THE CAYMAN ISLANDS COURT OF APPEAL

CIVIL APPEAL NO. 2 OF 1989

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Henry, J.A.

BETWEEN	ELSMER BLOOM RANGE	APPELLANT/Respondent
AND	ADINA MAY RANGE	RESPONDENT/Petitioner

Mr. Norman Hill, Q.C. for the Appellant
Mr. Keith Collins for the Respondent

August 11th and 16th 1989 and September 21st 1989

REASONS FOR JUDGMENT

On November 24, 1986 a consent order was made in the Grand Court in relation to ancillary matters and containing, inter alia, the following provisions in relation to the parties:

> "2. That the former matrimonial home situated on Crewe road be sold by public auction or private treaty to be agreed between the parties beforehand, subject to the rights of the Bank of Nova Scotia as mortgagee over the said property and the net proceeds therefrom to be transferred to the Petitioner absolutely in full and final settlement of any ancillary financial provision currently before this court.
>
> 4. That in compliance with 2 above, the Petitioner do forego and dispense with any claim for periodical payments of maintenance or other such financial provision from the Respondent.".

By summons dated September 2, 1988 the Petitioner/Respondent ("the wife") applied to the Grand Court to set aside or vary this order and for such further or other relief as to the court deemed fit. The wife's affidavit in support of that summons indicates that she had been shown a copy of a valuation of the property indicating a value of $250,000.00, that

she was told that the amount due to the Bank of Nova Scotia ("the bank") by the Appellant/Respondent ("the husband") was slightly in excess of $150,000.00 that the property was sold by the bank as mortgagee for an amount which only covered the amount due to the bank and that instead of the approximate amount of $100,000.00 which she expected to receive she has received nothing from the sale of the property.

In a written ruling dated December 23, 1988 the learned judge of the Grand Court found and ordered as follows:

> "My view of the meaning and effect of the consent order is this -
>
> (a) two alternative methods of sale of the matrimonial home were agreed upon - public auction or private treaty to be agreed between the parties beforehand. The reference to the rights of the mortgagee is not a reference to a sale by it taking place instead but to the rights subject to which one or other of the two methods of sale would take place.
> (b) the petitioner agreed to forego and dispense with her claims for financial provisions only on receipt of a payment of net proceeds following a sale by one or other of the agreed methods to which I have referred.
>
> No payment in accordance with the agreement was, or now can be made. That in my view is a change of circumstances which entitles the petitioner to apply for a variation of the Order.
>
> Accordingly I direct that the application for variation of the Order of 24th November, 1986 do proceed by the filing of an affidavit of means by the petitioner within 14 days of the date of this Order, and an affidavit in reply by the respondent within 14 days thereafter. Liberty for either party to apply for an extension of time. Costs reserved.".

On February 17, 1989 the learned judge granted leave to appeal out of time.

On August 16, 1989 we allowed the appeal and set aside the order and promised to give written reasons for our decision. We now do so.

Counsel for the husband submitted that the consent order finally and conclusively determined the rights of the parties, that it made a clean break between the parties as respects financial matters from which there could be no going back and

that the Grand Court had no jurisdiction to vary it or set it aside. He cited in support of his submissions de Lasala v de Lasala (1979) 2 All ER 1145, Dinch v Dinch (1987) 1 All ER 818 and Thwaite v Thwaite (1981) 2 All ER 789.

Counsel for the wife referred to sections 12(6), 18 and 23 of the Matrimonial Causes Law. He submitted that there was a fundamental assumption by the Court as well as the wife that she would get approximately $100,000.00 from the sale of the matrimonial home as the consideration for foregoing her claim for periodical payments. In circumstances where she had in fact received nothing the whole basis of the consent order had gone, he submitted, and it was therefore appropriate and within the jurisdiction of the court which made the order to vary it. He cited in support of his submissions Barder v Barder (Caluori intervening) (1987) 2 All ER 440 and Edgar v Edgar (1980) 3 All ER 887.

