

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN**

Cause No: D 80/2006

6 **BETWEEN:**

A. F.



11 **AND:**

R. F.

RESPONDENT

17 **Appearances:**

Mr. Simon Calhaem instructed by
Mr. Jayson Wood of Appleby for the
Petitioner

Mr. Anthony Akiwumi of Stuarts for
the Respondent

25 **Before:**

The Hon. Mr. Justice Charles Quin

26 **Heard:**

13th and 14th January 2011

27

28

Preamble

29

This Ruling is distributed on the strict understanding that in any report of this kind no persons other than the counsel or the attorneys instructing them (and other persons identified by name in Ruling itself) may be identified by name or location and, in particular, the anonymity of the children and the adult members of the family must be strictly preserved.

34

35

JUDGMENT

36

37

38

1. On the 23rd September 2010 the Respondent issued a Summons to discharge

39

paragraph 8 of the Consent Order dated the 6th June 2006.

- 1 3. *The Respondent shall have reasonable and liberal access to*
2 *[CF], the minor child of the marriage, to be agreed between the*
3 *parties and in the event of disagreement, to be fixed by the*
4 *Grand Court.*
- 5 4. *The Respondent shall pay to the Petitioner US\$1,000,000 as a*
6 *one-off, capital lump sum child maintenance payment from the*
7 *proceeds of any property transaction in which the Respondent*
8 *has an interest and/or from his receipt of the proceeds of any*
9 *future inheritance, whichever is earlier. Such capital lump sum*
10 *payment is in respect of all ongoing child maintenance issues*
11 *and is made in respect of all maintenance issues, including the*
12 *cost of secondary and tertiary education and the ancillary costs*
13 *associated therewith.*
- 14 5. *Until such time as the said capital lump sum child maintenance*
15 *payment is made, the Petitioner hereby agrees and accepts that*
16 *the full cost of maintenance for [CF], the minor child of the*
17 *marriage, shall be borne solely by the Petitioner.*
- 18 6. *The Petitioner shall have the right and ability to leave the*
19 *jurisdiction of the Cayman Islands with the child of the marriage*
20 *and to relocate permanently with the child of the marriage*
21 *outside the jurisdiction of the Cayman Islands.*

22 *Matrimonial Finances*

- 23 7. *The Respondent's interest in the former matrimonial home at*
24 *WBBS (sic) 12C 81 is transferred absolutely to the Petitioner.*
- 25 8. *The Respondent shall pay to the Petitioner a capital lump sum of*
26 *US\$1,583,334. US\$250,000 of this amount is represented by the*
27 *transfer of this interest in the former matrimonial home at*
28 *WWBS (sic) 12C 81. The balance, US\$1,333,334, will be paid*
29 *from either the Respondent's proceeds of the sale of the*
30 *Waterford Private Residence Club in Grand Cayman and/or any*
31 *property transaction in which the Respondent has an interest,*
32 *and/or from the immediate proceeds of any future inheritance,*
33 *whichever is the earliest in time, but in any event not later than 4*
34 *years from the date of this Consent Order."*

35

- 36 4. The parties signed the Consent Order sometime in early June 2006. On the
37 13th June 2006, Mr. Justice Henderson called the parties, together with the

1 Petitioner’s attorney, to appear before him. At this hearing, the evidence
2 discloses that Henderson J. required the Respondent to attend and asked him
3 if he had read the Order. The Respondent confirmed that he had read the
4 Order. Furthermore, Henderson J. asked the Respondent if he understood the
5 consequences of the Order and whether he had taken advice as to its content
6 and effect. It appears that the Respondent answered all of the Judge’s
7 questions in the affirmative and, as a result, the Order was approved and
8 placed on the Court file, with copies to be provided to the parties. On the
9 Respondent’s own evidence he states that Mrs. ‘SR’ had looked over the
10 Order and that he, the Respondent, “was satisfied with the content.”

11 5. On the morning of the 13th January 2011, the Respondent raised *in limine*
12 submissions attacking the Petitioner’s application dated the 5th November
13 2010, to strike out the Respondent’s Summons dated the 23rd September
14 2010.

15 6. After hearing extensive argument from both counsel, this Court ruled, during
16 the hearing on the 14th January 2011, against the Respondent’s *in limine*
17 submissions, and concluded that under the practice and procedure as laid
18 down by the Matrimonial Causes Law, and the practice and procedure of the
19 Supreme Court of Jamaica, that this Court did have jurisdiction to consider
20 the Petitioner’s strike out-application, dated the 4th November 2010. I also
21 ruled that the Third Affidavit of the Petitioner, dated the 5th October 2010,
22 was admissible, and that the Court could consider all the evidence adduced
23 by the parties in the agreed trial bundle. Finally, this Court ruled that the
24 Petitioner could also bring her application to strike out within the inherent
25 jurisdiction of the Court.

