Neutral Citation Number [2025] CICA (Civ) 2

THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS, FAMILY DIVISION

CICA (Civil) Appeal 0008 of 2023
(Formerly Cause No. FAM 257 of 2021)

BETWEEN:

JS

Appellant

- and –

KR

Respondent

AND

BETWEEN:

CICA (Civil) Appeal 0013 of 2023
(Formerly FAM 0018 of 2017)

YY

Appellant

-and-

RD

Respondent

BEFORE:

The Rt Hon Sir John Goldring, President
The Hon John Martin KC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Appearances: **Mr Richard Todd KC and Ms Kate McClymont of Nelsons Legal for the Appellants in CICA 8/2023.**

Mr Phillip Blatchly and Ms Lynne McDonagh of KSG for the Appellant in CICA 13/2023.
Mr Michael Horton KC and Ms Louise Desrosiers of Travers Thorp Alberga for the Respondents in both Appeals.

Date of Hearing: **12 November 2024**

Date draft circulation: **23 December 2024**

Date of Judgment: **28 January 2025**

JUDGMENT ON PRELIMINARY ISSUE

The President:

Introduction

1. I hope the parties do not mind if I refer to them as husband and wife. In the first case, by a Notice of Appeal of 2 June 2023, the husband seeks to appeal the ancillary financial order of 22 May 2023 of Justice Walters (Acting) arising from his judgment of 31 March 2023. In the second case, by an Amended Notice of Appeal of 2 August 2023, the wife seeks similarly to appeal the judgment of Justice Williams re-issued on 19 July 2023 following which he made orders in respect of ancillary relief. The appeals are brought under s. 24 of the Matrimonial Causes Act (2005 Revision) (MCA 2005). The Appellants have not sought leave of the Grand Court judge or this court to appeal. They submit that having lodged their notices of appeal within 21 days of the decree of dissolution of marriage, they may under s24 appeal without leave. The Respondent in each case has issued a Notice of Objection to the Appellant's Notice of Appeal in which it is asserted that leave to appeal is required.

2. On 12 November 2024 the court heard argument as whether leave to appeal was required. The appellant husband in the first case was represented by Mr Richard Todd KC and Ms Kate McClymont, the respondent wife by Mr Michael Horton KC and Ms Louise Desrosiers. In the second case, the appellant wife was represented by Mr Phillip Blatchly and Ms Lynne McDonagh, the respondent husband by Mr Horton and Ms Desrosiers. The court decided that the Appellants did not need leave to appeal. Following that decision, the first appeal settled. The court (slightly differently constituted) heard the second appeal on 18 November 2024 and reserved judgment. These are the reasons for the court's decision on the preliminary issue of leave.

The legislative background

The regime under the Matrimonial Causes Act 2005

3. Many of the provisions of the MCA 2005 are in identical terms to those of the Matrimonial Causes Act (1997 Revision) (MCA 1997). What are now ss. 20 to 26 appear to be in identical terms.

4. S. 3 of the MCA 2005 states that:

> "*The Court has jurisdiction in all matters pertaining to this Act, and, subject to the provisions thereof, has power to pronounce and enforce decrees of-*
>
> *…(c) dissolution of marriage…*"

5. S 10 ("*Grounds for pronouncing decrees for dissolution of marriage*") refers to "*A decree of dissolution of marriage*." That reflects, as Mr Horton submitted, that there is within the Cayman Islands only one decree of divorce: there are not two decrees, a decree nisi followed by a decree absolute. Although that is so, there has been, and to some extent still is, legislative reference which does not appear to reflect that. S. 4 of the Court of Appeal Act (Act 9 of 1975) referred to decrees nisi and absolute. That reflected the law of Jamaica at the time. S. 13 of the MCA 2005, inserted by the Children Act 2003 (although not brought into force), speaks of the court having the power in some circumstances not to make a decree of divorce "*absolute*." S. 64(d) of the Court of Appeal Act (2023 Revision) and Rule 12(5)(e) of the Court of Appeal Rules (2014 Revision) respectively refer to "*any order absolute for the dissolution*" and "*a decree absolute of divorce.*" It may well be that these current references are a hangover from the time when the law of Jamaica played a large role in the jurisprudence of the Cayman Islands. (Until 1984, appeals from decisions of the Grand Court of the Cayman Islands were heard by the Court of Appeal of Jamaica).