Both these cases are concerned with appeals against orders for ancillary relief and are not therefore of assistance in this matter which concerns the powers of the court which made the order to vary it. At the same time the cases cited by counsel for the husband are based on the wording of the English Matrimonial Causes Act, 1973 and, in the case of de Lasala v de Lasala on the Hong Kong Statute which is patterned on the English Act. That Act specifically excludes from variation, orders for lump sum payments and property adjustments. Accordingly in the cases cited it has been held that Parliament contemplated a clean break between the parties in relation to their financial affairs and the Court had no jurisdiction to vary orders made with that end in view. In the Cayman Islands, however, section 21 of the Matrimonial Causes Law provides for the making of ancillary orders and section 23 provides that "Either spouse or the personal representatives of either spouse may make application for variation of any order made under section 21, and the Court, after hearing the parties, may make such variation." No clean break principle can therefore be said to be established by the Legislature and the Grand Court has

jurisdiction to vary all ancillary orders. In our view, however, that jurisdiction ought to be sparingly exercised where the order itself appears to contemplate finality and is made by consent of the parties.

In Dinch v Dinch (supra) Lord Oliver at p. 827 after referring to the following dictum of Lord Herschell L.C. in Re South America and Mexican Co. ex p Bank of England (1895) 1 Ch. 37 at 40 -

> "The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

and to Brown v Kirrage (1980) 11 Fam. Law 141 in which Brandon L.J. regarded the dismissal of a wife's claim for ancillary relief as a matter of such seriousness that the court ought to be extremely cautious about implying a dismissal where none is actually expressed in the order concluded:-

> "One has, as it seems to me, simply to look at the order and any admissible material available for its construction, and determine what the court intended, or, in the case of the consent order, what the parties intended to effect by the order. If the conclusion is that what was intended was a final and conclusive once-for-all financial settlement, either overall or in relation to a particular property, then it must follow that that precludes any further claim to relief in relation to that property.".

At the same time de Lasala v de Lasala (supra) does establish that in matrimonial cases, "financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the Court, once they have been made, the subject of the court order no longer depend on the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order" (per Lord Diplock). And in Thwaite v Thwaite (supra) Ormrod LJ observed:

> "The effect of eliminating the contractual basis of these consent orders should simplify the problems. If their legal effect is derived from

> the court order it must follow, we think, that they must be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders.".

Bearing these considerations in mind, it was necessary for the learned trial judge to decide whether in the particular circumstances it was appropriate for him to vary the consent order. In doing so he appears to have concluded that the fact that no payment was or could now be made to the wife under the order was a change of circumstances which entitled her to apply for variation. We do not, with respect, consider that this is correct. The order was unhappily drafted and on its wording it was always a possibility that the unfortunate situation would arise since the sale was subject to the rights of the bank as mortgagee. For the same reason we do not agree that the wife agreed to forego her claim for financial provisions only in the event of a sale by public auction or private treaty agreed between the husband and wife. The valuation to which the wife referred in her affidavit was stated to be based on the replacement cost of the home and expressly stated that in the event of a forced sale the value assessed would be "in the range of CI$125,000.00 to CI$150,000". It may not be inappropriate here to repeat the observation of Lord Oliver of Aylmerton in Dinch v Dinch (supra) at p. 820 that "it is in all cases the imperative professional duty of those invested with the task of advising the parties to these unfortunate disputes to consider with due care the impact which any terms that they agree on behalf of their clients have and are intended to have on any outstanding application for ancillary relief and to ensure that such appropriate provision is inserted in any consent order made as will leave no room for any future doubt or misunderstanding or saddle the parties with the wasteful burden of wholly unnecessary costs." We are of the view that the learned trial judge was not, for the reasons he gave, justified in deciding that the jurisdiction to vary should be exercised, and was at best premature in ordering the parties to file affidavits of means. For this reason we set aside his order. There was, however, in the record, an affidavit by the wife dated August 4, 1988 alleging:

"8. (a) That after the aforementioned property was sold I was advised by the Bank's Attorneys-at-Law, Messrs Bruce Campbell & Co., that there was a further loan of $10,000.00 which my husband has taken out and which had not been originally taken into account and that the net proceeds of sale would now only cover the outstanding balance due to them together with interest and costs.

(b) That by an Interim Order dated the 25th day of April, 1985, my husband had been ordered to keep up the payments on the house but he refused to do so and he told me that he was not going to pay the outgoings and mortgage as he wanted the Bank to take the property and put me on the street."

If this affidavit was before the learned trial judge it would, we think, have been desirable for an order to be made affording to the husband an opportunity to reply to these allegations and generally to the affidavit(s) filed by the wife, before deciding whether the jurisdiction to vary the consent order ought to be exercised.

Notwithstanding that these issues are still outstanding, in the questions raised before us the order being premature we felt constrained to allow the appeal against it.