
18           *heads of agreement signed by the parties or a clear exchange of*  
19           *solicitors' letters will establish the consensus. Hopefully a case*  
20           *such as this requiring the exercise of the judge's discretion will be*  
21           *a rarity."*

22  
23           Thorpe L.J. went on to state at 692:

24           *"Therefore the purpose of negotiation is not finally to determine*  
25           *the liability (that can only be done by the court) but to reduce the*  
26           *length and expense of the process by which the court carries out its*  
27           *function. If there is a dispute as to whether the negotiations led to*  
28           *an accord that the process should be abbreviated, the court has a*  
29           *discretion in determining whether an accord was reached. In*  
30           *exercising that discretion the court should be astute to discern the*

1            *antics of a litigant who, having consistently pressed for*  
2            *abbreviation, is seeking to resile and to justify his shift by reliance*  
3            *on some point of detail that was open for determination by the*  
4            *court at its abbreviated hearing. If the court concludes that the*  
5            *parties agreed to settle on terms then it may have to consider*  
6            *whether the terms were vitiated by a factor such as material non-*  
7            *disclosure or tainted by a factor within the parameters set in*  
8            *Edgar v Edgar. Finally in every case the court must exercise its*  
9            *independent discretionary review applying the s 25 criteria to the*  
10           *circumstances of the case and to the terms of the accord.”*



11  
12 37. It is clear from all of these authorities that the courts have placed great importance  
13 on agreements reached by parties, especially if they have had the benefit of legal  
14 representation. It has been a consistent approach for a number of years. I am  
15 satisfied that the Court should ordinarily, after considering the s.19 factors, approve  
16 such agreements unless there is very good reason for not doing so.

17  
18 38. In an application to set aside a consent order, the appropriate approach is for the  
19 application to attack the basis of the order itself, and this is founded on one of  
20 several categories which can overlap, namely (i) non-disclosure of material facts,  
21 (ii) fraud and misrepresentation, (iii) supervening events and (iv) undue influence.  
22 Although a consent order has not been made, DR has argued his case in a manner  
23 more akin to a setting aside application. I mention the above categories because  
24 non-disclosure of material facts is the primary ground alleged by DR as a reason  
25 for this Court to set aside a consent order or to refuse to approve the agreement. I  
26 accept that is a ground that may vitiate, particularly if information comes to light

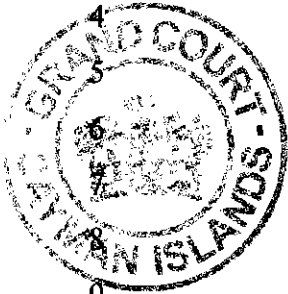
1 after the agreement. Although I note that if the complaining party is partly to  
2 blame, for example, he could have researched more, an order will not be set aside  
3 *Edmonds* (1990) 2 FLR 202.

4  
5 39. However, an issue as to disclosure may not be as significant as it might appear on  
6 the submissions made by DR. This is because these very same issues were raised  
7 by him prior to the hearing in February 2014. In fact they had been aired in his  
8 affidavit and they formed the basis of his summons that were then before the Court.

9 Despite this, it is clear that, at the hearing and during their negotiations, he and his  
10 attorneys was satisfied that they had sufficient disclosure to enable them to  
11 negotiate and reach the comprehensive agreement. The only additional disclosure  
12 issue raised by DR at this hearing is his concern that the children have been on a  
13 number of overseas trips which he questions the ability of KR to pay for from her  
14 disclosed income. KR indicated that the children have been able to take these trips  
15 due to contributions from her husband.

16  
17 40. When reaching my conclusions concerning disclosure issues raised by DR, I am  
18 assisted by the case of *X v X (Y and Z Intervening)* in which Munby J. stated:

19 *“Indeed, says Mr Pointer, this is a case in which, although each*  
20 *party’s position is that the other has failed to make full and frank*  
21 *disclosure, neither spouse has thought it necessary to investigate*  
22 *the other’s finances in detail before reaching agreement. Both, he*  
23 *says, were content to reach agreement on the basis of what they*  
24 *knew. This was in the circumstances an entirely appropriate and*



1 sensible approach. And, he submits, the court should not impede  
2 such an approach.

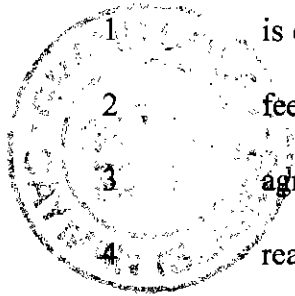
3 I agree. I am considering a *Dean v Dean* [1978] Fam 161  
4 application. In that context, as it seems to me, it is not at the end of  
5 the day vital for me to determine what family is actually worse off  
6 or to reach a concluded view as to the scale of the wife's financial.  
7 What is important, as it seems to me, is that (i) the husband  
8 believed his wife to have access to very substantial resources and  
9 her family to be worth hundreds of millions of pounds, (ii) the wife  
10 and her family saw no reason to seek to persuade him otherwise,  
11 (iii) both parties were prepared to strike a deal on a basis which, if  
12 properly analyse, assume that the wife did indeed have available to  
13 her substantial resources, and (iv) both parties were content to  
14 reach agreement on the basis of what they knew, or thought they  
15 knew, of the others resources<sup>5</sup> and without any detailed  
16 investigation of each other's finances."  
17

