IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO: FAM 120 of 2015

BETWEEN: **DIANNE PATRICE FLEIGER** **Petitioner**

AND: **FRANK GEORGE FLEIGER (DECEASED)** **Respondent**

MICHELE LENORE FLEIGER AS ADMINISTRATRIX OF THE ESTATE OF FRANK GEORGE FLEIGER (DECEASED) **Applicant**

Appearances: **Ms. Zeena Begum of Priestleys for the Applicant**
Ms. Louise Desrosiers & Mr. Bhavesh Patel of Travers Thorp Alberga for the Petitioner

Before: **Hon. Mr. Justice Richard Williams**

Heard: **8 February 2023**

Written submissions Received: **The Applicant - 5 June 2023; The Petitioner - 6 June 2023**

Draft Ruling circulated: **14 July 2023**

Judgment provided: **20 July 2023**

HEADNOTE

Ancillary Relief - Consent order - Procedure when Court is approving consent ancillary relief orders and Practice Direction No. 1/2013 Consent Orders in Ancillary Relief Proceedings - Application for declaration made pursuant to the Court's inherent powers as to true agreement in a consent ancillary relief order ("the Order") - Declarations cannot be made pursuant to S.13 Married Woman's Property Act (1977 Revision) post the granting of a certificate of dissolution of marriage - Application for variation of the Consent Order where Summons issued 5 years after Consent Order - Section 23 Matrimonial Causes Act - Test for variation application set out in the 'Tibbles Criteria', Tibbles v SIG plc (t/a Asphaltic Roofing Supplies) [2012] EWCA Civ 518.

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JUDGMENT

The Background - The identity of the parties and the Applicant's application

1. The hearing concerns the Summons dated 24 November 2020 ("the Summons") filed by the Applicant, Ms. Michele Lenore Fleiger as Administratrix of the Estate of her brother Frank George Fleiger (deceased) ("the Respondent").[1] The Summons relates to the Consent Ancillary Relief Order ("the Order")[2] reviewed and approved by me on 30 September 2015 ("the Order"). The Summons is supported by the Applicant's Affidavit sworn by her on 10 November 2020 and the Affidavit of her sister, Jacqueline Clare Geremia sworn on 12 November 2020. The Deceased's former wife, Dianne Patrice Fleiger ("the Petitioner"), opposes the application for the remedies sought in the Summons and relies upon the Affidavit sworn by her on 5 February 2021.

2. Having regard to the circumstances that existed at the time of the approval of the Order, an almost equal division of the assets was agreed. The Applicant contends that the events that have occurred since the Order was approved are *"grossly unfair"* and mean that the Petitioner received roughly 85.25% of the assets and the Respondent obtained at best 14.75% of the assets. The Petitioner correctly contends that this percentage calculation is *"flawed"* as it fails to take into account the liabilities solely met by the Petitioner or the assets which have been liquidated following the date of the Order.

3. The Applicant submits that, due to the way that the Petitioner has construed the Order and due to what has happened post Order, it was *"necessary and in the interests of justice and fairness"* for her to issue the Summons to seek assistance from the Court to clarify the effect of the Order and/or vary the Order *"to provide for both a fair division of the assets and a clean break"*. The Applicant states that, if the Petitioner was to succeed in the Insurance Writ proceedings and in the Mortgage proceedings brought against the Estate[3], the percentage figure would rise to just under 100% in her favour. It is contended that the clarity and fairness will come from the granting of declarations as to the effect of the Order and/or a variation of the Order.

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[1] The Respondent passed away on 17 December 2017. Letters of Administration were granted to the Applicant on 12 February 2018.
[2] Terms of the Order are set out at paragraphs 23 and 24 herein.
[3] See paragraphs 42-44 below.

4. The Applicant also contends that the Order does not make *"sensible or reasonable provision for separation of the parties' finances in terms of joint mortgages and and/or joint accounts and instead ties the parties together in a complex arrangement and intermingles the parties' personal financial resources"* with those of the liquidated business DFLM Management Ltd ("DFLM") (referred to as 'Copper Falls Steakhouse' in the Order) ("the Business")[4], adding that it is not practical for the Estate to be tied into the arrangements with the Petitioner for many years whilst mortgages are paid. She states that, in any event, the Business no longer exists and therefore a variation of the Order is required to clarify and conclude all the financial dealings between the present parties.

5. In the Summons, the Applicant as Administratrix of the Estate seeks the following orders:

(1) A declaration that by virtue of the agreement between the parties as embodied in the Order, the parties agreed to sever the joint tenancy in respect of the property Registration Section WBBS, Block 12C, Parcel 261 ("the Strand Property") and thereby became entitled to the Strand Property as proprietors in common in equal shares;

(2) That the Registrar of Lands is to forthwith cause the registration of the Strand Property in the Lands Register to be rectified so that the Strand Property is registered in the names of the Applicant and the Petitioner as proprietors in common in equal shares;

(3) That the Petitioner is to deliver up to the Applicant's attorneys-at-law forthwith any Land Certificate that has been issued to her in her sole name in respect of the Strand Property for cancellation by the Registrar of Lands;

(4) That, save for the delivery up of the said Land Certificate referred to in (iii) above, the Petitioner, whether by herself, her servants and/or agents is inhibited and/or restrained from dealing with, selling or otherwise disposing of the Strand Property for so long as the same remains registered in her sole name;

(5) That the Order be rectified or alternatively varied to provide that the Strand Property be sold and the net proceeds of sale be divided equally between the Petitioner and the Respondent;

(6) That the Order be varied in such manner as the Court shall consider fair in light of the changed circumstances including the death of the Respondent on 17 December 2017 and the

[4] Copper Falls is a restaurant which is operated by a company called DFLM Management Limited. A Mexican restaurant also operates out of the Strand Property (defined below) and pays rent to the Petitioner.

liquidation of the Business so as to provide for a fair division of the fruits of the marriage and a clean break;

(7) That the Order be varied to remove the requirement at paragraph 23 that each party should execute an individual irrevocable life insurance policy naming the other party as sole beneficiary;

(8) That, the extent that such provisions of the Order survive any order for variation, there shall be an account in respect of the parties' RBC joint account (#706-402-5) ("RBC Account") since the date of the Order and generally in relation to the:

(i) rental income received in respect of the rear rental unit pursuant to paragraph 18 (whether paid into the RBC Account or otherwise);

(ii) rental expenses in respect of the rear rental unit pursuant to paragraph 19 (whether paid out from the RBC Account or otherwise);

(iii) mortgage payments which were to be met jointly from the account pursuant to paragraphs 2, 10 and 14 (whether paid from the RBC Account or otherwise);

(iv) distributions which were made of any surplus above the CI$50,000 reserve as referred to in paragraph 18 (whether made from the RBC Account or otherwise); and

(v) any sums paid out of the RBC Account since the date of the Order which are not in relation to permitted expenses pursuant to paragraphs 2, 10, 14 and 19 of the Order.

(9) That, to facilitate the making of the above orders, the Petitioner do in advance give full and frank disclosure in relation to the entering into of the Order, her income, assets, liabilities and all other matters relevant to the Court's exercise of its statutory powers under the Matrimonial Causes Act (2005 Revision) ("the Act").

6. Although there are five matrimonial properties addressed in the Order[5], it is evident that the dispute concerns the Strand Property upon which the now insolvent "Copper Falls Steak House" and the "rear rental unit" were/are located. The Strand Property was purchased on 11 November 2009 by the Petitioner and the Respondent as joint proprietors. The primary dispute is whether they continued to hold it as joint proprietors following their divorce and pursuant to the Order. The Strand Property was purchased with a CI$875,000 mortgage from the Royal Bank of Canada and the mortgage payments were made jointly from the Copper Falls Steakhouse joint account as

[5] See the Order set out at paragraph 24 below.

confirmed by paragraph 17 in the Order. The Applicant argues that, putting aside the Strand Property, there is no issue that all of the other matrimonial property under the Order was to be split equally and that it would therefore be *"incongruous"* for the Order to be interpreted as the Petitioner and Respondent intending the rules of survivorship for the Strand Property.

7. The Applicant in her Skelton Argument characterises the remedies, which she says will achieve clarity, fairness and a clean break moving forward, under four headings, namely: (i) declaration as to the proper construction of the Order; (ii) variations; (iii) restrictions and/or rectifications; and (iv) requests for further disclosure.

Background – Proceedings brought relating to the Summons – Strike out Summons and legal issue hearing

8. On 5 February 2021, the Petitioner filed a Summons, listed for hearing on 2 June 2021, seeking an order that the Summons be struck out on the following basis:

   a. that the declaration was a spurious claim, frivolous and an abuse of process of the Court, hopeless and wrong in law and fact and was a re-litigation of a claim already settled by the Court in winding-up proceedings and determined by an independent, Court appointed Official Liquidator.

   b. that the claim for a rectification of the Land Register[6], that the claim for delivery up of the Land Certificate[7] and that the injunction claim concerning the Strand Property[8] were spurious claims, frivolous and an abuse of process of the Court, hopeless and wrong in law and fact. It was claimed that the pleading by the Applicant was embarrassing in its lack of specificity as it did not set out the legal basis of the remedies sought and as pleaded disclosed no cause or action. In relation to the Applicant's claim at paragraph b. in her Summons, it was also pleaded by the Petitioner that the remedy sought was not available to the Court as the rectification sought is to a state of affairs that never existed and seeks a transfer of the property to a person who is deceased.

[6] Paragraph b. in the Applicant's Summons.
[7] Paragraph c. in the Applicant's Summons.
[8] Paragraph d. in the Applicant's Summons.

c. that the claims to rectify or alternatively vary the Order relating to the Strand Property[9] and for an unspecified variation of the Order *"In such manner as the Court consider fair"*[10] were spurious claims, frivolous and an abuse of process of the Court, hopeless and wrong in law and fact. It was claimed that the pleading by the Applicant was embarrassing in its lack of specificity, as it did not set out the legal basis of the remedies sought and as pleaded disclosed no cause or action. It was contended that a rectification of an order is not available to the Court on the facts of case and that a partial variation cannot be granted on the grounds relied upon by the Applicant, *"which as pleaded are grounds for an appeal over 5 years after the Order and over 3 years from the death of the Respondent"*. It was submitted that it was an abuse of process as the order sought for a sale was *"so far removed from the intention of the Parties to the divorce"*.

d. that the claim to vary the Order by removing the life insurance policy clause was a spurious claim, frivolous and an abuse of process of the Court, hopeless and wrong in law and fact; and

e. That the claims for disclosure were spurious claims, frivolous and an abuse of process of the Court which do not relate to the other remedies sought and were a *"fishing expedition"* with the aim of re-litigating afresh the ancillary relief proceedings.

9. That strike out Summons was later withdrawn as recorded in the order of Carter J (Actg) on 3 June 2021. Although this was not proceeded with, several of the contentions were resurrected at a legal issue hearing heard by me on 9 June 2022[11] at which the Court was asked to make a determination as to whether the relief claimed in the Summons was, as a matter of law, one that is available to the Applicant.