1 7. In order to properly consider all the points raised by the respective counsel of
2 both parties, it is necessary to provide a chronology of the applications
3 brought by both parties to vary the Consent Order dated the 6th June 2006
4 and their various affidavits filed in relation to the said Consent Order.

5 **Relevant Chronology of Applications, Affidavits and Orders**

6 8. On the 19th September 2006 the Respondent, through his then attorneys,
7 Messrs. Brooks & Brooks, issued a Summons seeking to vary paragraphs 1
8 to 6 of the Consent Order dated the 6th June 2006.

9 9. The Respondent, with the assistance of his attorneys, filed two affidavits
10 dated the 11th October 2006 and the 18th October 2006 respectively, in
11 support of this Summons.

12 10. On the 19th October 2006 Mr. Justice Sanderson ordered that the
13 Respondent's application be adjourned to enable the Respondent to file a
14 new application, and for both parties to file additional evidence/affidavits.

15 11. On the 23rd October 2006, the Respondent, through his attorneys Brooks &
16 Brooks, filed an amended Summons to vary or set aside paragraphs 1 to 5 of
17 the Consent Order. Also, on the 23rd October 2006, the Respondent filed his
18 Third Affidavit in support of his application to vary the Consent Order. The
19 Petitioner filed her affidavit dated the 20th October 2006.

20 12. On the 25th October 2006 Mrs. 'SR' filed an affidavit confirming that she did
21 not represent the Respondent in Cause No. 80 of 2006.

22 13. On the 31st October 2006 the Petitioner filed her Second Affidavit.

- 1 14. On the 2nd November 2006 Sanderson J varied the Consent Order in relation
2 to access and left other matters to be resolved or dealt with at a later stage.
- 3 15. On the 6th March 2007, the Petitioner issued a Summons for directions and
4 for certain issues to be litigated as per the Judgment of Sanderson J., and for
5 a further Affidavit of Means to be filed.
- 6 16. On the 17th April 2007 the Respondent filed a Fourth Affidavit, and on the
7 18th April 2007 he filed, through his attorneys, a re-amended Summons for
8 variation of the Consent Order in relation to the child of the family.
- 9 17. On the 25th April 2007 the Petitioner filed her Third Affidavit.
- 10 18. On the 23rd April 2007 Chief Justice Smellie varied the Consent Order of the
11 6th June 2006, in that he ordered defined access in relation to the child of the
12 marriage. In relation to the Respondent's application to vary his child
13 maintenance obligations, the Chief Justice declined to make a variation and
14 ordered that the Respondent establish a trust fund for the purpose of holding
15 the lump sum payment of US\$1,000,000.00 payable under paragraph 4 of the
16 Consent Order.
- 17 19. The Respondent's Summons was otherwise adjourned and the Respondent
18 was directed to file an Affidavit of Means ancillary to the setting up and
19 funding of the trust fund for the child of the marriage.
- 20 20. On the 9th October 2007 the Petitioner filed an application for the
21 examination of the Respondent and on the 11th October 2007, the Court
22 ordered the Respondent to attend on the 27th March 2008 to be orally
23 examined about the debts owing to him and properly owed by him.

- 1 21. On the 6th March 2008 the Respondent, through his attorneys Brooks &
2 Brooks, filed a Summons in relation to access for the child of the marriage.
- 3 22. On the 19th March 2008 the Respondent filed his Fifth Affidavit.
- 4 23. On the 27th March 2008 the hearing of the Respondent's Summons dated the
5 6th March 2008, and the examination of the Respondent took place before
6 Acting Justice Meeson. Meeson J. ordered the Respondent to produce further
7 documents relating to his financial position and that he be restrained from
8 transferring or otherwise dealing with his legal or equitable interest in a list
9 of properties.
- 10 24. On the 24th October 2008 the Respondent issued a Summons in relation to
11 access to the child of the family. And on the 13th November 2008 the
12 Respondent filed his Sixth Affidavit through his attorneys Brooks & Brooks.
- 13 25. On the 3rd November 2008 the Petitioner filed her Fifth Affidavit.
- 14 26. On the 17th November 2008 the Petitioner filed her Sixth Affidavit.
- 15 27. On the 24th November 2008 the Petitioner filed a Summons for, *inter alia*,
16 the Respondent to pay maintenance as ordered in paragraph 4 of the Consent
17 Order dated the 6th June 2006.
- 18 28. On the 3rd December 2008 the Respondent filed his Seventh Affidavit
19 through his attorneys Brooks & Brooks.
- 20 29. On the 12th December 2008 there was another hearing before Acting Justice
21 Foster, pursuant to the Petitioner's Summons dated the 24th November 2008.
22 Foster J. adjourned the substantive hearing of the Respondent's application to

1 vary the lump sum child maintenance Order, but ordered that the Respondent
2 pay interim child maintenance of US\$2,000 per month until paragraph 4 of
3 the Consent Order was properly funded.