6. S 12(5) of the MCA 2005 applies to decrees of dissolution of marriage. It states that:

> "*The Court shall postpone pronouncement of a decree…until it is satisfied that provision has been made for the custody and care of all the children of the marriage and that no application for any order for-*
>
> *(a) settlement of marital property;*
>
> *(b) financial provision;*
>
> *(c) periodic payments;*
>
> *(d) damages; or*
>
> *(e) costs,*
>
> *remains outstanding.*"

7. S. 20 provides for the making of "*orders pending suit*." Those orders may provide for-

> "*(a) the care and control of the children of a marriage;*
> *(b) the use of a matrimonial home;*
> *(c) periodic payments to be made by one party to another pending suit;*
> *(d) an injunction for the protection of settled and other property in which either spouse claims an interest;*
> *(e) the protection of one spouse from interference by the other; and*
> *(f) security for costs.*"

8. The specific orders in respect of which the Appellants appeal were "*Ancillary orders*" made under s. 21 of the MCA 2005. That section states:

> "*At the time of pronouncing a decree under this Act, the Court shall, as appropriate, make orders for-*
> *(a) the custody, care and control of the children of the marriage;*
> *(b) the disposition of matrimonial property, including the matrimonial home;*
> *(c) varying any settlement of the property of the spouses made in consideration of the marriage…*
> *(d) varying any other settlement of matrimonial property;*
> *(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*
> *(f) providing for periodic payments to be made by either spouse for the children of the marriage and for the other spouse;*
> *(e) [sic] costs.*"

9. Although the wording of s. 21 envisages orders for ancillary relief being made at the same time as the pronouncement of the decree, that is not the normal practice. As most petitions are undefended, the practice is first to make an order proving the petition, with issues of ancillary relief being adjourned into chambers. It is only after the court has decided the appropriate ancillary orders under s. 21 that, in accordance with s. 12(5), it orders the dissolution of the marriage. The ancillary orders are included as an integral part of the decree of dissolution. The decree in the second case illustrates the position. It states:

> "***UPON READING*** *the Petitioner's application…for an Order that a Decree of Dissolution of marriage be made.*

> ***AND UPON*** *the Court having made an Order…that the Amended Petition was proved.*
>
> ***AND UPON*** *the Court having made an order…settling all claims made by the Petitioner and Respondent for ancillary relief.*
>
> ***AND UPON*** *a Consent Order being made…settling all claims made by the Petitioner and Respondent in relation to any child related matters.*
>
> ***IT IS HEREBY ORDERED*** *that the marriage…is dissolved.*"

10. The decree is signed by a judge. Upon its pronouncement, the 21 days in which either party to the suit may appeal under s. 24 runs. Ss. 24 and 25 provide:

> "*24. Either party to a suit brought under this Act may appeal to the Court of Appeal against any decree or order pronounced or made by the Court in such suit in respect of any matter of law or of mixed fact and law, provided that written notice of appeal is lodged within twenty-one days of the pronouncement of the decree or such notice is given orally in open court at the time of the pronouncement of the decree.*
>
> *25. The Court of Appeal may, after hearing and considering any appeal against any decree pronounced under this Act-*
>
> *(a) rescind the decree; or*
>
> *(b) confirm the decree <u>with or without variation of any order made therein</u>.*"
>
> (my emphasis)

11. Finally, by s. 26:

> "*Any spouse whose marriage has been dissolved…under this Act may remarry-*
>
> *(a) when the time for appeal against the decree has expired without notice of appeal having been given; or*
>
> *(b) if notice of appeal has been given; or*
>
> *(i) when the time for appeal against the decree has expired without notice; or*
>
> *(ii) after the pronouncement of the judgment of the Court of Appeal confirming the decree,*
>
> *whichever is appropriate.*"