10. A Judgment emanating from the legal issue hearing was handed down on 13 July 2022 ("the July Judgment"). Although I had concerns about the lack of clarity from the Applicant concerning what she was seeking, I stated therein that, in all of the circumstances in this case, I was not satisfied that the Applicant should be estopped from fully arguing the declaratory relief claim contained in the Summons. I did not accept the submission that the Court must dismiss the entire

[9] Paragraph e. in the Order.
[10] Paragraph f. in the Order.
[11] The legal issues hearing was listed at the request of the Petitioner made at a directions hearing held on 15 February 2022.

application at this stage on the basis that no reasonable cause of action was shown or because there was an abuse of process to seek the Court's determination of matters that have not been properly pleaded. I gave directions to the hearing of the Summons and I ordered that the Petitioner provide details of the written negotiations that took place leading up to the Order. Costs relating to the legal issue hearing were reserved. Having regard to the relevancy of the background information set out and the analysis performed in that Judgment, it is convenient to replicate large parts of the July Judgment herein.

The background - The Petitioner's position in relation to application made in the Summons

11. The Petitioner contends that the Applicant has not heeded the Court's earlier advice concerning the lack of clarity. The Petitioner states that the findings sought by the Applicant should not be made because:

> *"a. The Strand Property was purchased by the parties as joint proprietors in 2009;*
>
> *b. The Order was freely and voluntarily entered into and agreed by the Parties with an understanding it was valid and binding on the Parties;*
>
> *c. That the parties operated under the Order without dispute from its inception until the Respondent's death in 2017;*
>
> *d. The legal position as set out by the Legal Opinion obtained by the Official Liquidator is clear and was not disputed;*
>
> *i. the Strand Property was owned by the Respondent and Petitioner as joint proprietors and as such the Petitioner had the right of survivorship;*
> *ii. The Order did not sever the joint proprietorship;*
> *iii. The Petitioner interpreted the legal position correctly when she transferred the Strand Property into her sole name following the Respondent's death; and*
> *iv. In these circumstances there is no legal remedy under the Registered Land Law or otherwise to allow a 'rectification' of the Land Register.*
>
> *e. In relation to a variation, the death of both parties was contemplated by the parties and reflected in the Order;*
>
> *f. The Respondent's death does not amount to a 'material change in circumstance' in and of itself;*
>
> *g. The Order is not affected by the Respondent's death as a matter of fact and law;*
>
> *h. The Order was not fraudulently obtained as originally alleged (position since abandoned);*

i. *The Applicant's calculation of the assets in the Respondent's Estate following death is incomplete as it does not include life insurance policies in which the Estate alone were beneficiaries, nor properties that were sold and which the Respondent solely retained the profits of, nor does it fully capture the debts serviced by the Petitioner;*

j. *Assets which were originally contemplated by the Order have since been sold, closed, liquidated and so forth;*

k. *There is nothing inherently unfair about the Order and, if there was, this would give rise to an appeal and not a variation."*

12. The Petitioner rightly says that, unlike the Applicant, her case has remained consistent throughout. It is that she and the Respondent, after jointly taking legal advice, purchased the Strand Property as joint proprietors. Her case is that they did that because they intended the right of survivorship. She says that the terms in the Order are clear but that the Applicant's interpretation of them is wrong. The Petitioner contends, when highlighting that the Order purposely did not make any express reference to rectification of the Land Register or to the execution of land documents, that the Order accurately reflects their intention that the position in relation to the Strand Property should continue post-divorce. She argues that the Order accurately reflects the fact that neither party sought to sever the tenancy or transfer the Strand Property to the Business. In support of that contention, the Petitioner further highlights the preamble to the order which provided that any *"real and personal chattels not disposed of by this order shall be and remain the absolute property of the party in whose possession they are now*" and that the "*the parties agree that the Business shall continue to operate as it does presently and without any interruption on account of these proceedings or settlement terms"*.

The hearing of the Applicant's Summons

13. The Summons came on before me for hearing on 8 and 9 February 2023. I received oral submissions from Counsel for each party and heard oral evidence from the Applicant, the Applicant's sister (Jacqueline Geremia) and the Petitioner. At the end of the hearing, I adjourned the matter to enable the parties to submit their written submissions by 6 March 2023 and for me to thereafter prepare and deliver this reserved written judgment. Unfortunately, for compelling personal reasons, Counsel for the Applicant was not able to submit her written submissions by the directed date. The deadline for submitting those submissions was extended on a number of

occasions and I commend Counsel for the Petitioner and their client who sensitively agreed to all of the requested further extensions. The written submissions were filed on 5 and 6 June 2023. When determining the issues addressed in this Reserved Judgment, I have considered the oral evidence, the written and oral submissions filed on behalf of the Applicant and the Petitioner as well as the content in the provided bundles.

Background - The divorce proceedings

14. As I cannot improve on the background analysis set out in the July 2022 Judgment and because I feel that it is important that the details are also found in this Judgment rather than simply inviting the reader to read the content in that Judgment, I repeat some of that below.

15. The Petitioner and the Respondent commenced their relationship in or around 1999. They were married on 20 December 2002. The Petitioner filed the Divorce Petition on 26 June 2015, at which time the parties separated, but they remained in business with each other. The Petition was unopposed and was proved on 2 July 2015. Following the approval of the Order, the Decree of Dissolution of Marriage was granted on 30 September 2015. At that time, the Petitioner was represented by different attorneys and the Respondent was unrepresented.

Background – The Consent Order Information Form filed with the draft Order submitted for the Court's approval

16. As the Order was reached by consent, pursuant to Practice Direction No 1/2013 Consent Orders in Ancillary Relief Proceedings, it was filed with an accompanying fully completed and signed Statement of Information for a Consent Order form ("the Form")[12]. The Form is required because the Court is obliged, when approving an ancillary relief order, to comply with the statutory duty imposed by s.19 of the Act.

[12] The final version of the Form was dated 26 August 2015 and it was submitted on 30 September 2015. The original Form had to be redrafted as it wrongly stated that both parties were represented by Samson & McGrath, the Petitioner's then attorneys. I note in an email dated 17 August 2015 sent to the Judge's Personal Assistant that Samson & McGrath stated that they had also been *"assisting the Respondent with the procedural parts of the divorce as the matter is amicable and non-contentious"*. I also note that in the final version of the Form the Respondent confirmed that he had declined to take up the available opportunity to seek his own representation for legal advice concerning the settlement.

17. The purpose of the Form is to: (i) provide the Court with sufficient financial information to enable it to exercise its s.19 duty; (ii) satisfy the Court that the order is not one that has been reached under duress; (iii) inform the Court whether parties are legally represented or not and, if a party is not represented, that he is aware that he could have sought representation and that he is still content to consent to the terms of the order; and (iv) satisfy the Court that the parties are content with the financial disclosure that has been provided. At the end of the Form there is a Statement of Truth which the parties (and, if they are represented, also their attorney) must complete and sign. In the Statement the parties must confirm that they believe that the facts stated in the Form are true. The declaration which the Petitioner and the Respondent signed in this matter stated:

> *"I confirm that I have read the consent order and the completed statement of information for a consent order (from the other party) and that I have made and received sufficient disclosure to enable me to make an informed decision to ask the Court to approve the terms contained within the consent order attached. .... I confirm that I have not (been) pressured in any way to endorse the terms of the consent order attached."*

As the Respondent was unrepresented his declaration also included the following wording:

> *"I confirm that I am unrepresented and I have had the opportunity to seek legal advice in regard to the proposed settlement and have declined to do so."*

18. The Form was signed by the parties and included a notice that:

> *"Proceedings for contempt of court may be brought against a person who makes or causes to be made, a false statement in a document verified by a statement of truth."*

19. Attached to the Form was a signed and dated 'Schedule of the Parties Assets and Valuations'. These were listed as follows:

(i) *FMH – WBBW, Block 4C, Parcel 352 – Approximate value = CI$400,000. Mortgage = CI$98,704.08 repayable at CI$1,100 per month until 31 July 2027.*

(ii) *Land 1 – WBNW, Block 4C, Parcel 310 – Approximate value = CI$80,000. No mortgage. Paid for by Dianne only.*

(iii) *Land 2 –WBNE, Block 9A, Parcel 911 – Approximate value = CI$225,000. Mortgage = CI4148512.89 repayable at CI$1,275 per month until 31 July 2027.*

(iv) Duplex – WBNW, Block 4C, Parcel 259 – Approximate value = CI$180,000. Plus renovations of approximately CI$50,000.00. Mortgage = CI$160,498.41 repayable at CI$1,400 per month until 30 July 2028.

(v) Business – WBBS, Block 12C, Parcel 261 – CI$875,000.00. Mortgage on the building and land = CI$297,799.51 repayable at CI$7,000 per month until 29 February 2024.

(vi) Vehicles - Approximate values CI$48,000.00 for 2015 Audi S3 and 2015 Ford Mustang GT

All approximate values based on what was paid for the property, including renovations or was appraised at some point in the past. We have both agreed that the values of fair as far as we are concerned and we are both happy with the split we have decided on."[13]

This information provided sufficient detail to the Court about what the relevant assets were and what the valuations of the same were. This Schedule was provided as the Court had specifically requested it. That proactive request was made because, following my review of the draft order and the Form[14], I was not willing to approve it because I concluded that additional information was required concerning the assets and valuations to enable the Court to properly consider the s.19 factors.

20. In the Form, under the heading 'Capital Resources less any unpaid mortgage or charges', the parties calculated these to be *"CI$1,780,000.00 - 705,514.79 = 1,074,485.21"*. The parties stated in the Form that they each had an income of CI$96,000 per annum. In the Form the parties wrote:

"The attached proposed consent order was agreed to by way of several discussions between the parties, usually while at the former matrimonial home."

This seems to indicate that a great deal of the negotiations took place between the parties rather through the Petitioner's attorney.

[13] When one totals up the value of the assets before deducting the mortgage liability as set out in the Schedule they total $1,808,000 and not the $1,780,000 figure given in paragraph 1 in the Form (see paragraph 20 below).
[14] The first Form (dated 12 August 2015 and submitted on 14 August 2015) did not identify the individual assets or their separate valuations.

21. However, the Applicant contends that discussions between the Petitioner and Respondent should not be seen as illustrating a good level of cooperation between them but, when considering the evidence as a whole, were discussions influenced by the Respondent's lack of trust for the Petitioner and his desire for there to be an equal and fair division of the assets. With this in mind, the Applicant refers to some of the emails that were being transmitted when the terms of the Order were still being negotiated. In an email from the Petitioner to her lawyer dated 14 September 2015, she noted that the Respondent was again questioning his risk situation of being voted out of the company if her parents remain as directors of the company. In an email from the Petitioner to the Respondent on 18 September 2015 headed "*Re: Trust*", she informed him that she had never said anything about trying to have him removed from the Business and stressed that she and her parents knew that the success of the Business was due to his work. On 18 September 2015, the Respondent sent a further email to the Respondent in which she commented about him having an issue signing the revised Consent Order and she added *"then I realized that you still don't trust me, you never had"*. She then went on to talk about a partnership agreement being drawn up to prevent the Business being taken away from one of them.