4 30. On the 6th March 2009 the Petitioner filed her Seventh Affidavit.

5 31. On the 13th May 2009 the Petitioner filed another Summons regarding access
6 and maintenance for the child of the marriage.

7 32. On the 6th June 2009 the Respondent filed another amended Summons
8 seeking variations of paragraphs 1 to 5 of the Consent Order in relation to the
9 child of the marriage.

10 33. On the 29th June 2009 there was a continuation of the Respondent's
11 examination as a judgment debtor, and Acting Justice Harrison directed that
12 the Respondent not transfer any of his property or assets.

13 34. On the 9th July 2009 a Consent Order was entered into between the
14 Respondent and the Petitioner in relation to the child's summer travel
15 arrangements.

16 35. On the 14th July 2009 the Petitioner filed an application for the committal of
17 the Respondent based on non-compliance with paragraph 8 of the Consent
18 Order.

19 36. On the 20th July 2009 the Respondent filed his Eighth Affidavit.

20 37. On the 21st and 22nd July 2009 there was a hearing of the Petitioner's
21 Summons dated the 13th May 2009 and the Respondent's Summons to vary
22 the Consent Order dated the 6th June 2006. The Respondent was represented

1 by Brooks & Brooks and the Petitioner by Appleby. Foster J. made a
2 comprehensive Order and, *inter alia*, ordered the Respondent to take all
3 reasonable steps to sell and obtain a sale, within six months, of the parcel of
4 land in Little Cayman, currently valued at US\$277,000, for a net price not
5 less than US\$265,000. Foster J. also ordered that all purchase offers received
6 are to be copied promptly and forwarded to the Petitioner's attorneys.

7 38. On the 28th August 2009 the Respondent filed his Ninth Affidavit.

8 39. On the 11th September 2009 the Petitioner filed her Eighth Affidavit.

9 40. The 10th June 2010 was the final date for the Respondent to pay to the
10 Petitioner the capital lump sum pursuant to the terms of the June 2006
11 Consent Order.

12 41. On the 23rd June 2010 the Petitioner served a bankruptcy notice on the
13 Respondent seeking payment of the balance of US\$1,333,334, referred to in
14 the Consent Order, within seven days. There was still no payment by the
15 Respondent to the Petitioner of any sum.

16 42. On the 3rd August 2010 the Petitioner presented a Creditor's Petition for the
17 Respondent's bankruptcy.

18 43. On the 31st August 2010 Stuarts came on the record for the Respondent in
19 place of Brooks & Brooks.

20 44. On the 17th September 2010 there was a hearing for the issuance of a
21 Provisional Bankruptcy Order, for which directions were given.

1 45. On the 23rd September 2010 the Respondent issued a Summons to discharge
2 paragraph 8 of the Order dated the 6th June 2006.

3 46. On the 4th November 2010 the Petitioner issued a Summons to strike out the
4 Respondent's Summons dated the 24th September 2010 under the inherent
5 jurisdiction of the Court on the ground that the application is frivolous,
6 vexatious and/or an abuse of process of the Court.

7 **Respondent's Position**

8 47. The Respondent contends that he has a good arguable case warranting the
9 Court's statutory discretion to set aside the Consent Order on various
10 equitable grounds including, but not limited to, the undue influence and
11 unconscionable conduct of the Petitioner.

12 48. The Respondent submits in his counsel's skeleton that the Court's power to
13 strike out a litigant's process is one which is discretionary and that it is a well
14 settled principle that this power is one which should be exercised sparingly.

15 49. The Respondent relies on the classic dicta of Lord Herschell in *Lawrence v.*
16 *Lord Norreys* (1890) 15 App Cas 210:

17 *"It is a jurisdiction which ought to be very sparingly exercised*
18 *and only in very exceptional cases."*

19 In addition, the Respondent prays in aid the commentary to the Supreme
20 Court Practice 1999 Volume 1 at paragraph 18/19/27:

21 *"A judicial discretion must be used as to what proceedings are*
22 *vexatious, for the Court must not prevent a suitor from*
23 *exercising his undoubted rights on any vague and indefinite*
24 *principle. The jurisdiction will not be exercised, except with*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

great circumspection and unless it is perfectly clear that the plea cannot succeed.”

50. The Respondent’s counsel submits in his written skeleton that the Respondent’s case raises issues of law and fact, which prima facie stand strong grounds of succeeding. Further, the Respondent submits that, in considering the strength of the Respondent’s case the Court should only be concerned with the evidence given by the Respondent in this matter.