The regime under the Court of Appeal Act (2023 Revision) and the Court of Appeal Rules (2014 Revision)

The Court of Appeal Act (2023 Revision)

12. By ss. 5 and 6 of the Court of Appeal Act (2023 Revision):

> "*5. Subject to this Act, the Court shall have jurisdiction to hear and determine appeals from any judgment of the Grand Court given or made in civil proceedings…*
>
> *…Provided that no judgment of the Grand Court shall be altered or reversed in any case in which the Court is satisfied that the effect of the judgment is to do substantial justice between the parties.*
>
> *6. No appeal shall lie-*
>
> *…(d) from any order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree, except upon some point which would not have been available to such party on such an appeal…*
>
> *…(f) without leave of the Grand Court, or of the Court, from an interlocutory judgment made or given by the Judge of the Grand Court except-*
>
> *…(iii) in the case of a decree nisi in a matrimonial cause…;*"
>
> (My emphasis)

13. By s. 19(1):

> "*In the case of an appeal from any judgment of the Grand Court in the exercise of its civil jurisdiction, the appeal shall be brought by the appellant, within fourteen days after the date of the judgment...*"

14. Under ss. 24 and 25 the Court of Appeal has the power to extend time, a power which, in broad terms, is required to be construed liberally in favour of the right of appeal.

15. S. 35(1) establishes the Rules Committee, the function of which, under subsection 3, is:

> "*…to make rules of court for the purpose of regulating appeals to the Court.*"

The Court of Appeal Rules (2014 Revision)

16. By Rule 12:

> "*(1) For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with subrules (2) to (7)…*
>
> *(3) A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it…*
>
> *…(5) Notwithstanding anything in subrule (3), the following orders shall be treated as final-*
>
> *…(e) a decree absolute of divorce or nullity of marriage…*
>
> *…(6) Notwithstanding anything in subrule (3), but without prejudice to subrule (5), the following judgments and orders shall be treated as interlocutory-*
>
> *…(x) an order relating to access to, or custody, care, education or welfare of, a minor whether in matrimonial, wardship, guardianship or any other proceedings;*
>
> *(y) an order for or relating to ancillary relief in matrimonial proceedings, including a property adjustment order, an order for the payment of a lump sum and any other order making or relating to financial provisions whether of a capital or income nature*." (My emphasis)

The anomalies under the two regimes

17. The difference in the two regimes gives rise to some significant anomalies leading to potential injustice.

18. Under the MCA 2005 an appeal against any decree or order may be brought under s. 24 if notice is given orally at the time of pronouncement of the decree or a written appeal is lodged within 21 days. There is no requirement for leave. There is no provision to extend time. The grounds are limited to any matter of law or mixed law and fact. Under s. 25 the court may rescind the decree or confirm it "*with or without any order made therein*." Re-marriage is constrained pending resolution of the Notice of Appeal.

19. Because an appeal under s. 24 can only be brought once a decree has been pronounced, no appeal in respect of an ancillary order pending suit under s. 20 can be appealed under it. Any appeal in respect of a s. 20 order has to be made in accordance with the Court of Appeal Act (2023 Revision)

and the Court of Appeal Rules (2014 Revision*)*. Under that regime, the notice of appeal must be served within 14 days of the judgment. Time may be extended. Leave to appeal from the Grand Court or the Court of Appeal is necessary. The grounds are not limited to law or mixed law and fact. As was pointed out during argument, it is conceivable that some of the issues raised and resolved in a s. 20 hearing could be identical to those arising in a s. 21 hearing.

20. Any appeal in respect of an ancillary order made after the pronouncement of the decree, such as a variation of an order concerning a child and not forming part of the decree cannot be appealed under s. 24. It falls to be appealed under the provisions of the Court of Appeal Act (2023 Revision) and the Court of Appeal Rules (2014 Revision). The grounds are not constrained. Leave is needed. The court may extend time to appeal.