22. When I look at the content in the emails that have been presented, it is clear that they were concentrating on the Respondent's concern that the Petitioner and her parents may try to oust him from the Business. His concern was likely exacerbated by the fact that one of his former business partners had acted in that manner in relation to another business. It is a specific concern and the Petitioner, although not happy about the lack of trust the husband had for her in this regard, went on to suggest an appropriate way to address his concerns. Although the Petitioner mentioned in an email to her attorney on 3 September 2015 that the Respondent was not happy with what she had put together, that is nothing out of the ordinary in a matrimonial case where negotiations take place and revisions are made to draft orders following exchanged suggestions. What is clear, from the Order signed by the Petitioner and Respondent and from the declarations that they signed on the accompanying Form, is that they both agreed the content of the Order which was reached following further discussions and with revisions being made to what was initially "*put together*" by the Petitioner.

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Background - The content of the Order

23. The Order was signed by the parties and it included in its preamble the standard 'clean break clause'[15] and confirmation that the Order represented the *"full and final settlement of all ancillary relief issues"* arising out of their marriage and that the parties were *"releasing all rights, claims or interests, whether legal or equitable, which either of them may have against each other in respect of any other assets or property of any kind whatsoever which either party may have now or in the future…."*

Importantly, another preamble provided that the Order was made *"...upon each party confirming that sufficient disclosure has been made and received to allow each of them to make the information[16] (sic.) decision to ask the Court to approve the below terms, pursuant to the requirements of Practice Direction No.1 of 2013"*.

24. Due to the issues raised before me, to put them into a proper context, I replicate the full terms of the compartmentalised Order herein. The Order approved by me contains the following terms:

"Former Matrimonial Home ("FMH")

1. *The Petitioner shall retain the FMH located at 15 Pleasant Drive, West Bay, Grand Cayman (Registration Section WBBW, Block 4C, Parcel 532).*
2. *The parties agree to remain jointly and severally liable on the mortgage with Royal Bank of Canada and to continue sharing repayment of the mortgage equally such that the outstanding sum of CI$98,704.08 will remain repayable at CI$1,100 per month with a maturity date of 31 July 2027. The parties agree that the repayments shall continue to be made from their existing RBC account (#706-402-5).*
3. *The Petitioner shall assume full responsibility for all other liabilities in respect of the FMH and hereby releases, relieves and indemnifies the Respondent from other liability.*
4. *The parties shall take all reasonable steps to remove the Respondent's name from the FMH forthwith and shall execute all necessary documentation to effect the said transfer.*

[15] The preamble confirmed the parties' intention that the order would enable them to achieve a clean break in respect of their financial affairs.
[16] The word *"information"* may have been intended to be the word *"informed"*.

5. *Unless otherwise agreed between the parties, the chattels contained in the FMH shall remain in the FMH or be divided between the parties by agreement."*

Registration Section WBNW, Block 4C, Parcel 310 ("Land 1")

6. *The Petitioner shall retain Land 1 which is mortgage-free.*
7. *The parties shall take all reasonable steps to remove the Respondent's name from Land 1 forthwith and shall execute all necessary documentation to effect the said transfer.*
8. *The Petitioner shall assume full responsibility for all liabilities in respect of Land 1 and hereby releases, relieves and indemnifies the Respondent from further liability against Land 1.*

Registration Section WBNE, Block 9A, Parcel 911 ("Land 2")

9. *The Respondent shall retain Land 2.*

10. *The parties agree to remain jointly and severally liable on the mortgage with Royal Bank of Canada and to continue sharing repayment of the mortgage equally such that the outstanding sum of CI$148,512.89 will remain repayable at CI$1,275 per month with a maturity date of 31 July 2027. The parties agree that the repayments shall continue to be made from their existing RBC account (#706-402-5).*

11. *The Respondent shall assume full responsibility for all other liabilities in respect of Land 2 and hereby releases, relieves and indemnifies the Petitioner from other liability.*

12. *The parties shall take all reasonable steps to remove the Petitioner's name from Land 2 forthwith and shall execute all necessary documentation to effect the said transfer.*

Registration Section WBNW, Block 4C, Parcel 259 ("Duplex")

13. *The Respondent shall retain Apartment B of the Duplex which is on the left hand side and presently occupied by the Respondent. The Petitioner's parents, Mr. Lewin Osgood Parsons and/or Mrs. Marilee Jemima Parsons, shall retain Apartment A of the Duplex which is on the right hand side. No transfer documentation is required.*

14. *The parties agree to remain jointly and severally liable on the mortgage with Royal Bank of Canada and hereby agree to continue sharing repayment of the mortgage equally such that the outstanding sum of CI$160,498.31 will remain repayable at CI$1,400 per month with a maturity date of 30 July 2028. The parties agree that the repayments shall continue to be made from their existing RBC account (#706-402-5).*

15. *The parties agree that in the event that the Respondent decides to sell Apartment B of the Duplex at any point in the future, he shall offer the Petitioner's parents, Mr. Lewin Osgood Parsons and/or Mrs. Marilee Jemima Parsons, a right of first refusal on the purchase.*

Registration Section WBBS, Block 12C, Parcel 261 – Copper Falls Steakhouse and rear rental unit ("the Business")[17]

16. *The parties agree that the Business shall continue to operate as it does presently and without any interruption on account of these proceedings or settlement terms.*

17. *The parties agree to remain jointly and severally liable on the mortgage with Royal Bank of Canada in respect of the building and land and hereby agree to continue sharing repayment of the mortgage equally such that the outstanding sum of CI$297,799.51 will remain repayable at CI$7,000 per month with a maturity date of 29 February 2024. The parties agree that the repayments shall continue to be made from their Copper Falls Steakhouse account at RBC (#112-949-3).*

18. *The parties agree that the rental income from the rear rental unit shall be paid into the parties' existing RBC joint account (#706-402-5). Once the parties have built up a minimum reserve of CI$50,000 in the account, any monies over and above this amount shall be shared equally between the parties.*

19. *Any rental expenses in respect of the rear rental unit shall be paid from the parties' existing RBC joint account (#706-402-5) or from the Copper Falls Steakhouse accounts, whichever is able to pay at the specific time and upon agreement between the parties. There shall be a positive obligation on both parties to continue working together in respect of any issues which arise from the rental of the rear unit.*

20. *The parties hereby agree to each work 3 nights per week at Copper Falls Steakhouse. The specific days at which each party will be present at Copper Falls Steakhouse shall be determined in advance by agreement between the parties.*

21. *There shall be an ongoing profit share in respect of the dividends from the Business on the following terms:*

    - *The first 10% shall be paid to the Petitioner's parents, Mr. Lewin Osgood Parsons and/or Mrs. Marilee Jemima Parsons.*
    - *The remaining 90% shall be split on the following basis*
        - *60% to the Respondent; and*
        - *40% to the Petitioner.*

22. *The parties shall take all reasonable steps to assist with the transfer of Mr. Lewin Osgood Parsons' 25% shareholding in the Business to the Petitioner forthwith and to*

[17] The Applicant places emphasis on this description of the business.

assist with the transfer of Mrs. Marilee Jemima Parsons 25% shareholding in the Business to the Respondent forthwith. The effect of such transfers shall be that the Petitioner and Respondent each retain an equal 50% shareholding in the Business.

Other

23. *The parties hereby agree to each execute individual irrevocable life insurance policies forthwith in the sum of US$250,000 naming the other party as the sole 100% beneficiary.*
24. *The parties shall retain their respective pension policies and neither party shall make any claim against the other in relation to any entitlement. The parties agree to provide the necessary waivers and documentation required to remove their respective names as beneficiary from each other's pension policies.*
25. *The parties shall retain ownership and possession of their own vehicles for their sole benefit and shall indemnify the other party in relation to any liabilities relating to such vehicles. The Petitioner shall retain the 2015 Audi S3 (License # 160969) and the Respondent shall retain the 2015 Ford Mustang GT (License # 162639). No transfer documentation is required.*
26. *All other assets and liabilities which are not otherwise dealt with by the above terms and which are held in the sole name of either party as at the date of signing a consent order shall remain the sole asset or liability of the individual in whose name it is held. The other party hereby waives and releases any and all claims or interest to such assets.*
27. *Any individual mortgages or loans held in the sole name of either party as at the date of signing shall remain the sole liability of the individual in whose name it is held.*
28. *There shall be no order as to costs.*
29. *There shall be liberty to the parties to apply as to the workings of this order."*

The procedure to be followed by the Court in relation to approving consent ancillary relief orders

25. It seems that the Applicant has imputed at times in these proceedings that, as the Respondent was unrepresented and as the Petitioner's attorney drafted the Order (which is the normal practice when one party is unrepresented), it makes the Order in the circumstances of this case more open to challenge.

26. The Applicant may also be imputing that insufficient disclosure had been given by the Petitioner. However, it is not clear whether at this stage she is primarily focusing her disclosure concerns on the disclosure about the negotiations leading up to the approval of Order, as she states that if that is not provided she may ask *"that appropriate inferences are drawn against the Petitioner"*.[18] The Grand Court in ancillary relief proceedings has not ordinarily viewed s.14 of the Act as requiring the parties to present copies of their negotiations/correspondence leading to the agreement contained in the consent order to the Judge who is approving the Order. If required, the Judge may ask questions/request disclosure about the negotiations, whilst at the same time being conscious that some of the negotiations may have been conducted without prejudice. The fact that most consent ancillary relief orders are now reached after successful mediation, following confidential negotiations and discussions in mediation, to require such disclosure before approving an Order may be inconsistent with that confidentiality and impracticable.

27. The approach to consent orders advocated by Waite LJ in ***Pounds v Pounds*** [1994] 1 WLR 1535 at 1540 has been followed by the Grand Court, well before the introduction of mandated mediation in the Family Division. Although we do not have a similar provision to s.33A Matrimonial Causes Act 1973 (England and Wales), the long adopted broad appraisal approach to parties' finances in the Grand Court Family Division led to the introduction of the Practice Direction No.1 /2013 and the Statement of Information for a Consent Order Form which contains similar information to that contained in the Statement of Information Form which is considered by the Courts in England and Wales when reviewing draft consent orders. Waite LJ stated:

> *"When the House of Lords ruled in Livesey v Jenkins (1985 AC 424) that the duty of disclosure of assets was owed by spouses not only to each other but to the court, it did so upon the basis that it was the function of the court in every case, whether it was proceeding by consent of the parties or after a contested hearing, to be satisfied that the provision made by the order fulfilled the criteria laid down by S 25 of the Matrimonial Causes Act 1973.*[19] *It is clear, however, that this was intended to be an assertion of*

[18] Paragraph 14 Affidavit of the Applicant sworn on 10 November 2020.

[19] The Courts in the Cayman Islands, in deciding whether to exercise their powers under s.21 of the Act and, if so, in what manner have, when considering what is fair in all the circumstances of the case, traditionally had regard not only to the matters set out in s.19 of the Act, but had also been guided by the relevant factors raised in s.25(2) of the Matrimonial Causes Act 1973 ("the MCA"). ***Doak v Doak and Riley*** [2002] CILR 224, [17], [21], [22], ***Wood v Wood*** [2009] CILR 255, [12] as commented upon by Sir John Chadwick P. in ***McTaggart v McTaggart*** (2011) 2 CILR 366[39].

> *general principle only, and not to impose on the court the need to scrutinise in detail the financial affairs of parties who came to it for approval of an independently negotiated bargain……*
>
> *"….. on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application....."* [My emphasis]

The *"prescribed information"* is the same that is set out in the Form required by the Practice Direction No.1 /2013.[20] However, as rightly reiterated by Lord Brandon in ***Livesey v Jenkins*** [1985] AC 424 at 444, the need for full and frank disclosure still remains, adding that procedure in England and Wales (which is similar to that set out in Practice Direction No.1/2013) was a *"step in the right direction"*.