51. The Respondent sets out four grounds on which he seeks to challenge the Consent Order, namely:

- i. Undue influence
- ii. Unconscionable conduct
- iii. The Respondent was not at the material time legally represented sufficiently or at all
- iv. Subsequent events have occurred which have vitiated the basis upon which the Consent Order was made.

52. The Respondent contends that the ultimate resolution of all four issues should be determined at trial, after examination and cross examination of both the Petitioner and the Respondent.

53. The Respondent relies on the Judgment of Millett LJ in *Credit Lyonnais Bank Nederland N.V. v. Burch* [1996] EWCA Civ 1292 in which he stated:

“In such a context the two equitable jurisdictions (to set aside harsh and unconscionable bargains and to set aside transactions

1
2
3
4
5
6
7

8

9

10

11
12
13
14
15
16
17

18

19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40

41

obtained by undue influence) have many similarities. In either case it is necessary to show that the conscience of the party who seeks to uphold the transaction was effected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary, and in either case the Court may, in a proper case, infer the presence of the impropriety from the terms of the transaction itself.”

Millet LJ referred to the decision of Sir John Salmond in *Brusewitz v. Brown* [1923] NZLR 1106 in which Sir John Salmond stated at page 1109-10:

“The law in general leaves every man at liberty to make such bargains as he pleases, and to dispose of his own property as he chooses. However improvident, unreasonable, or unjust such bargains or dispositions may be, they are binding on every party to them unless he can prove affirmatively the existence of one of the recognized invalidating circumstances such as fraud or undue influence.”

Sir John Salmond went on to state:

“Where there is not merely an absence or inadequacy of consideration for the transfer of property, but there also exists between the grantor and the grantee some special relation of confidence, control, domination, influence or other form of superiority, such as to render reasonable presumption that the transaction was procured by the grantee of some unconscious use of his power over the grantor, the law would make that presumption. The commonest and most important instances of this presumption are those cases in which the relationship between the parties is some recognized legal relationship of confidence, such as that existing between solicitor and client and between trustee and beneficiary. The rule, however, is not limited to any exclusive and defined list of recognized legal relations. It is quite general in its application. The question in each case is ... did there exist between [the parties] such a relation of superiority on the one side, and inferiority on the other (whatever the source or nature of that superiority or inferiority may be), and therefore such an opportunity and temptation for the unconscientious abuse of the power and influence so possessed by the superior party, as to justify the legal presumption that such an abuse actually took place and that the transaction was procured thereby?”

1 Waterford Private Residence Club ceased to operate. The Respondent
2 accepts that he may still be due monies with respect to the Waterford Private
3 Residence Club. But this will depend on a designated number of pre-sales or
4 the sale of the property, and only then will the Respondent be able to receive
5 monies.

6 58. The Respondent confirms, and relies upon the fact, that on the passing of his
7 mother, the estate was expected to be valued at \$20 million, but the inventory
8 done by his mother's attorneys shows an estate of only CI\$3,676,236.50.
9 This, the Respondent contends, represents a significant unexpected loss of
10 value.

11 59. The Respondent submits in his counsel's skeleton that the supervening
12 events, namely the global economic crisis, resulting in the loss of viability of
13 the Respondent's property developments, substantially decreased the amount
14 of his assets from which any lump sum payment to the Petitioner would be
15 due. The Respondent submits that the lower valuations, on any account, are
16 markedly below the expectation of the Court and the parties at the time the
17 Consent Order was entered into. As a result, the Respondent contends that
18 the subsequent devaluation of his property developments, together with the
19 unforeseen and unforeseeable extraordinary decrease in his mother's estate,
20 has had the effect of invalidating the basis upon which the Consent Order
21 was agreed.

22 60. In conclusion the Respondent argues that it is an inappropriate case for the
23 Court to exercise its discretion and strike out his Summons dated the 23rd
24 September 2009. The Respondent submits that he has raised credible

1 arguments in his affidavit dated the 15th September 2010, and that only a
2 detailed examination of this evidence will allow the Court to come to a
3 proper decision.

4 **Petitioner's Position**

5 61. The Petitioner relies on the following grounds to strike out the Respondent's
6 Summons dated the 23rd September 2010 which are:

7 i. Delay

8 ii. Material non-disclosure

9 iii. No evidence of undue influence

10 iv. No reasonable prospect of success

11 v. The issues raised by the Respondent have already been litigated.

12 ***Delay***

13 62. The Petitioner submits that there is no possible excuse for the Respondent to
14 wait for four years before making this application. The Petitioner submits
15 that the reason for the delay is that during the intervening period the
16 Respondent has received very significant sums by way of inheritance, and
17 has transferred property into the name of other family members. The
18 Petitioner submits that any prior application would have disclosed more
19 easily the extent of the Respondent's resources, and this would have been
20 fatal to his claim. Accordingly, the Petitioner submits that the Respondent's

1 Summons to discharge or vary paragraph 8 of the Consent Order is an abuse
2 of process.

3 63. Furthermore, the Petitioner submits that the Respondent's application is
4 clearly a tactical attempt to delay a bankruptcy order being made against him.