Previous decisions

21. This is not the first time the present issue has arisen, as the headnote in *Wight v Wight* [2006] CILR 416 makes clear. It states:

> "*The Grand Court made an order for financial provision…The appellant appealed against the order without seeking leave from either the Grand Court or the Court of Appeal. The Court of Appeal agreed to decide, as a preliminary issue, whether her appeal against the ancillary order could properly be brought under the Matrimonial Causes Act without leave, or if it was necessary to seek leave and bring the appeal under the Court of Appeal Act.*"

22. The court decided leave was not necessary. Taylor JA subsequently gave its reasons. At [3]-[4] he said:

> "*3. The [MCA 2005]…provides only for a single, and thus final, decree of dissolution of marriage. This may, under s. 12(5), be granted only when provision has been made for all ancillary matters, including the settlement of matrimonial property and financial arrangements, as well as care and custody of children, and when no application for any order in respect of such matter remains outstanding. The practice is for the court first to determine whether the facts alleged in support of the petition for dissolution have been established, which is usually done by affidavit, and thereafter, when an order has been made that these have been proved, to deal with any ancillary matters. Only after orders have been made disposing of the ancillary matters is a decree of*

dissolution granted. Until the decree of dissolution is granted, any order disposing of matrimonial assets is without effect, since the marriage remains until then in effect and could, indeed, be terminated upon death, in which case a different disposition of the matrimonial property might take effect.

4 …The decree [in the present case] recites the making of the earlier orders and declares the marriage dissolved."

23. The judge referred to what are now sections 5 and 6(f)(iii) of the Court of Appeal Act (2023 Revision) and rule 12(6)(y) of the Court of Appeal Rules (2014 Revision). At [7] and [8] he said:

"*7. We were of the view that the expression in s. 24, "any decree or order pronounced or made by the Court in such suit," must be taken to extend to an order for ancillary relief relating to division of assets granted in association with the decree of divorce, and that the time for giving notice of appeal against any such order must be taken to run from the date of the granting of the decree of divorce. The right of appeal provided for in the Matrimonial Causes Act does not seem capable of application to ancillary relief orders made after the granting of the divorce decree, such as orders varying provisions made for custody or maintenance. This anomaly could not, in our view, justify the court disregarding the plain words of s. 24 creating an appeal as of right with respect to orders made in the divorce proceedings which take effect in association with the granting of the decree of divorce.*

8. While this is all that it was necessary to decide in order to dispose of this preliminary point, we think it right to suggest that an early amendment to the Matrimonial Causes Act would be desirable in order to clarify the present confusing position with respect to appeals from orders for ancillary relief granted before, in conjunction with and after a decree of dissolution is issued in matrimonial proceedings. It is of significance in that different appeal periods are provided for under two conflicting statutory regimes, that leave is required in one and not under the other, and that the single appeal period provided under the Matrimonial Causes Act appears incapable of extension. There is obvious potential in the present state of the law for procedural disputes, and resultant wastes of money and court time, as well as the possibility of consequential injustice."

24. The court's suggestion was not heeded.

25. In *Connolly v Connolly*, the reference for which is given as Civil Appeal No. 25 of 2003, albeit the judgment was given on 31 March 2009, the Court of Appeal was dealing, in broad terms, with the following facts. On 20 June 2003 the judge determined claims concerning ancillary relief. On the same date, reflecting a practice which is no longer current, the marriage was dissolved by final decree. On 3 July 2003 the wife's notice of appeal was lodged. It was not served on the husband within 14 days of the judgment. Although there were many subsequent hearings relating to ancillary relief, it was only after some five years that the wife sought to proceed under her original notice of appeal. The husband objected. He relied upon provisions identical to those of the Court of Appeal Act (2023 Revision). The wife argued she was entitled to appeal under section 24 of the MCA 2005. She relied upon *Wight*. In a judgment with which Forte JA and Conteh JA agreed, Chadwick P distinguished *Wight*. He said [12]-[14]:

> "*12…The question before the Court in…[Wight] for preliminary ruling in that case was whether the time for appealing against an order for ancillary relief made before the pronouncement of the decree of dissolution ran from the date of the order or from the date of the decree. The Court held that time ran from the date of the decree. That question does not arise in the present case: the decree was pronounced as [sic] the same date as the order appealed from and notice of appeal was filed within fourteen days of that date.*
>
> *13. It would follow, necessarily from that decision (i) that the time for filing notice of appeal from an order for ancillary relief made before the pronouncement of the decree of dissolution of the marriage was twenty one days (rather than the fourteen days for which section 19(1) of the Court of Appeal Act provides) and (ii) that leave to appeal is not required in such a case (notwithstanding section 6(f) of the Court of Appeal Act and rule 12(6)(y) of the Court of Appeal Rules (2004 Revision). But I should emphasise that those requirements are varied or abrogated only where the appeal is from an order made before pronouncement of the decree of absolution. Appeals from orders varying ancillary relief, made after dissolution of the marriage, are unaffected.*
>
> *14. The ruling in Wight v Wight is not authority for the broad proposition that on an appeal from an order made in matrimonial proceedings an appellant does not need to comply with any of the requirements under section 19 of the Court of Appeal Act. Effect must be given to section 24 of the Matrimonial Causes Act*

> *in so far as the provisions of that section are inconsistent with the requirements in section 19 of the Court of Appeal Act and the provisions of the Court of Appeal Rules; but, where there is no inconsistency, those requirements and those provisions are not overridden. In particular, Wight v Wight does not entitle the appellant who has filed notice of appeal within the time prescribed by under [sic] section 24 of the Matrimonial Causes Act to ignore the requirement that a memorandum of the grounds of appeal must be filed timeously: conversely, the powers of the Court to extend time for the filing of a notice of appeal or of grounds of appeal, conferred by section 24 of the Court of Appeal Act, apply to appeals from orders made in matrimonial proceedings.*"

26. I am bound to say I have not found the argument by which the President distinguished *Wight* entirely easy to follow. However, it is clear that the present cases fall within the ambit of *Wight* as defined in *Connolly*. Moreover, the current practice of the Family Division follows the approach in *Wight*. (See *F (M.) v F (R.) and H [2010](1) CILR 524* and *DJ v BJ and RK*.)

The argument

The Respondents' submissions

27. Mr Horton submitted by reference to the sequence of the legislation and the rules that the Rules Committee of the Court of Appeal must have intended to qualify the appeal rights under what is now s. 24 of the MCA 2005. The MCA 1976 first set out those rights. In 1999 rule 12(5)(e) of the Court of Appeal (Amendment) Rules made it clear that a "*decree absolute*" was a final order, thereby giving a right to appeal. The Rules did not suggest that an order for ancillary relief fell within that category. The s. 24 rights were repeated in the MCA 2005. In 2014 rule 12(6)(y)) was adopted in terms that made it clear that orders for ancillary relief were interlocutory giving no right to appeal, while repeating rule 12(5)(e). In the result, submitted Mr Horton the Rules Committee must have intended to exclude ancillary relief from any s. 24 appeal right.

28. In support of his submission that the Rules may qualify a right of appeal, Mr Horton referred to the right of appeal under s. 29(1) of the Court of Appeal Act (2023 Revision) and subsequent rules ostensibly qualifying that right.

29. S. 29(1) states:

> "*Any person…aggrieved by any judgment given or made by the Grand Court in the exercise of its appellate or revisional jurisdiction…may appeal, subject to this Act, to the Court on any ground of appeal which involves a point of law alone…but not upon any question of fact.*"

30. There is no power to impose a requirement for leave to appeal. However, rule 11 subrules 4A and 4B of the Court of Appeal Rules (2014 Revision), introduced by the Court of Appeal (Amendment) Rules 2009 provide:

> "*(4A) In addition to those cases specified as requiring leave to appeal in paragraphs (e) and (f) of section 6 of the Court of Appeal Act, leave of the Court shall be required for an appeal under section 29(1) of that Act from any decision of the Grand Court in the exercise of its appellate jurisdiction in civil proceedings except where the liberty of the subject or the custody of an infant is in question.*
>
> *(4B) In a case falling under subrule (4A) leave to appeal shall not be granted unless the appeal involves a point of law alone and-*
>
> *(a) the appeal would raise an important point of principle or practice; or*
>
> *(b) there is some other compelling reason why a second appeal should be heard by the Court.*"