28. I am satisfied, when considering the established practical application of s.14 of the Act and the contents and purpose of Practice Direction No.1/2013, that the *"paternal function"* of the Court when approving financial consent orders should be, as LJ Waite opines:

> *"a broad appraisal of the parties' financial circumstances"* as disclosed to it in the Form, *"without descent into the valley of detail"* and it is *"… only if that survey puts the court on inquiry as to whether there are other circumstances into which it ought to probe more deeply that any further investigation is required of the judge before approving the bargain that the spouses have made for themselves."*

Background - The procedure actually followed in relation to the approval of the Order

29. Having read the parties' signed declarations in the Statements of Truth in the Form and the content of part of the preamble set out in the Order, when approving the Order, I was satisfied that the parties had reached an agreement at arms-length and not under duress, based on disclosure that they felt sufficient to enable them to do so in an informed manner. Based on the financial information in the Form, I was given sufficient insight into the parties' responsibilities, needs, financial and other resources and earning power. Being satisfied that s.14 of the Act had been complied with and having conducted the s.19 of the Act review, I determined that the Order was a fair one in the unusual circumstances of the case and that it reflected an agreement properly

[20] The draft copy of the Form is annexed to the Practice Direction.

reached. As stated by the authors of Duckworth Matrimonial Property Finance (Duckworth) at D2 [5]:

> *"The statement of information should…be complete. A significant omission means the court is unable to do its job properly, and may give grounds for appeal*[21]*…"*

30. I note that at times during these proceedings it has been inferred by the Applicant that: (i) I was wrong in reaching the above conclusions; (ii) I exercised my discretion incorrectly in approving the Order; and (iii) I approved provisions in the order which the Court did not have the jurisdiction to make. Such contentions would not ground a variation application, but should instead be challenged by an appeal. On one hand, it seems to now be submitted on behalf of the Applicant that her position is not that there was an error of the Court in approving the Order, but that the Order was predicated on an assumption that actions would take place in relation to the Petitioner's parents and that these actions did not take place. However, on the other hand, I note that the Applicant also contends at paragraph 5 of her affidavit that the Order is *"highly unusual and potentially unlawful in a number of respects"* and that this contributes to the need for there to be a variation to the Order. If the latter is the basis for a challenge to the Order, then such a challenge would take place via the appeal route. This is one example of the lack of clarity, particularly prior to the present hearing and during the evidential stage of the hearing, about the basis for the applications being made.

31. As the above comment has been made about the terms contained in the Order, one should recognise that there are several different types of clauses that may be arise in ancillary relief financial orders. In consent orders, such as this one, the Court often considers and approves provisions thoughtfully designed by the parties to meet their specific circumstances, which by their nature may not be characterised as being standard provisions (as long as the Court has the jurisdiction to make such an order). This is because, the parties are often best placed to tailor the terms of the order which will govern the division or utilisation of their assets upon divorce to better meet their circumstances and wishes rather than having a potentially less practicable order imposed on them by the Court.

[21] ***Toleman v Toleman*** [1985] FLR 62, CA.

32. In this case it was evident, on all the material then before me, that the parties had commendably approached the divorce proceedings in a fairly constructive manner, although they understandably at times questioned the other's suggestions. It was apparent to me, at the time of approving the Order, that they were both keen to put in place sensible and workable arrangements in the Order, that would enable them to continue to jointly run the Business, especially as it was their primary source of income. Therefore, I approved the Order being satisfied that it was a fair order, reflecting the parties' wishes and meeting their short and long term needs.

Background – Events following the approval of the Order

33. Until the Respondent's unexpected passing, he and the Petitioner operated the Business in the intended manner which was consistent with the terms of the Order. Pursuant to paragraph 17 of the Order, the Petitioner and the Respondent remained jointly and severally liable on the mortgage and still made the payments, as agreed, from the Business' joint RBC account. This was a practicable way of making and ensuring payments were made as and when they were due and it did not indicate an intention that the joint proprietorship had been brought to an end. Importantly, neither party sought to vary any of the terms of the Order post its approval and neither of them sought to vary the status quo and register any change in the ownership of the Strand Property with the Land Registry. An example of their ongoing cooperation is that although the land mentioned at paragraphs 9-12 of the Order was not transferred to the Respondent, in the spirit of the Order, it was sold and the entire sale proceeds were placed into the Respondent's personal account. It is only after his passing on 17 December 2017 that any dispute arose concerning the terms of the Order and its operation.

34. On 5 January 2018, about three weeks after the Respondent's passing, the Petitioner transferred the Strand Property into her sole name in accordance with holding the property as joint proprietor with the deceased. The Petitioner did not consult with the Applicant prior to doing that, as she states that she was simply updating the Land Register to reflect the passing of the Respondent's interest in the property to her due to her legal right to ownership as sole survivor after his death.

35. The Petitioner disagreed with the Applicant's initial assertion made in the below mentioned winding up proceedings that the intention between the Respondent and the Petitioner was that, if either of them passed away, the Strand Property would be treated as a business asset and that the

Estate of the surviving party would participate in the running of the Business. The Petitioner highlighted that, after they had jointly obtained legal advice from Campbells attorneys, the Strand Property was deliberately purchased as joint proprietors. Although a part of the Strand Property housed the Business, the Petitioner points out that the joint proprietorship was not severed/changed at any stage, including (she contends) deliberately in the Order where provision was specifically made about the ownership of other matrimonial properties, and she states that the intention was and remained that it would not be an asset of the Business.

36. It is accepted that a joint tenancy can be severed by mutual agreement or a course of conduct, but with reliance placed on ***Gore and Snell v Carpenter*** [1990] 60 P. & C.R, Chancery Division it is contended by the Petitioner that severance must be the result of agreement or a course of conduct. It is submitted that neither of these were present in this matter and, therefore, the joint tenancy has not been severed and the Petitioner remained entitled to the right of survivorship as the joint tenancy was still technically in existence at the time of the Respondent's death. The Petitioner submits that, in any event, the intention was that a surviving party would own the Strand Property where the Business was based, as that would enable him/her to continue to run the Business without interference.

37. The Applicant stated that, shortly after the Respondent's passing, the Petitioner was maintaining that the Respondent (and now the Estate) was a 50% shareholder in DFLM[22], but in June 2018 the Petitioner indicated through her attorneys that there was a dispute about the beneficial ownership. In the end the Petitioner was stating that, due to the fact that transfers from her parents of their shares had not actually taken place, that the Estate was only a 25% shareholder.[23]

Background – The winding up proceedings brought by the Applicant on behalf of the Estate and concluded in the Financial Services Division prior to the issuing of the Summons

38. The Applicant took issue with the Petitioner's actions concerning the Strand Property, including receipt of the rent payments relating to that property. She also challenged the approach of the Petitioner relating to the Respondent's interest in the Business. She highlighted that the Estate had not received any distributions of profit from the Business and had been excluded from the

[22] The Respondent highlights that the Petitioner when commissioning a valuation report in 2018 informed IRR that she and the Respondent were each 50% shareholders.
[23] See paragraphs 45-46 below.

management and affairs of the Business. Therefore, the Applicant, on behalf of the Estate, presented the Winding Up Petition against the Company on 24 July 2018 on a just and equitable basis. That Petition seems to have been brought on the basis that the Strand Property was a company asset and that the transfer made by Petitioner was a breach of her fiduciary duty causing a breakdown of trust and confidence such that the Applicant, as a shareholder, contended that it was just and equitable to wind up the company.

39. The Winding Up Petition was contested and during the case management stage it was amended and directions were given to trial. The Applicant states that Kawaley J, sitting in the Financial Services Division, did not accede to the Petitioner's request that he determine the ownership of the Strand Property as a preliminary issue, as the Applicant contended that in itself would not have resulted in the resolution of the proceedings before him. The Petitioner contends that at no time before or at the hearing before Kawaley J held in November 2019 was it suggested by the Applicant's attorney that the Strand Property was owned by the Petitioner and Respondent as proprietors in common, but in fact she was then arguing in the Petition that it was a Company asset and that the estate would participate in the running of the business. At paragraph 22 of the Applicant's Affidavit sworn on 25 July 2018 in the winding up proceedings the Applicant stated that:

"The Strand property was always regarded as beneficially owned by the Company."

The Applicant now takes a very different position in relation to the Strand Property, arguing that, in the Order, the parties were intending to sever the joint tenancy in respect of the Strand Property so that they became entitled to that property as proprietors in common in equal shares.

40. In the end, by consent, the Company was wound up voluntarily and placed into liquidation before the Petition was heard. This flowed from the restaurant's closure due to the Covid-19 pandemic. Graham Robinson was appointed as Official Liquidator and he prepared a final report on 30 June 2020 and thereafter the proceedings were concluded. At paragraph 2.3 in that report he wrote:

"Due to conflicting views of the Estate and Dianne Parsons in regard to the ownership of the property located at 43 Canal Pointe Drive also known as registration section West Bay Beach South, Block 12C, Parcel 261 (the 'Property') the OL obtained a legal opinion from HSM Chambers in regard to the ownership of the Property. <u>The legal</u>

opinion concludes that under the laws of the Cayman Islands Dianne Parsons is the legal owner of the Property as registered in the Cayman Islands Land Register[24].”

Seemingly it was after the Official Liquidator had shared the opinion that the Strand Property was owned by the Petitioner and the Respondent as joint proprietors when the Applicant changed her view expressed in the winding up proceedings about who had the interest in the Strand Property to the contradictory view now being put forward by her. During her oral evidence at the hearing before me, the Applicant agreed that the legal opinion was never challenged in the winding up proceedings.

Background – Events after the Official Liquidator was appointed

41. The Petitioner set up a new restaurant at the same part of the Strand Property. She established a new company that offered to purchase the Business which was supported by the Official Liquidator and sanctioned by the Court. She was able to acquire the fixtures and fittings and stock from the Business.

Background – Other litigation following the death of the Respondent – Proceedings brought by the Petitioner

42. Despite making some attempts to arrange it, in non-compliance with paragraph 23 of the Order, the Respondent failed to take out the irrevocable life insurance policy naming the Petitioner as the sole beneficiary. The Order provides that the policies were to be taken out *“forthwith”* by both parties. This resulted in the Petitioner issuing a Writ against the Estate[25] in the Civil Division[26] with a claim for $250,000 damages due to the mortgage liability she claims she has been left with and which would have been greatly reduced if such a policy had been taken out. I note with some interest, especially having regard to the nature of her own Writ, that up to the date of his passing the Petitioner was similarly acting in a technical breach of the Order as she also failed to comply with the agreed provision concerning the life insurance policies.

[24] My emphasis by underlining.
[25] As the Respondent’s liability passed to the Estate.
[26] Cause No. G171 of 2019.

43. The Petitioner also issued a Writ[27] against the Estate seeking damages in respect of mortgage payments alleged to have been made solely by her totalling CI$167,263.73[28] which she argues that the Estate is 50% responsible for pursuant to the Order. The claim is in relation to the properties at paragraphs 19(i), 19(iii) and 19(iv) above. The proceedings do not concern the business property set out at paragraph 19(v) above.