5 *Material Non-disclosure*

6 64. The Petitioner submits that the Respondent claims that his case is based on
7 undue influence or material change of circumstance, and relies heavily on
8 paragraph 128 of his Tenth Affidavit (First Affidavit in FSD 183/2010) dated
9 the 15th of September 2010. The Petitioner submits that the Respondent has
10 not disclosed any evidence of undue influence, or any evidence of material
11 change of circumstance.

12 65. The Petitioner submits that the only material change of circumstance appears
13 to be based on the fact that the Respondent has divested himself of a number
14 of interests in property to other family members in order to "repay loans."
15 The Petitioner submits that the Respondent's affidavit demonstrably fails to
16 set out his financial circumstances to support his claim that there has been
17 material change of his circumstances.

18 66. The Petitioner produces a schedule of all the known assets of the Respondent
19 attached to the Petitioner's skeleton which reads that these assets amount to
20 some US\$14,682,156.

21 67. The Petitioner maintains that there is evidence that the approximate value of
22 the Respondent's inheritance received in 2006-2007 was US\$15,121,778.

1 68. However, the Petitioner maintains that even on the Respondent's own case,
2 he is a man of not inconsiderable means. The Respondent deposes to having
3 a home in West Bay on the market for CI\$1,250,000; a 50% interest in the
4 Waterford property – property which is on the market for US\$9,900,000;
5 and, a property he jointly owns with his brother in Little Cayman, which is
6 on the market for US\$300,000.

7 69. Furthermore, the Petitioner reminds the Court that the Respondent attested to
8 Harrison J. that his brother, Gary, owes him CI\$75,000.

9 70. The Petitioner maintains that the major plank of the Respondent's case seems
10 to be that he is entitled to set aside the original June 2006 Order on the basis
11 that the global economic crisis has affected the value of his assets.

12 71. The Petitioner maintains that the Respondent has not provided any evidence
13 of these loans (referred to in paragraph 65 above) nor is there any evidence
14 proving the existence of the loans and somehow linking the loans to the
15 property transactions relied upon.

16 72. Furthermore, the Petitioner submits that many of the transfers appeared to
17 have occurred the day before the Respondent was due to undergo an oral
18 examination of his means.

19 73. The Petitioner submits that the Respondent has not made a full and proper
20 disclosure of his financial dealings and assets for the purpose of determining
21 any ancillary matters.

22 74. Accordingly, the Petitioner relies on *Hydes v. Hydes* [2009] CILR Note 6 in
23 which Foster J. stated:

1
2
3
4
5
6
7
8
9
10
11
12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

“Where there has been an obvious material failure by the husband to make full and proper disclosure of his financial dealings and his assets for the purpose of determining ancillary matters on divorce – despite court orders requiring him to do so – the court, if appropriate in the exercise of its discretion under the Matrimonial Causes Law (2005 Revision) s.19, the Court may infer the existence of assets denied by the husband to exist or which he has failed to disclose. The Court does not have to be in a position to quantify the non-disclosed assets or those dissipated, but may draw on the inferences made to ensure a fair division between the parties. (Baker v. Baker [1995] 2 FLR 829 followed)”

No Evidence of Undue Influence

75. The Petitioner points out that the Respondent has merely stated in evidence that he signed the Consent Order as a result of undue influence. The Respondent later appeared before Henderson J. and told Henderson J. that Mrs. ‘SR’ had looked over the Order for him and that he was satisfied with the content. Accordingly, the Petitioner says that there is absolutely no evidence of undue influence.

76. The Petitioner submits that the Respondent signed the Consent Order on or before the 6th June 2006. Henderson J, called the parties in to ensure, we must assume, that the Respondent had signed and understood the content of the Order. In addition, there is evidence that the Judge asked the Respondent if he understood the document and whether he had had a lawyer review it. Even on the Respondent’s own evidence it is clear that in response to the Judge’s questions the Respondent asked Mrs. ‘SR’ to look over the Order and that the Respondent said that he was satisfied with its content.

1

2

3

No Reasonable Prospect of Success

4

77. The Petitioner maintains that, on an examination of the Respondent's affidavit it is bereft of any basis in law why the Court should exercise its "sparingly used" discretion to vary Orders intended to be final.

5

6

7

78. The Petitioner reminds the Court of the recital which, according to the parties "represented the full and final settlement of all ancillary issues arising out of the marriage" and provided a release of all rights, claims or interests and intended "that the parties should hereby achieve a "clean break" in respect of their financial affairs..."