31. Mr Horton also relied upon s. 3(1)(b) of the Cayman Islands (Appeals to the Privy Council) Order 1984, which, in the context of family appeals, limits the right of appeal to the Privy Council to:

> "*…final decisions in proceedings for dissolution or nullity of marriage.*"

32. In *Gordon v Watler* [2015] (1) CILR, it was held that appeals to the Privy Council relating to ancillary relief are interlocutory and leave is required. Mr Horton submitted that it was inconsistent having an unrestricted right to appeal in respect of ancillary relief under s. 24 and a qualified right to appeal to the Privy Council in respect of the same relief.

33. Mr Horton further argued that on a proper and contextual reading of s. 24, the right to appeal only applies to an appeal against the decree itself and those things intimately concerned with it, such as costs. It does not apply to appeals in respect of orders for ancillary relief. The language, he submitted, suggests as much. S. 25 speaks of an appeal against any decree, and not any other order. That s. 24 applies to the decree itself is also suggested by s. 26, providing, as it does, that a person may remarry once time for an appeal has expired or an appeal has been determined.

34. Mr Horton accepted that *Wight*, and the authorities to which I have referred, were not consistent with his analysis. He submitted that the court should depart from *Wight*. He did so on two bases.

35. Firstly, he submitted that *Wight* was decided *per incuriam*. The court made no reference to what are now s. 6(d) of the Court of Appeal Act (2023 Revision) or rule 12(5)(e) of the Court of Appeal Rules (2014 Revision). Key, Mr Horton submitted, was the court's failure to appreciate that the rules can qualify s. 24. Furthermore, it did not appreciate, he submitted, that s. 35(3) of the Court of Appeal Act (2023 Revision) gave the Rules Committee the power to qualify s. 24 of the MCA 2005. Had it done so, and taken account of the sequence of the legislation and the rules, and the fact that by s. 25 of the Court of Appeal Act (2023 Revision) it was required to construe rights of appeal under the Act liberally, it would have reached a different conclusion.

36. Mr Horton also made the point that if s. 24 gives a right of appeal, the provisions of s. 6(d) and rule 12(5)(e) are otiose.

37. Secondly, Mr Horton submitted that if *Wight* was not decided *per incuriam*, this court was entitled in the circumstances not to follow it. It was wrongly decided and leads, he submitted, to the many anomalies (or, as he put it, absurdities) which were referred to in *Wight* and which I have set out above.

38. Although Mr Horton urged the court to accept his analysis, he himself sought to rely upon s. 24 in one respect at least. He submitted that the grounds of any appeal were restricted to those set out in the section: that any appeal had to be in respect of any matter of law or of mixed law and fact. Mr Horton did not accept the suggestion in argument that this was a somewhat contradictory position to take.

The Respondents' submissions

39. *McTaggart v McTaggart* [2011] 2 CILR 366 is the leading Court of Appeal decision in the Cayman Islands regarding, among other things, ancillary relief. The appeal in *McTaggart* was made under s. 24 of the MCA 2005. Mr Todd submitted that that was because it was believed by those who practise family law in the Cayman Islands that s. 24 governed the position. That still is the case submitted Mr Todd.

40. Mr Todd's fundamental submission was that ss. 24 and 25 must be read together. S. 24 gives the right to appeal in respect of "*any decree or order made or pronounced by the Court*." S. 25(b) gives the court power to confirm the decree "*with or without variation of any order therein*." The reference to "*any order therein*" must, he submitted, be a reference to the order made under s. 21. It is an integral part of the court's decree of dissolution. There is no such order until the pronouncement of the decree. Until then, any order for ancillary relief is ineffective. Should a party die before pronouncement of the decree any order made under s. 21 is ineffective, as Taylor JA pointed out in paragraph 3 of *Wight*.