## 18 CONCLUSIONS

19 41. There is no dispute in this case that the parties reached the comprehensive  
20 agreement. There is been no change of circumstances since the reaching of the  
21 agreement in June 2014, such that DR should not now be held to the agreement.  
22 Having carefully reviewed the full terms of the agreement I find that it is one that  
23 can be implemented. I am satisfied that it is an agreement reached by the parties  
24 despite any concerns they may have had at the time relating to disclosure. It was an  
25 agreement reached after a full half day of concentrated negotiations at Court in  
26 February 2014 and lengthy negotiations thereafter with experienced Counsel  
27 representing the parties' interests on their instructions. I am not satisfied that there

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<sup>5</sup> My visits by underlining.



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is evidence of material non-disclosure on KR's part. The fact that the husband now feels that the order is an unfair one is not a valid ground for him to resile from the agreement. There must be finality to ancillary relief proceedings and the agreement reached between the parties was reached with that end in mind

42. The agreement was not one made for the benefit of KR, but for the welfare of the children of the marriage, my first concern under s.19. It is clear that it was an agreement reached by both parties taking a sensible and informed look at the state of affairs. I am not satisfied that there are any vitiating circumstances which would cause injustice to DR if he were held to this agreement. Accordingly, I find no good reason to go behind the parties' agreement which was concluded by them in an unhurried manner with the benefit of legal advice.

43. Accordingly, I approve the agreement reflected in the June draft consent order and make it a court order. The terms of the agreement clearly set out the commencement date for the increased maintenance payments to be 2<sup>nd</sup> March 2014. Therefore, DR's increased maintenance obligations under the order commenced at that date. This means that he is responsible for paying maintenance at the agreed level from that time. Therefore, I make an order that he pay what amounts to arrears of maintenance in relation to SR in the sum of US\$4,625. Having received written clarification from UCCI that BR is in full-time education, I order DR to pay what amounts to maintenance arrears in relation from March to date which amount to US\$10,875.

1 **LEGAL FEES/COSTS**

2 **Judge:** Having made that order I must now go on to consider the issue of costs. Mr. (DR)  
3 ordinarily the costs of the application usually follow the event. By that I mean that the  
4 successful party is entitled to recover the costs from the unsuccessful party. However  
5 before I decide what order for costs should be made, I must give you an opportunity to  
6 address me.

7

8 **DR:** My only comment is that this is been battling on from number of years. There been a  
9 number of vexatious matters which had been dropped. There been some suggestions about  
10 nondisclosure from pension funds, requested. From the original summons...

11

12 **Judge:** If it assists Mr. (DR), you need not worry about the historical costs it is only the  
13 costs occasioned by the summons currently before me concerning the agreement and make  
14 it into an order. You will see that agreement which I have approved, and today made into a  
15 consent order, provides that there be no order for costs. So the costs in question are only  
16 the costs relating to the current Summons.

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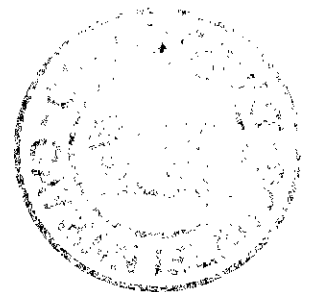
18 **DR:** That helps, thank you.

19

20 **Mr. Fee:** We seek the costs backdated to 10<sup>th</sup> June 2014 and on the indemnity basis.

21

22 **Judge:** This application brought by Summons and this hearing have been necessary due to  
23 the position taken by DR. KR has been successful in her application and therefore is



1 entitled to her costs of the application, which are to be taxed if not agreed. These costs of  
2 those reasonably incurred. I do not feel it appropriate to make an order for costs on the  
3 indemnity basis having regard to the nature of these proceedings and the circumstances of  
4 this case. Costs will therefore be on the standard basis.

5

6 A copy of the transcript of this ex tempore ruling will be made available to the parties. As  
7 it has been spoken into my computer, it will need to be perfected. I hope to have that with  
8 the parties by Friday or early next week. I will then provide a draft to the parties and invite  
9 them to review it to see if there are any errors that may need correction.

10

11 Before I close I would thank Mr. Fee for his able and sensitive handling of the matter. I  
12 would also like to thank Mr. (DR) for the courteous manner in which, as a litigant in  
13 person, he has conducted himself today in what is a potentially emotive matter. This has  
14 been particularly so during the delivery of this ex tempore ruling and our exchanges  
15 thereafter, which I can understand may have been upsetting for him.

16

17

18

19 **Honourable Mr. Justice Richard Williams**  
20 **JUDGE OF THE GRAND COURT**