44. Both actions brought by the Petitioner remain contested by the Estate, and they are both stayed as of 25 January 2021 until the determination of the applications in the Summons.

Background – Paragraph 22 of the Order not complied with

45. Paragraph 22 of the Order has also not been complied with. The Order was designed to provide a roughly equal division of the assets as they stood at the time between the Petitioner and the Respondent, who had parity in their income. It is accepted that the intention in the Order was that the Respondent and the Petitioner would each become 50% shareholders in the Business. However, at that time the Petitioner and each of her parents held 25% of the shares in the Business. The proposed equal ownership would occur following the parties taking all reasonable steps to assist the Petitioner's father's intended forthwith transfer of his 25% shareholding in the Business to the Petitioner and the Petitioner's mother's forthwith transfer of her 25% shareholding in the Business to the Respondent.[29] There would however be an ongoing profit share arrangement, presumably to compensate the parents who I am informed had contributed financially to the setting up of the Business, whereby the first 10% of the dividends from the business would be paid to the Petitioner's parents and the Respondent and Petitioner would apply the remaining 90% at a 60% and 40% split respectively.[30]

46. Despite the above provision, in or around June 2018, it became apparent that the transfer by the Petitioner's mother never occurred. The brief reason provided by the Petitioner for this is that her mother refused to make the transfer. I was informed at the hearing that the Petitioner's father has

[27] Cause No G 124 of 2020.
[28] 50% of the contributions up to the date the claim was issued, and a further 50% of the total outstanding mortgage balances at that date of CI$233,699.16 plus interest thereon).
[29] This is at paragraph 22 in the Order.
[30] Paragraph 21 of the Order.

also failed to transfer his share.[31] There is no evidence provided by the Petitioner's parents setting out the reasons given for their inaction concerning the transfers. There is no evidence before the Court to indicate that they did not agree to the transfer/dividend payment term being placed in the Order. With the benefit of hindsight, as they were not invited to intervene in the ancillary relief proceedings which were settled very shortly after the Petition was issued, it would have been helpful if the Form accompanying the draft order had attached to it the written consent of the Petitioner's parents to the relevant provisions. Despite the transfers not happening, there appears to be no dispute about the intention of the Petitioner and the Respondent, nor about the impression that the former wished to be given to others about the shareholding, as the annual return filed by the Company with the Register of Companies on 9 January 2017 listed the Petitioner and Respondent as 50% shareholders and stated that the Petitioner's parents held no shares in it. The Petitioner signed that return on 10 December 2016, which contained a written declaration that it was a *"true report and summary of the company"*. However, due to the winding up of the company, the 50% shareholding now has no value. It may have had financial relevance to the winding up, but no enforcement proceedings were brought by the Applicant (including in the Financial Services Division) in relation to the non-transfer and related to any sums that may have been due from dividends. I also note that no enforcement proceedings were brought in relation to rent received from the Strand Property, which the Estate appears to argue were due to it as a result of the rental provision in the Order.

The orders sought by the Applicant

(i) The primary declaration sought

47. The primary declaration sought by the Applicant is *"a declaration that by virtue of the agreement between the parties as embodied in the Order, the parties agreed to sever the joint tenancy in respect of the property Registration Section WBBS, Block 12C, Parcel 261 ("the Strand Property") and thereby became entitled to the Strand Property as proprietors in common in equal shares."*[32]

[31] This is elaborated on in paragraph 57 below.
[32] Paragraph 1 in the Summons.

48. The Applicant submits that, if the above primary declaration or the below alternative declaration is made, the Court should order an accounting to enable the Strand Property to be valued and the withheld rental income to be assessed. In such circumstances the Applicant states that the Petitioner should have the first right of refusal in any sale of the Applicant's 50% share.

49. The primary declaration is sought because: (a) it is contended by the Applicant that the Petitioner, to benefit herself, has incorrectly interpreted the Order in a manner which is inconsistent with the agreement that she had with the Respondent; and (b) of the level of legal costs incurred by the Estate when defending two writ actions relating to the Order which have been brought by the Petitioner. The Applicant's primary position is that when looking at the Order it is clear that the parties intended to equally split all of the matrimonial debts and assets including the Business and that if they had intended the land to be excluded from that, the Block and Parcel details would not have been included in the heading for the description of the Business found above paragraph 16 in the Order. It is submitted that this would be consistent with the provisions found at paragraphs 16-22 in the Order which provide for: (i) the parties remaining jointly and severally liable for the mortgage payments; (ii) any surplus on income from the rear rental unit being divided equally; (iii) the parties agreeing to each work 3 nights/week at the restaurant; and (iv) the shareholding be changed so that they each hold a 50% shareholding in the Business. The Applicant also contends that the provision relating to the taking out life insurance policies sits incongruously with an agreement for the other party to the divorce to inherit the Strand Property in any event. The Applicant states that because she expresses the view that the intention behind the taking out of policies was that, if the Respondent or Petitioner passed away, there would be compensation for the Estate of the deceased and the survivor would continue with the Business without interruption from the Estate.

50. The Applicant contends that during cross examination the Petitioner conceded that the term "Business" includes the land, being the Strand Property, as well as the restaurants on the land. My note of the Petitioner's evidence when she was being taken through paragraphs 17-22 in the Order was that when the heading was put to her she agreed that the Order *"said business"* but that they operated as Copper Falls and that the block and parcel were two different things. It was then asked of her whether she agreed that the definition of the Business was to include the block

and parcel and my notes state that she replied that her parents, who were shareholders in the Business had no interest in the land, just the Business. She said:

> *"They had no part in the property, they were never meant to have a share in the property. My father was annoyed when we purchased the land as he always wants to increase its asset base and be a part of the process."*

51. The Applicant points to the evidence presented by her sister and herself concerning the considerable financial payments made by the Respondent to his parents and submits that he was a family oriented gentleman who would, at the time of the making of the Order, have wanted his family and not his wife to receive the benefit from the Strand Property if he was to pre-decease the Petitioner. The Applicant adds that this is particularly so as there is no mention of survivorship to the Petitioner in the Order or any contemporaneous evidence in that regard. However, on the other hand, there is no evidence provided in which the Respondent indicated the purported wish for his family to benefit from the Strand Property if he were to die.

52. The Applicant submits that the Court has an inherent power to grant declarations. In the July Judgment, I found that in principle, as a matter of law, declaratory relief may be available to an applicant in ancillary relief proceedings, and may do so in relation to the Order.[33] However, I made clear in the July Judgment that I was not at that time determining that it was appropriate to make any declaration or to make a declaration in the terms sought because that could only be done after consideration of the evidence and the merits of the claim.

53. The Applicant submits that the agreement between the Petitioner and the Respondent *"embodied"* in the Order was an agreement to sever the joint tenancy in respect of the Strand Property, resulting in them each being entitled to that property as tenants in common in equal shares without survivorship. It is submitted that this conclusion becomes clearer when looking at the preamble and the following descriptions given for the four pieces of land in the Order:

(i) Registration Section WBNW, Block,4C, Parcel 310 ("Land 1")

(ii) Registration Section WBNE, Block,9C, Parcel 911 ("Land 2")

(iii) Registration Section NBNW, Block 4C, Parcel 259 ("Duplex")

[33] The reasons for this decision can be found at paragraph 42-56 in the July Judgment.

(iv) Registration Section NBBS, Block 12C, Parcel 261 – Copper Falls Steakhouse and rear rental unit ("the Business").

54. It is submitted by the Applicant that, as the items at (i) to (iii) are described in property terms and as the block and Parcel item (iv) is differently described as "the Business", the intention was to include the Strand Property where the business stood. It is then highlighted that paragraph 22 of the Order envisaged that after the designated transfer of the Respondent's parents' shareholdings had taken place that the spouses would each retain a 50% shareholding in the Business and therefore a 50% interest in the Strand Property.

(ii) The alternative declaration sought

55. If the Court does not agree with the Applicant and finds that the Order did not sever the joint tenancy, the Applicant invites the Court to make a declaration that the joint tenancy is severed under the principles set out in the House of Lords decision in ***Stack v Dowden*** [2007] 2 W.L.R. 831 and then order that the Land Register be amended to reflect that decision. This declaration was not sought in the Summons and as the Petitioner rightly highlights it is an example of the Applicant's case shifting and being presented as a *"moving target"*. This creates uncertainty for the other party who is trying to prepare for the case which it believes is being presented. Despite that, I will still review the submissions now being made relation to this unpleaded declaration and I note that there is some overlap in the facts being relied upon by the Applicant in relation to both declarations.

56. Reliance is placed on Baroness Hale's comments made at *paragraphs 56* and *57* where she states:

> *"The starting point where there is a joint legal ownership is joint beneficial ownership. The onus is on the person seeking to show that the beneficial ownership is different from the legal ownership"* and "*the parties may not intend survivorship even if they do intend that their shares be equal. In many commercial context, and no doubt some domestic ones, it will be highly unlikely that the parties intend survivorship "winner takes all" effect."*

It is submitted that the Strand property is a commercial entity and when considering the above observations made in the House of Lords, it is highly unlikely that the parties intended survivorship to apply.

57. Reference is also made by the Applicant to Lady Hale's following comments concerning factors which could form a part of the Court's deliberations which are found at paragraph 69:

> *"Any advice or discussion at the time of the transfer which cast light on their intentions then; the reasons why the home was acquired in joint names, the reasons why (it be the case) the survivor was authorised to give receipt for the capital moneys; the purpose the home was acquired; the nature of the parties' relationship…."*.

With this in mind, the Applicant invites the Court to have regard to the Petitioner's failure to have the shares transferred in line with paragraph 22 of the Order. I accept that this was an indication that they both agreed that they have an equal interest in the business which they were to both equally actively run post-divorce. However, I note that the Order required the parties to take all reasonable steps to assist the transfer. There is oral evidence from the Petitioner that there were transfer forms which she, the Respondent and her parents had signed. A letter from Ritch & Connolly who were the Petitioner's parents' attorney in the winding up proceedings indicated an acceptance that there was an intention to transfer the shares but said that has not happened and they remain as shareholders. The letter then indicated that as shareholders they oppose the winding up application. The letter did not mention that transfer forms had been signed and no signed form has been produced in the proceedings. The Applicant submits that there are no transfer forms that were signed and that, as the Petitioner was the bookkeeper, she was the party best placed to ensure the transfer, which she failed to do. The Petitioner's parents refused to sign them and therefore I do not accept that she *"made no effort to secure the transfer of the shares"*.

58. When considering Lady Hale's comments, the Applicant invites the Court to have regard to the Petitioner's actions soon after the Respondent's passing. It is suggested that she acted, for her own benefit, without consultation with the Estate to deal with the assets in a *"winner takes all"* manner inconsistent with the wishes of the Respondent. The Applicant says that these actions include the Petitioner's speedy transfer of the Strand Property to her sole name and her view that the rental income from the rear rental of that property belonged wholly to her in circumstances

where the Order did not say the sharing of the rental payments with the Estate would end upon death. The Applicant, in this context, also refers to the insurance and mortgage writs issued by the Applicant, the consequences of which show her *"true colours"* as she would then control 100% of the matrimonial assets.