41. Mr Todd submitted that *Wight* was the complete answer to Mr Horton's submissions. Paragraph 7 was plainly right. The argument that *Wight* was decided *per incuriam* was described by Mr Todd as ambitious. The court in *Wight* had well in mind the provisions of ss 5 and 6(f)(iii) of what is now the Court of Appeal Act (2023 Revision), as well as rule 12(6)(y) of what are now the Court of Appeal Rules (2014 Revision). The court's reasoning would not have been affected by reference to what is now s. 6(d) of the Court of Appeal Act (2023 Revision) or rule 12(5)(e), he submitted. Moreover, said Mr Todd, there is ambiguity in s. 6(d). The drafter did not understand that in the Cayman Islands there is no decree nisi.

42. As I have said, Mr Horton, while seeking to rely upon the provisions of the Court of Appeal Act (2023 Revision) and the rules, submitted that the Respondents were entitled to benefit from the restriction of the grounds of appeal to any matter of law or of mixed law and fact as provided for in s. 24 of the MCA. Mr Todd on the other hand, submitted that an appellant was not so constrained: that because s. 24 was permissive, an appellant could seek leave to appeal on grounds not falling within s. 24 by relying on the provisions of the Court of Appeal Act (2023 Revision). He accepted that might mean an appellant in the same case having an entitlement to appeal on some grounds and needing leave to appeal on others.

43. Mr. Blatchly adopted and expanded upon Mr Todd's submissions. In doing so, he helpfully referred the court to a number of decisions of the English Court of Appeal concerning the doctrine of *per incuriam* as well as those cases in which the court considered whether or not it was obliged to follow its previous decisions. I refer to some of them below.

Discussion and conclusion

Does the ambit of s. 24 include ancillary relief?

44. As Mr Todd observed, it is reasonably clear that the profession regards s. 24 as the provision which governs appeals in this area. *McTaggart* suggests as much. So do the present appeals. That of course does not necessarily mean the profession is right.

45. Although it is now the practice first to make an order proving the petition, with issues of ancillary relief being adjourned into chambers, it is an essential element of the decree of dissolution that it contains the order for ancillary relief. Ss. 24 and 25 must, as Mr Todd submitted, be read together. S. 24 gives the right to appeal in respect of an order "*made or pronounced by the Court*." S. 25(1)(b) refers to "*any order made therein.*" An order for ancillary relief, contained as it is in the decree of dissolution must in my view inevitably be such an order.

46. In short, provided the procedure set out in s. 24 is followed, there is on the face of it an unqualified right to appeal an order for ancillary relief, as the court concluded in *Wight*. It follows that I do not accept Mr Horton's submission that the right only applies to the decree itself and matters intimately concerning it. It also follows that there is the tension identified in *Wight* between s. 24 of the MCA 2005 and the provisions of the Court of Appeal Act (2023 Revision) and the Rules (2014 Revision).

Was Wight wrongly decided?

47. While I accept, as Mr Horton submitted, a right of appeal may be qualified, I find it difficult, as did the court in *Wight*, to disregard the plain words of s. 24 of the MCA 2005. The rights it gives are unqualified. They have been in place since 1976. Even Mr Horton seeks to rely on some of what is said in s. 24, namely the restriction it imposes on the grounds of appeal. An essential part of Mr Horton's submission that *Wight* was wrongly decided is his argument that in promulgating rules 12(5)(e) and 12(6)(y) the Rules Committee must have intended to exclude ancillary relief from s. 24 of the MCA 2005. That seems to me a difficult argument. The rules make no reference to s. 24, let alone to such an intention. They are secondary legislation. The power to make them derives from s. 35(3). In my view it is doubtful that the powers of the Committee under s. 35(3) extend to what, given my understanding of the effect of s. 24, would amount to the effective repeal of substantive provisions of an Act of Parliament giving citizens an unqualified right to appeal.

48. As to Mr Horton's analogy with s. 29(1) of the Court of Appeal Act (2023 Revision) and rule 11 (4A) and (4B) of the Court of Appeal Rules (2014 Revision), consideration of them must await another day and following full argument. It may well be that different considerations apply.