8

9

10

11

12

Matters Already Litigated

13

79. The Petitioner submits that the Respondent's case has been put on the same basis in earlier applications to vary the Consent Order dated the 6th October 2006. Praying in aid as an example, the Petitioner states that the Respondent's application to vary paragraph 4 of the Consent Order, as recently as the 22nd July 2009 on exactly the same subject matter of this application has already been dismissed. Accordingly, the Petitioner contends that the argument that the Respondent's application is an "abuse" is made even stronger, as his previous application pleaded on the same factual matrix did not seek to discharge or vary paragraph 8. Accordingly, the Petitioner's counsel describes the Respondent's application as "scurrilous."

14

15

16

17

18

19

20

21

22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

Conclusion

80. The first three grounds of the Respondent’s application to challenge paragraph 8 of the Consent Order, namely, the undue influence exerted by the Petitioner over the Respondent, the unconscionable conduct of the Petitioner and the fact that the Respondent was not at the material time legally represented sufficiently or at all, in many respects overlap one another.

81. In his Tenth Affidavit dated the 15th September 2010, the Respondent sets out his position.

82. In summary, he states that he agreed to enter into discussions regarding the Consent Order because of his love of the child of the family. He said that he contemplated obtaining legal representation, but he was afraid of the Petitioner’s veiled threats and stated that he was unable to fund legal representation – which all caused him to decide against obtaining legal representation.

83. He does recall showing a draft of the Consent Order to his family’s attorney, Mrs. ‘SR’ who, although not a family law practitioner, advised that the terms were extremely one-sided and could affect his custody of ‘CF’.

84. The Respondent contends that as a result of the Petitioner’s promises regarding his rights of access, he agreed to transfer what he claims is the only real asset at the time, in the form of the matrimonial home. Thereafter he attended the Petitioner’s then attorneys to sign the Consent Order. The Respondent claims that he signed the Consent Order, thinking it properly

1 embodied the terms they had agreed, and therefore he states that he signed
2 the Order without reading it.

3 85. The Respondent was aware that the Consent Order was submitted to Court
4 for signing and that Henderson J. signed the Consent Order on the 6th June
5 2006.

6 86. The Court takes note of the fact that the Respondent had already undergone
7 two divorce petitions.

8 87. In addition, from a review of the evidence before the Court, it is clear that the
9 Respondent is a property developer who had been involved in several
10 businesses and companies. He had also bought and sold property and
11 interests in property, and was a man not unfamiliar with how business is
12 carried out in the Cayman Islands.

13 88. If the Respondent had just signed the Consent Order in the Petitioner's
14 attorney's office, then there would be some support to what he now claims to
15 be the position.

16 89. However, it is clear from the evidence adduced by both parties, that
17 Henderson J. was intent on ensuring that the Respondent understood the
18 terms of the Consent Order. This is particularly so because Henderson J.
19 noted on the Consent Order that the Respondent was not represented.
20 Accordingly, even on the Respondent's own evidence, the learned judge
21 asked the Respondent whether or not he was legally represented, and further,
22 whether the Respondent was satisfied with the content of the Consent Order.

1 The Respondent replied that Mrs. 'SR' had looked over the Order and he was
2 satisfied with its content.

3 90. The content of the Order, and in particular, paragraph 8, is not difficult to
4 understand. The Respondent is a property developer and businessman and
5 the evidence discloses that he clearly understood, and was satisfied with, the
6 content of the Consent Order.

7 91. There is no evidence on the material before the Court that the Petitioner or
8 those advising her were guilty of any impropriety. Furthermore, this Court
9 can find no evidence that there was any superiority on the side of the
10 Petitioner, and/or any corresponding inferiority on the side of the
11 Respondent. To adopt Sir John Salmond's words I can find no basis on
12 which to find or even suggest that the content of paragraph 8 is improvident,
13 unreasonable or unjust. It would appear to this Court that paragraph 8
14 represented a fair, just and reasonable Order in all the circumstances that
15 existed at that time.

16 92. Having read the affidavits on the Court file, the parties' respective skeleton
17 arguments and listened to the submissions of both counsel, the Court cannot
18 find any basis for finding the Petitioner guilty of undue influence or
19 unconscionable conduct.

20 93. In addition to the first three grounds the Respondent relies on the fact that
21 there have been subsequent events which have vitiated the basis upon which
22 the Consent Order was made. He submits that he was caught up in the current
23 global economic crisis and, as a result, his property developments have

1 effectively ceased to operate. This, and the diminution in his mother's estate
2 constitute the main subsequent events.