59. The Applicant also highlights that the Strand Property was purchased by the parties during the course of their marriage as part of their joint commercial endeavours. The property was paid for from the profits of the Copper Falls Steakhouse which again was a joint venture (albeit with initial contributions from the Petitioner's parents). Looking at this matter in the round, it is submitted that it is quite clear that the parties did not intend survivorship. The Court is invited to find, to any extent necessary, that the beneficial ownership differed from the legal ownership with the effect that any joint tenancy was split, and to make a declaration to that effect.

60. For completeness, reference is made to ***Roulstone v Panton*** [1952-79 CILR 369], a case brought by an estate claiming a beneficial interest in plots of land bought by two friends which confirms that the question of beneficial interest in property does not die with the person and a case can be brought by the Estate.

The Petitioner's position in relation to the declarations sought by the Applicant

61. The Petitioner raises a number of issues about what she sees as being flaws in the Applicant's arguments concerning the declarations. She contends that the primary declaration sought is wrong in law and fact, arguing that no such declaration is embodied in the Order. This is because it is submitted that the Order makes clear that the then prevailing state of affairs that existed would continue and not be interrupted or affected by the ancillary relief proceedings. In addition, the mortgage provision at paragraph 17 in the Order clarified that the arrangements for the payment of the mortgage was that they would be serviced and discharged jointly and severally by the spouses. The Petitioner stresses the fact that the Strand Property was held from the date of purchase in 2009 by the spouses as joint proprietors as evidenced by the Land Registry documents. The Petitioner points out that the Land Registry did not change following the sealing of the Order in 2015, nor at the time of the Respondent's passing in 2017. In such circumstances, the Petitioner contends that primary declaration cannot be made as there is no embodiment in the Order that the parties agreed to sever the joint proprietorship.

62. The Petitioner's view is consistent with the legal opinion dated 18 June 2020 obtained from attorney Linda DaCosta of HSM Chambers by the Official Liquidator in the winding up proceedings, who advised that the property was held at all material times by the spouses as joint proprietors. In that report, Ms. DaCosta was considering a claim made by the Applicant that the Property was beneficially owned by the Company, a claim based on her then view that it was supported by financial records and the content of the Order. The Applicant's attorneys asserted that the property was beneficially owned by the Company for a number of reasons including: (i) that in the Order, the Company's Business was defined as "the business" and that the mortgage against the property was paid out of the Company's business bank account; (ii) that the Company's balance sheet dated 30 June 2017 includes in the fixed assets of the business the property which is consistent with the Company having a beneficial ownership of the Property and the Property was treated as part of the Company's business; and (iii) the absence of a lease between the company and the Petitioner and Respondent was strong evidence of the fact that the Property is owned by the Company. Importantly, the Applicant does not now state that the above submissions were not made or seek to challenge or appeal the Official Liquidator's decision, but instead now takes a very different view relating to the Order, namely that the property was intended to be held personally between the spouses as tenants in common. I note that the Applicant did not seek to comment, in her closing written submissions, on the review of the evidence conducted by Ms. DaCosta nor concerning the reasoned conclusions given in the written advice/opinion.

63. It is clear that Ms. DaCosta considered the submissions in the background information provided to her. She disagreed with the contention that the absence of a lease between the company and the spouses as joint proprietors did not support any contention that the property was beneficially owned by the Company. She highlighted that in 2014 the deposit agreement was entered into between the spouses (and not the Company) with Messrs Hillier and Brown in relation to a lease for part of the property and an agreement to lease was entered into between the spouses (and again not the Company) and MLIC Holdings Ltd, after the certificate of dissolution of marriage, on 17 March 2016 for a period of five years with an option to renew for a further five years which lease is registered against the property pursuant to the Registered Land Law. She advised that:

> *"This lease is consistent with the fact that Frank and Dianne were the joint proprietors of the property"* adding that: *"As there was a lease with MLIC Holdings Ltd and it was*

entered into after Frank and Dianne divorced this supports that there was no intention for the Company to beneficially own the Property and the rental income was deposited into Dianne and Frank's joint account." Ms. DaCosta stated that their *"treatment of the property evidence that they intended for the Property to be owned by them personally and that the Company's business would operate from the property."*

64. Ms. DaCosta referred to the Order in which she said:

"It was agreed inter alia that certain properties were to be retained by the parties accordingly and in particular that the business would continue to operate as it did from 2009 without interruption. Therefore, the parties continue to hold the property as joint proprietors and operate the business as they did from inception until Frank's death."

When discussing the Order, Ms DaCosta showed that she was aware of the requirements and purpose of Practice Direction No. 1/2013.[34] and concluded, as I have done, that the Respondent's *"signing the Statement of Information for a Consent Order shows that he proceeded voluntarily and was not pressured to sign the Consent Order".*

65. She added that no steps have been taken by spouses following a loan to purchase the property for them to hold as proprietors in common and she referred to the case of ***Mums Incorporated v Cayman and Capital Trust Company BV*** [2000] CILR 131 at page 136 which stated:

"The RLL makes clear that Severance of joint proprietorship can only be by consent of all joint proprietors and that severance does no more than create a proprietorship in common."

66. Ms. DaCosta concluded in her Opinion at paragraph 36 that:

"At all material times Frank and Dianne held the Property as joint proprietors and no evidence has been produced that steps were taken for them to hold the Property as proprietors in common pursuant to the (Registered Land Law)" and at paragraph 34: *"Evidence has not been provided showing that Dianne and Frank that they intended to transfer the Property as tenants in common pursuant to section 100(3) and in fact the*

[34] See paragraph 27 above.

contrary has been shown. In the circumstances, pursuant to section 100(1)(b) of the RLL, upon Frank's death the Property vested in the surviving proprietor, namely, Dianne."

67. Ms. DaCosta rightly said that upon the Respondent's death the Petitioner was not required to discuss with the Estate before having the Registrar of Lands place the property in her sole name. She correctly highlighted that any discussion with the estate would concern the Respondent's interest in the Business.

68. It is evident that the Official Liquidator was guided by the conclusions in Ms. DaCosta's legal opinion, as in his report to the creditors dated 30 June 2020 stated at paragraph 2.3:

"Due to conflicting views of the Estate and Dianne Parsons in regard to the ownership of the property located at 43 Canal Pointe Drive also known as registration section West Bay Beach South, Block 12C, Parcel 261 (the 'Property') the OL obtained a legal opinion from HSM Chambers in regards to the ownership of the Property [page S73]. The legal opinion concludes that under the laws of the Cayman Islands Dianne Parsons is the legal owner of the Property as registered in the Cayman Islands Land Register."

The term *"conflicting views"* mentioned above is a reference to the evidence put forward by the Estate in the winding up proceedings that the Business was the true owner of the Strand Property.

Conclusion on the Application for both declarations sought by the Applicant

69. I am, of course, not in any way bound by the conclusions reached by Ms. DaCosta. With that in mind, I have conducted an independent analysis of the evidence. However, having done that, my conclusion does not differ to the one reached by Ms. DaCosta. My conclusion about the meritorious independent opinion provided by Ms. DaCosta, which was based on her accurate review of the evidence, has not changed as a result of the new submissions now being made and the additional evidence being given.

70. I do not accept the Applicant's contention that the Order evinced the intention of the parties to change the registered joint ownership arrangement for the Strand Property (an arrangement which indisputably existed at the time of and before the Order and before the dissolution of the marriage). I prefer the Petitioner's submission that her and the Respondent's intention had always

been that they would continue to hold the Strand Property as joint proprietors with the right of survivorship. Neither of them took any action to sever the joint tenancy, for example with the Registry or by notifying the mortgage bank. In addition to the above, there is agreed evidence given by the Applicant in her affidavit that the Respondent would not have tolerated or intended, if the Petitioner was to predecease him, a situation that would have resulted in him ending up in business with her then partner and now husband. This is inconsistent with the Applicant's views about the severance. When looking at the Order, what is clear is that the global agreement intended by the parties concerning their post marital financial affairs was driven by their wish to cooperate in relation to the maintaining and running of the Business. On the evidence before me, I do not find that the term in relation to the taking out of the insurance policy was designed to compensate their estate if one was to predecease the other. There is a possibility that it was in fact a mechanism to ensure that the business would continue to run as the funds from the policy could be used to off set the lost contribution to those costs.

71. Accordingly, I do not make the primary declaration or the alternative declaration sought by the Applicant.

Alternative application made by the Applicant

72. Although also not pleaded in the Summons, if the Court does not find that the Order is clear as to the Respondent's interest in the property, the Applicant invites the Court to find that he had a beneficial interest by using its wide discretion under s.13 Married Women's Property Act (1977 Revision) ("the MWPA") to make any order the Court sees fit where there is any question between a husband and wife as to the title to property. It seems that thought was only given to this unpleaded potential avenue after I mentioned it at paragraph 46-47 in the July 2022 Judgment. The reference was made by me in the context of the Married Women's Property Act 1882 in England and Wales to highlight that in certain circumstances declarations in relation to property matters in ancillary relief proceedings may in principle be made using the MWPA route. I was not finding that it was a basis for providing such relief in this case.

73. I mentioned the MWPA to the parties at the outset of the June 2022 Hearing. I highlighted my concern about whether there was any time limit post-dissolution of marriage[35] that might restrict the bringing of any such application. I made it clear that, in the absence of fuller argument, it was not appropriate to rule on whether it would be a suitable avenue to use. At the time, because I was only raising a general point that declaratory relief could be obtained under MWPA, I had not considered in an informed way whether that jurisdiction still existed post the granting of a certificate of dissolution. Although now choosing to try to seek relief under the MWPA, the Applicant has failed to adequately address the issue of whether the Court can make such a declaration in these proceedings. The Applicant's submissions are limited to three brief paragraphs with no analysis of the relevant provisions.

74. The Petitioner sought to address the potential application and highlighted certain issues about it in the closing written submissions. She noted that s.13 MWPA allows the application to be made '*by summons or otherwise in a summary way'* and that no such Summons or amended summons has been filed. She accepted that although this did not necessarily preclude the application being made, it formed a part of her concern about the moving case that she has to meet.

75. Section 13 MWPA states that:

> *"In any question between husband and wife* [36]*as to the title to or possession of property, either party, or any such bank, corporation, company, public body or society, as aforesaid in whose books any stocks, funds or shares of either party are standing"* can make the application.

The wording at the start of s.13 MWPA is similar to the English Act. Before the amendment to the English Act the position in England was that set out in Rayden On Divorce 10th Edition where under the heading: "Husband and Wife": Effect of decree Absolute" the authors noted:

> *"An application under section 17 may be made only if the parties are husband and wife. The procedure is not available after the decree nisi has been made absolute, but if the summons was issued, or an order directing an enquiry was made, before the decree was*

[35] There is a 3 year limit in the England and Wales legislation.
[36] My emphasis by underlining.

made absolute, the enquiry may be proceeded with, notwithstanding that the decree nis was made absolute before the enquiry was begun."

In the present case the present proceedings were not issued prior to the certificate of dissolution and therefore an application under our equivalent of s.13 MWPA cannot be made.