49. As to Mr Horton's submissions in respect of the limited right of appeal to the Privy Council, that does not seem to me of great weight. As Mr Blatchly argued, a filtering of second appeals is understandable.

50. In the result, I was unable to conclude that *Wight* was wrongly decided. While that alone was sufficient to resolve the preliminary issue in favour of the Respondents, there were further, alternative, reasons to do so.

51. Unless *Wight* was decided *per incuriam* or this court takes the exceptional decision of not following it, the rule of *stare decisis* means the court is bound to follow *Wight*. For, as Lord Donaldson MR said in *Rickards v Rickards* [1990] Fam 194 at page 203C:

> "*The importance of the rule of stare decisis in relation to the Court of Appeal's own decisions can hardly be overstated.*"

Per incuriam

52. In *Morelle Ld. v Wakeling* [1955] QB 379 at page 406, Lord Evershed MR, giving the judgment of the court, put the doctrine of *per incuriam* in the following way (at page 406):

> "*As a general rule the only cases in which decisions should be held to have been given per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. That definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.R. [in Young v Bristol Aeroplane Company Ltd [1944] K.B. 718] of the rarest occurrence.*"

53. In *Duke v Reliance Systems Ltd* [1988] 1 QB 108, in a judgment with which Lord Justice Balcombe and Lord Justice Nicholls (as he then was) concurred, Sir John Donaldson MR (as he then was) said at page 113C:

> "*I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision…I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion.*" (original emphasis)

54. In my view the *per incuriam* argument could not succeed as far as the decision in *Wight* is concerned. As Mr Todd submitted, the court had well in mind the provisions of ss. 5 and 6(f)(iii) of what is now the Court of Appeal Act (2023 Revision), as well as rule 12(6)(y) of what are now the Court of Appeal Rules (2014 Revision). While the court did not refer to s. 6(d) of the Act or rule 12(5)(e), it plainly recognised the conflict between the MCA 2005 and the provisions set out in Court of Appeal Act and the rules deriving from it. In my view its reasoning would not have been affected by reference to those provisions. They are merely further examples of the conflict which the court identified. They are not inconsistent with the decision and cannot demonstrate it was wrong.

55. The absence of any reference in *Wight* to what is now s. 35(3) of the Court of Appeal Act (2023 Revision) also cannot render the decision demonstrably wrong. As I set out above, it is doubtful that the powers of the Committee under s. 35(3) extend to what, given my understanding of the effect of s. 24 of the MCA 2005, would amount to the effective repeal of substantive provisions of an Act of Parliament giving to citizens an unqualified right to appeal.

The court not following its previous decision

56. In *Rickards*, in the judgment to which I have referred, Lord Donaldson referred to the "*exceptional category*" of case in which the court will not follow its previous decision. Among other things he said (page 203G):

> "*…certainty in relation to substantive law is usually to be preferred to correctness…Erroneous decisions as to procedural rules affect only the parties engaged in the relevant litigation. This is a much less extensive group and*

> *accordingly a departure from established practice is to that extent less undesirable…an erroneous decision which involves the jurisdiction of the court is particularly objectionable…Nevertheless, this court must have very strong reasons if any departure from its own previous decisions is to be justifiable.*"

57. In my judgment, even assuming Mr Horton's submissions had substance, this case falls short of those exceptional cases which Lord Donaldson had in mind. The court could not justify departing from a decision which recognised citizens' rights to an unqualified entitlement to appeal, a decision which has informed the practice of the Cayman Islands for many years.

58. In the result, the court was in my view bound to follow the decision in *Wight*, whether or not it was wrongly decided.

A final observation

59. The above are the reasons the court felt driven to conclude that leave was not necessary. It means that this most unsatisfactory situation, which was pointed out as long ago as 2006 in *Wight*, continues. It is now imperative that something is done. In the meantime, the profession should be aware, if it is not already, that the grounds on which appeals may be advanced under s. 24 of the MCA 2005 are strictly limited by the terms of the section to appeals on matters of law or mixed fact and law. Appeals on questions of fact alone are not permitted.

Field JA:

60. I agree.

Martin JA:

61. I also agree