3 94. The Court gains considerable assistance and guidance from the speech of
4 Lord Brandon of Oakbrook in *Barder v. Barder* [1987] 2 FLR 480 in which
5 Lord Brandon sets out the principles governing an application to set aside an
6 ancillary relief order, on the grounds of some dramatic subsequent events and
7 stated:

8 *“A court may properly exercise its discretion to grant leave to*
9 *appeal out of time from an order for financial provision or*
10 *property transfer made after a divorce on the ground of new*
11 *events, provided that certain conditions are satisfied. The first*
12 *condition is that new events have occurred since the making of*
13 *the order which invalidates the basis, or fundamental*
14 *assumption, upon which the order was made, so that, if leave to*
15 *appeal out of time were to be given, the appeal would be certain,*
16 *or very likely, to succeed. The second condition is that the new*
17 *events should have occurred within a relatively short time of the*
18 *order being made. While the length of time cannot be laid down*
19 *precisely, I should regard it as extremely unlikely that it could be*
20 *as much as a year, and in most cases it will be no more than a*
21 *few months. The third condition is that the application for leave*
22 *to appeal out of time should be made reasonably promptly in the*
23 *circumstances of this case.”*

24
25 95. The Court notes that the Respondent has, since the 18th September 2006,
26 retained matrimonial attorneys. The Respondent states that he was advised by
27 his previous attorneys, Brooks & Brooks, that he could not vary or discharge
28 the Order on the basis of undue influence or material change of circumstance.
29 It is not clear when the Respondent received that advice and the Respondent
30 has made a number of applications to vary the paragraphs of the Consent
31 Order dated the 6th June 2006. However, as set out above, this Court finds no
32 evidence of undue influence or unconscionable conduct. Given that between

1 the 18th September 2006 and the swearing of his Tenth Affidavit on the 15th
2 September 2010, the Consent Order was varied and the Respondent has been
3 advised and represented by matrimonial attorneys, the compelling inference
4 is that he was at no time overly concerned about the contents of paragraph 8
5 and took no steps to vary that paragraph of the Order on the ground that the
6 balance of the capital sum, namely US\$1,333,334, was too much or on any
7 other ground.

8 96. The Court gains further assistance from the judgment of Madame Justice
9 Hale (as she then was) in *Cornick v. Cornick* 1994 2 FLR 530 where she
10 states at paragraph 531:

11 *“Where such a dramatic change in the comparative wealth of the*
12 *parties takes place very shortly after a capital settlement in*
13 *divorce proceedings, it is not surprising that the disadvantaged*
14 *party should want the settlement set aside in some way. But it is*
15 *only possible to do this in very limited circumstances, and it is*
16 *important not to allow one’s natural sympathy for the position*
17 *which the wife finds herself to colour the application of those*
18 *principles to the facts of the particular case.”*

19

20 97. Madame Justice Hale continues and states at paragraph 536:

21 *“On analysis, therefore, there are three possible causes of a*
22 *difference in the value of assets taken into account at the hearing,*
23 *each coinciding with one of the three situations mentioned earlier:*

24 (1) *An asset which was taken into account and correctly valued at*
25 *the date of the hearing changes value within a relatively short*
26 *time owing to natural processes of price fluctuation. The court*
27 *should not then manipulate the power to grant leave to appeal*
28 *out of time to provide a disguised power of variation which*
29 *Parliament has quite obviously deliberately declined to enact.*

30 (2) *A wrong value was put upon that asset at the hearing, which had*
31 *it been known about at the time would have led to a different*
32 *order. Provided that it is not the fault of the person alleging the*
33 *mistake, it is open to the court to give leave for the matter to be*

1 reopened. Although falling within the *Barder* principle it is more
2 akin to the misrepresentation or non-disclosure cases than to
3 *Barder* itself.

4 (3) Something unforeseen and unforeseeable had happened since the
5 date of the hearing which had altered the value of the assets so
6 dramatically as to bring about a substantial change in the
7 balance of assets brought about by the order. Then, provided
8 that the other three conditions are fulfilled, the *Barder* principle
9 may apply. However, the circumstances in which this can
10 happen are very few and far between. The case law, taken as a
11 whole, does not suggest that the natural processes of price
12 fluctuation, whether in houses, shares or any other property, and
13 however dramatic, fall within this principle.”

14

15 98. Madame Justice Hale then states:

16 “In my judgment this case clearly falls within the first category.
17 There was no misvaluation or mistake at the trial. Nothing has
18 happened since then other than the natural albeit dramatic
19 change in the value of the husband’s shareholding. The wife’s
20 case amounts in effect to saying that is all terribly unfair.”