76. Before moving on, I note that the English Act was amended by the s.39 Matrimonial Proceedings and Property Act 1970 where under the heading: *"Extension of the s.17 Married Women's Property Act 1882"* s. 39 provided:

"An application may be made to the High Court or a county court under section 17 of the [1882 c. 75.] Married Women's Property Act 1882 (powers of the court in disputes between husband and wife about property) (including that section as extended by section 7 of the [1958 c. 35.] Matrimonial Causes (Property and Maintenance) Act 1958) by either of the parties to a marriage notwithstanding that their marriage has been dissolved or annulled so long as the application is made within the period of three years beginning with the date on which the marriage was dissolved or annulled; and references in the said section 17 and the said section 7 to a husband or a wife shall be construed accordingly."

This amendment enabled a divorced husband or wife to bring an application under s.17 within 3 years of the decree absolute. No such extension exists in the Cayman Islands MWPA and therefore the position remains the same as it used to be in England and Wales before the above extending amendment, namely that the s.13 procedure is not available post the granting of a certificate of dissolution.

77. For completeness sake, I note that s.19 MWPA provides that *'For the purposes of this Law, the legal personal representative of any married woman, shall, in respect of her estate*[37]*, have the same rights and liabilities, and be subject to the same jurisdiction, as she would be if she were living*' and that this means that a married woman's estate would be eligible to make an application under section 13. The Petitioner rightly concludes that s. 19 restricts itself to granting rights under the MWPA to only a married women's estate and as a result the Applicant would be

[37] My emphasis by underlining.

excluded from making an application under s.13 on behalf of the Respondent's estate. S.19 MWPA mirrors s.23 of the English Act and even if interpreted in a way that it was extended to a married man's estate, it would not enable the Applicant to apply under s.13 post the granting of a certificate of dissolution.

The Applicant's alternative variation application

The Law concerning variations

78. If the Court does not make a declaration, in the alternative, as per paragraphs 5, 6, 7 and 8 of the Summons[38], the Applicant seeks a variation of the Order pursuant to s. 23 of the Act to *"achieve fairness and justice"* and *"in order to give effect to the true agreement between the Petitioner and the Respondent and to disentangle the complex arrangement that exists between the Estate's finances and those of the liquidated Business"* and thereby achieve a clean break disentangling the affairs of the Petitioner and the Estate and to *"resolve ongoing disputes"*.

79. Section 23 of the Act permits a personal representative to apply to vary *"any order"* made pursuant to s.21 of the Act. This section in principle enables the Grand Court to vary certain property orders made in final ancillary relief orders. In England and Wales, orders are variable pursuant to s.31 of the Matrimonial Causes Act 1973. Section 31 is not as wide as s.23 in the Act, as it is more limiting as to which type of orders may be varied.

80. The Applicant contends that the test for a variation is the found in ***Tibbles v SIG plc (t/a Asphaltic Roofing Supplies)*** [2012] EWCA Civ 518. The Applicant did not analyse the test set out in the case in her submissions and seems to rely upon it in relation to the change of circumstances requirement. The observations made in ***Tibbles*** are more substantial than that.

81. In ***Tibbles***, the Court of Appeal dismissed an appeal against a decision to vary a costs order and provided guidance on the approach to the court's power under CPR 3.1(7). The claimant was seeking, after being successful at trial, to vary an earlier order of a District Judge transferring the action from the small claims to the fast track. The order transferring the action did not make any provision for the claimant to recover the costs prior to transfer. The claimant argued that the order transferring the action should have included provision for the costs incurred prior to transfer to be

[38] See paragraph 5 above.

recoverable as if they were fast track costs. As it was the provisions of CPR 44.11 applied and, without a specific order, the pre-transfer costs were not recoverable. The Court of Appeal rejected the argument that such an order could be readily granted. There was a detailed consideration of the relevant principles and the Court of Appeal established what some term to be the *"Tibbles Criteria"* which stated the following three circumstances in which the court would usually exercise its discretion to set aside or vary an order in applications made under CPR 3.1(7)[39]:

(i) Where there had been a material change of circumstances since the order was made;

(ii) Where the facts on which the original decision was made had been misstated: or

(iii) Where there had been a manifest mistake on the part of the judge in formulating the order.

82. After conducting a review of the relevant case law, Rix LJ stated at paragraph 39:

"39. In my judgment, this jurisprudence permits the following conclusions to be drawn:

(i) *Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal[40]."*

Rix LJ added at 39 (vii):

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order[41], especially in the absence of a change of circumstances in an interlocutory situation.

83. Rix LJ also placed great emphasis upon the need for an applicant to act promptly if they wish to request that the court vary an order already made. He stated:

[39] This was not necessarily an exhaustive list.
[40] My emphasis by underlining.
[41] My emphasis by underlining.

> *"41. Thus it may well be that there is room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time. On that basis, the power within the rule would not be invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court.*
>
> *42. I emphasise however the word "prompt" which I have used above. The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made. Promptness in application is inherent in many of the rules of court*[42]*: for instance in applying for an appeal, or in seeking relief against sanctions (see CPR 3.9(1)(b)). Indeed, the checklist within CPR 3.9(1) must be of general relevance, mutatis mutandis, as factors going to the exercise of any discretion to vary or revoke an order."*

84. Applying the above principles to the facts in ***Tibbles***, Rix LJ found, *inter alia*, that the circumstances of the case actually mitigated against the exercise of the CPR 3.1(7) power. There was a very long delay in making the application to vary and this delay caused inevitable prejudice to the defendant. Further, there was no change of circumstances which would justify a variation of the order. In any event, it was held that the district judge was wrong to exercise his discretion and there was no new evidence from the claimant which would justify an exercise of that discretion.

85. If the *'Tibbles Criteria'* is the test to be applied, then the courts will be extremely cautious in exercising their powers and will take into account a wide range of factors when considering an

[42] My emphasis by underlining.

application to vary or revoke an order. In particular, the courts will seek to ascertain whether there has been a material change of circumstances since the order was made or where the facts on which the original decision was made were (innocently or otherwise) mis-stated. Finally, any application to vary must, as Rix LJ emphasised in ***Tibbles***, be made promptly and any delay in doing so will not be well received by the courts.

86. Although it is questionable whether the wording of s.23 of the Act should only be approached in the same way as CPR 3.1(7) after an ancillary relief consent order, I note that some of the *"Tibbles Criteria"* echo the way that the Grand Court has previously approached such cases. There is a public policy in all litigation, but especially in family law litigation, about finality, conclusion and certainty. It is important for parties to know that there is an end to the dispute and court litigation. This policy, despite the wide wording in s.23, applies to applications to set aside/vary consent orders and appeals. The Court of Appeal in ***Range v Range*** [1988-89 CILR 437*]* made it clear that the exercise of the s.23 discretion to vary an ancillary order should only be done sparingly *"where the order itself appears to contemplate finality and is made with the consent of the parties"."*[43]

87. However, there may be exceptional cases where a consent order is no longer fair and just and that a review of the finality of litigation is permitted. Despite some of the evidence provided by and submissions made in the earlier stages of these post-Order proceedings by the Applicant, strictly there cannot be an appeal as there are no decided issues of fact or law or merits. The challenge is then about the order itself and, therefore, the avenue may for example be if: (i) there has been non-disclosure of material facts; (ii) fraud and misrepresentation; (iii) supervening events; or (iv) undue influence.

The nature of the application being made - variation or setting aside or appeal

88. At this and at the June 2022 hearings the Petitioner understandably stressed that there was a lack of clarity from the Applicant about the nature of her application, namely whether the Applicant seeks a variation of the Order, or is in effect appealing the decision. The Petitioner rightly views it as being the Applicant making a challenge to the Order based on grounds that in reality should be brought by appeal. The Petitioner states that the Respondent has brought an appeal *"under the*

[43] Zacca P, Paragraph 15

guise of a variation application by effectively seeking to rehear the issues in the divorce and/or re-evaluate the (Husband's) claim after his death, for the benefit of the estate". The Petitioner refers to the Applicant stating in her affidavit evidence that the Order is "*highly unusual and potentially unlawful in a numbers of respects*" and that a need for a variation *"is contributed to by the fact that the Ancillary Relief order is potentially unlawful in part, highly unusual, badly worded and unclear in a number respects."* The Petitioner rightly states that these grounds would be seen in an application to set aside an entire order or appeal an order. It is submitted that:

> *"Whilst (the Applicant) seeks a variation of the (Order) on the face of the application, upon the facts relied upon in their own evidence, it is clear that an appeal is in fact the more appropriate remedy and they do not have standing to pursue such a remedy and/or would be out of time, so are instead attempting to shoehorn an application under declaratory relief or variation.*

89. In my July 2023 Judgment concerning the legal issue I commented upon the lack of clarity concerning the application and I stated the following:

> *"At this time, in the material presented by the Applicant, if all arguments set out therein are pursued, it appears to be a hybrid application with characteristics associated with appeal proceedings, variation and a setting aside application. This needs to be clarified before the outset of the hearing of the Summons and I would expect that to be done at the latest in the skeleton argument. There was a regrettable reluctance by Counsel for the Applicant at this hearing (and it appears prior to this hearing) to address the question about whether (i) the Applicant accepts that the Order is final and binding and that a variation is sought due to a change of circumstances after the Order was approved or (ii) the Applicant challenges the terms of the Order as being inaccurate or containing omissions. It seems that the Applicant feels reticent to commit and her submissions contained elements relating to both approaches. If this approach is maintained at the hearing, it may be difficult for the Applicant to persuade the Court to interfere with the Order."*

90. The Applicant in her closing written closing submissions now states that she *"made it clear both in her skeleton argument and at the hearing that (she) does not say that there was an error of the court"*. As noted above that position was not previously a clear one, especially as her affidavit

evidence states that there had been an error. In the winding up proceedings she argued that the Property was owned by the Business. Initially in her present proceedings she said that the Respondent was unrepresented at the time of signing the Order which was potentially unlawful, unclear and badly worded and that he may not have understood its terms. By the end of the hearing, she had further reformed her submission to being that the Order was actually very clear and that the Petitioner had knowingly acted in a manner that was inconsistent with the terms of the Order. These different submissions adopted by the Applicant as a means of attacking the Order has made her approach appear to be an inconsistent and confusing one.

91. When clarity was sought at the start of the hearing, the Applicant's Counsel stated that she did not wish to argue that the Order was unlawful but said, with specific reference made to the Respondent's passing, that a variation was sought on the basis of a change of circumstances. The Applicant, in her oral evidence, indicated that she was not saying that the Order was unclear, but that it was the execution of the order that is problematic. The Applicant in her closing written closing submissions states that she *"made it clear both in her skeleton argument and at the hearing that (she) does not say that there was an error of the court"*. I have to say that this position was not previously a clear one, especially as her affidavit evidence states that there had been an error. What is now argued is a fundamentally different position, but for her a necessary one, as the Applicant seeks a declaration that reflects what she submits are clear terms of the Order requiring an equal split of all the assets. This changed approach may have also occurred because the Applicant recognised that an appeal would not be an appropriate or available remedy for her to seek. The Estate was not a party to the divorce suit.[44] During these proceedings the Applicant recognised that the Petitioner's actions and the submitted change of circumstances, which she feels require the Court's assistance with the interpretation of the Order, occurred well outside of the permissible timeframe for bringing any appeal. As pointed out by the Petitioner the Applicant's case has the characteristics of a *"moving target"* and I am conscious of the problems that this will have caused the Petitioner when trying to meet the case that is now being put forward.