21

22 99. Although our Matrimonial Causes Act does not mirror the then UK
23 Matrimonial Causes Act 1973, the principles enunciated by Lord Brandon in
24 *Barder v. Barder* and by Madame Justice Hale *Cornick v. Cornick* apply to
25 the circumstances in which the parties in this matter have found themselves.
26 The Consent Order dated the 6th June 2006 represented a full and final
27 settlement of all ancillary issues arising out of their marriage. Both parties
28 released each other from all rights, claims or interests, whether legal or
29 equitable, which either of them may have against each other in respect of any
30 other assets or property of any kind whatsoever which either party may have
31 now or in the future. Finally, in the recital to the Consent Order both parties
32 stated that it is intended that the parties should hereby achieve a “clean
33 break” in respect of their financial affairs.

1 100. I turn now to the English Court of Appeal decision in *Myerson v. Myerson*
2 (2) [2009] 2 FLR 147 and the Judgment of Lord Justice Thorpe stated under
3 *per curiam*:

4 “There might be many contemplating an attempt to reopen an
5 existing ancillary relief order on the grounds of subsequently
6 encountered financial eclipse. All in that situation should ponder
7 Hale J’s analysis in *Cornick* and ask themselves whether the
8 events upon which they intended to rely could be categorized as
9 either a wrong value being put upon an asset at the hearing, or
10 something unforeseen and foreseeable that it altered the value of
11 the asset so dramatically as to bring about a substantial change
12 in the balance of assets brought about by the order. They would
13 be well advised to heed the warning that very few successful
14 applications had been reported and that natural price
15 fluctuation, however dramatic, was not sufficient” (see paras
16 [30], [39]).

17
18 101. I repeat that paragraph 8 is simple and easily understood especially by
19 somebody such as the Respondent who could never be described as a “poor
20 and ignorant man” in the *Fry v. Lane* context. Furthermore, he has had
21 consistent and constant advice from matrimonial attorneys regarding the
22 variation of the Consent Order and if he had been concerned that the terms,
23 and in particular paragraph 8, constituted what he now claims is a “total and
24 complete inequity” being reached between the parties, then it was open for
25 him to make an application in 2006, 2007 or even 2008, and not to wait until
26 late 2010.

27 102. The Court has to ask itself the question: why did the Respondent wait until
28 the 23rd September 2010 to challenge paragraph 8? There is no evidence of
29 any of the matrimonial assets being categorized as having a wrong value, nor
30 is there any new event that could be properly described as being unforeseen

1 and unforeseeable. Furthermore, there is no evidence of any new events
2 occurring within a short time of the Consent Order.

3 103. When one reviews the chronology one is forced to come to the conclusion
4 that the Respondent's Summons, being filed seven days after the hearing for
5 the issuance of a provisional bankruptcy order, where directions were given,
6 leads this Court to the inescapable conclusion that it is the Petitioner's
7 petition for the Respondent's bankruptcy that has triggered the Respondent's
8 application to discharge paragraph 8, over four years after entering into the
9 Consent Order.

10 104. The lump sum to which the Respondent agreed could not have been said to
11 have reached on a wholly erroneous basis as in *Warren v. Warren* (1983) 4
12 FLR 529, nor has there been any supervening event such as Hurricane Ivan
13 which was unforeseen or unforeseeable.

14 105. Accordingly, it is the Court's decision that the Respondent's Summons to
15 discharge paragraph 8 of the Order has no reasonable prospect of succeeding.
16 This Court finds that it is an abuse of the process of the Court, in that, on the
17 evidence before this Court, it is a blatant attempt to delay and frustrate the
18 Petitioner's petition for the husband's bankruptcy.

19 106. Furthermore, it is over four years since the Consent Order was entered into
20 and there is no evidence that the Respondent has paid any money to
21 discharge the outstanding balance of US\$1,333,334, or any portion thereof.

22 107. There is evidence before the Court that the Respondent has the means to pay
23 the outstanding balance. It is therefore the Court's decision, on the evidence

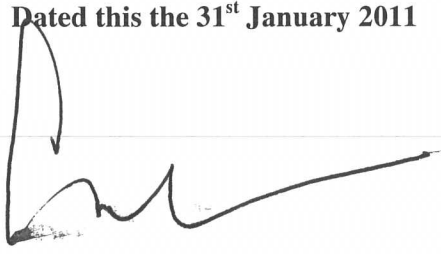
1 before it, that if the Respondent's Summons dated the 23rd September 2010
2 were allowed to continue, it is bound to fail.

3 108. Accordingly, I grant the Petitioner the Order she seeks and strike out the
4 Respondent's Summons dated the 23rd September 2010 under the inherent
5 jurisdiction of the Court on the grounds that it is frivolous, vexatious and an
6 abuse of the process of the Court.

7 109. As costs follow the event I order that the Petitioner's costs be paid by the
8 Respondent and to be taxed if not agreed.

9
10

11 **Dated this the 31st January 2011**

12
13
14 



15 **Honourable Mr. Justice Charles Quin**
16 **Judge of the Grand Court**