92. When considering the Applicant's revised submissions, I am cognisant that, just because the appeal route is not available, it would not be appropriate to argue, 'through the back door',

[44] Section 24 of the Law provides that only parties to the suit may appeal and that they must do so within 21 days.

matters that should more properly be dealt with by appeal by labelling them as being variation proceedings. When considering the variation application, the Court must be careful not to permit it to become a challenge to the Order that is actually based on appeal grounds. I accept that the Applicant's case is no longer one in which she seeks to challenge the Order on the basis that it was wrong or unlawful. It also appears that the Applicant is no longer seeking to challenge the Order on the basis that the Respondent was legally represented at the time as her case is now that the Order is clear and that it accurately reflects the parties' intention. Therefore, the legal representation 'issue' which was raised earlier in these proceedings is now not one that I have to deal with.

The actual variations now sought by the Applicant and the Petitioner's position

93. The variations sought were initially set out at paragraphs 5-8 of the Summons and they are set out at paragraph 5 in this Judgment. Paragraph 8 of the Summons is not a variation application but seeks an accounting in relation the Petitioner and Respondent's joint account if the sought variations are not made. If the variations are not made I do need not to consider the accounting point.

94. The Applicant endeavours at paragraphs 44 to 47 in her Skeleton Argument dated 27 January 2023 to be more specific about the sought variations as follows:

> *"44. The Respondent shall retain Apartment B (paragraph 13 of the Order) without any requirement to offer as first refusal to the Petitioner's parents….*
>
> *45. The Strand Property (paragraphs 16 - 22 of the Order) to be valued and sold (The Petitioner to be offered first right of refusal)*
>
> *46. The Petitioner is to provide an accounting of the rental value for the rear property to be valued from the date of the Applicant's death to the date of the sale and 50% of the profits of the Estate…*
>
> *47. Life insurance clause (paragraph 22 of the Order) to be revoked…."*

95. The *"variation"* sought in paragraph 5 of the Summons for a sale of the Strand Property is premised on the basis that in the Order the Petitioner and Respondent intended the joint tenancy to be severed. It is also made on the basis that even if they did intend to sever that, that the Court hearing a variation application in concluded matrimonial proceedings has the jurisdiction

concerning the ownership of the Strand Property post the changed registration by the Petitioner made just after the Respondent's death.

96. The application at paragraph 6 of the Summons is poorly drafted and vague. It is too general and, as drafted is more akin to a setting aside the full order application provision. On the face of paragraph 6, it seems to be seeking the Court to redraft the Order by replacing/varying as many as the provisions in the orders that the Court sees fit in any manner that the Court sees fit. It fails to state what paragraphs should be varied and has not suggested what those variations should be. The detail set out at paragraph 95 above gives a little extra clarity, but not much.

97. Paragraph 7 concerning the removal or variation of the provision requiring the parties to execute life insurance policies is made without any foundation being given for such an order in these proceedings. The life insurance provision is the subject of civil litigation and the issues are for determination in those proceedings if the Petitioner persists with them.

98. The Petitioner contends that the now sought variations are not consistent with the intention of the parties when the Order was agreed and that they do not have anything to do with the Property or the Company. The Petitioner views them, as being *"at best a re-writing of the settlement of her divorce"* which should not be entertained. It is submitted that a Court should not approach the matter as a *de novo* hearing to vary the entire Order, but it must conduct an exercise which is proportionate to the requirements of the case. It is contended that this approach is the correct one when post-order events include the death of a party and where: (i) property has been transferred to a third party; (ii) bank accounts have been closed; (iii) where mortgages have been discharged; and (iv) where the relevant businesses have been wound up.

Grounds argued for a variation

99. The Applicant contends that there should be a variation based on a change in circumstances. The Applicant now claims that the change of circumstances are: (i) the unexpected passing of the Respondent; (ii) the manner in which the Petitioner has acted when applying the terms of the Order (which the Applicant states has been self-serving for her benefit and inconsistent with what had been agreed or intended by the Respondent and Petitioner at the time that the order was approved); (iii) the net unfair division of the assets: and (iv) the *"need to untangle the complex*

financial relations between the estate and (the Petitioner) to put an end to hostile litigation which has now been running on for several years". The Applicant, in her closing written submissions no longer raises the winding up of the company as a separate change of circumstance grounding a variation application.

100. Ongoing litigation is expensive and difficult for families to deal with, for monetary and emotional reasons. The wording in s. 23 of the Act which allows an application to be made to vary any of the s.21 orders does not mean that there should be a departure from the view that there are only a small number of cases in which it is right to reopen litigation after a consent order. That said, death of one of the parties after the approval of an ancillary relief may in certain rare circumstances enable a reconsideration of the terms of a consent order. However, this is ordinarily when an unforeseen death occurs soon after the ancillary relief order and results in a change which goes to the heart of the order. In ***Barder v Barder (Caluori Intervening)*** [1987] 2 FLR 480 a consent order provided that the matrimonial home be transferred to the wife with whom the children of the marriage resided. However, five weeks after the order was approved and before the transfer took place, the mother took her own life. The wife's will provided that all of her assets went to her mother, and her estate sought to enforce that. The Court found that her death falsified the entire basis of the order transferring the property to her on a clean break, and so the order was set aside, resurrecting the prior tenancy in common. Lord Brandon outlined the following four circumstances (often referred to as '*Barder events'*) which could ground an application to change/set aside the order and which a party should consider before applying to change the order:[45]

(i) The new event must have occurred since the making of the order.
(ii) The new event is such that it invalidates the basis or the fundamental assumption, on which the order was made.
(iii) If leave to appeal out of time was given the appeal would certainly or very likely succeed
(iv) The new event should have occurred within a relatively short space of time of the order having been made. The time scale of that is usually no more than one year, but in most cases it will only be a few months.[46]
(v) That the application concerning the order must be made promptly.[47]
(vi) That any new order must not prejudice third parties.[48]

[45] In ***Barder*** the Court was referring to an application for permission to set aside.
[46] Lord Brandon at paragraph 43.
[47] In ***Barder*** it was an application for permission to appeal that had to be made promptly.
[48] In ***Barder*** it was a grant or permission to appeal which should not prejudice a third party.

101. In ***Barder,*** the Court was outlining the basis for an application to appeal out of time a consent order where the challenge to the order involved the party being the estate of a deceased spouse rather than a variation. The fact that was an appeal case does not mean that '*Barder event*s' cannot be considered if there is a variation/setting aside application. In ***Shaw v Shaw*** *[2002] EWCA Civ 1298* Thorpe LJ stated:

> *"The residual right to reopen litigation is clearly established by the decisions in Livesy v Jenkins and Barder v Calouri. But the number of cases that properly fall into either category is exceptionally small. The public interests in finality in this field must always be emphasized."*

102. The Petitioner, when making submissions about the '*Barder events'*, submits that the facts and the appeal route taken in ***Barder*** support her contention that an appeal and not a variation is the appropriate route for the challenges to consent orders. This contention is consistent with the position in practice that for events arising after a consent order is made, the application should be for leave to appeal out of time using normal appeal methods and procedures. Whereas for events arising at or before the time of the original consent order including going to the basis of the circumstances at the time of the original consent order, the application should be to set aside the original order. The cases involving application to reconsider an order following the death of a party all seem to be by appeal. A few examples of these include ***Smith v Smith*** (*Smith and Others Intervening)* [1992] Fam 69, ***WA v The Executors of the estate*** [2015] EWHC 2233 (Fam), ***Barber v* Barber** [1993] 1 FLR 476, CA, ***Passmore v Gill*** [1987] 1 FLR 441, CA, and ***Benson v Benson (Deceased)*** [1996] 1 FLR 692.

103. I agree with the view of the submission of the Petitioner that any application to review the order due to the supervening event of a death should be brought by appeal. The Applicant has not done that, and she may well have had in mind the reasons why an appeal would not be possible at this time. Despite reaching that decision I still go on to now consider the requirements set out in ***Barder***. On the facts of this case, I am satisfied that requirement (i) is satisfied. I am not satisfied that requirements (ii) and (iii) are satisfied as I have found that the intention at the time of the order was that the Strand Property would continue to be held by the Petitioner and the Respondent as joint proprietors to enable the business to continue to operate without interruption even if one of them was to pass away. I am not satisfied that requirement (iv) is satisfied. The

Respondent passed away on 17 December 2017 which was over two years and two months after the consent order was approved and, therefore, it cannot be said to be an event that occurred relatively shortly after the order.

104. I turn now to requirement (v) in ***Barder.*** When considering delay in making an application, every case has to be decided on its own facts. The Applicant contends that there has not been any undue delay. It is submitted that the Estate wished to try and work with the Petitioner after the Respondent's death. However, the Applicant accepts that that route was short lived as they contend that shortly after the death the Applicant cut off communication with the Estate and was denying that the Estate had any interest in the Business. Apparently failing to recognise the requirement to apply promptly if seeking to challenge a consent ancillary relief order by appeal, setting aside or variation, the Estate chose to resolve the issues by issuing winding up proceedings on 24 July 2018. The Applicant highlights that the Petitioner filed her life insurance Writ on 11 October 2019 and her mortgage payments Writ on 19 August 2020 and that those applications in themselves necessitated the filing of the Summons by the Estate on 24 November 2019 (15 months after the first writ and 6 weeks after the second writ were filed). The delay in this case came about due to the decision to bring winding proceedings in the Financial Services Division rather than any proceedings in the Family Division. When I have regard to that I also have regard to the fact that the Applicant ran a different case as to the status of the Strand Property in the winding up proceedings to that being put forward now. The Summons was not filed until 24 November 2021, which was 23 months after the Respondent's passing, in circumstances where no challenges had been made by the Respondent to the Order or no applications had been made to the Land Registry to change the status of the Strand Property in the 26 months after the Order before the Respondent's passing.

105. The delay in commencing these proceedings has been lengthy with a lack of the pre-issuing promptness required in either an appeal or variation application concerning a consent ancillary relief order I find, therefore, that the requirement (v) as set out in ***Barder*** is not satisfied and, therefore, the Applicant fails that test. Even if the approach should be, as suggested by the Applicant, one akin to the one under CPR 3.1(7) and one applying the '*Tibbles Criteria'*, the Applicant has still failed to act sufficiently promptly. As Rix LJ pointed out in ***Tibbles*** when stressing the importance of finality, the passing of time is likely to be prejudicial to a respondent

who is entitled to go forward in reliance on an order that was made, in this case one made by consent. The Applicant wrongly contends there is no restriction on an application being considered arising out of the passage of time that has passed since the approval of the Order or post the revenant intervening event.

106. In relation to requirement (vi), it is arguable that the mortgage and to a degree the Petitioner's parents may have an interest in the application being made. However, I am satisfied that no prejudice would arise in respect of them or any other third parties as contemplated in *Barder*

107. Having made the findings that I have in relation to the Business and the property, I see no merit in the Applicant's submission made that a need to disentangle "*the complex set up*" amounts ot a change of circumstances in this case. Strictly speaking that does not amount to a change of circumstances and, in any event, it is a submission based on how the Applicant wrongly interprets the intention behind and the wording of the Order.

108. Having made the findings that the Petitioner's actions concerning the Strand Property were appropriate, they do not justify a variation application. The issues about the shareholding and the Petitioner's parents would also not justify a variation and I also note that the wound up Company no longer has any value.

Costs

109. The Petitioner has been the successful party to the Applicant's Summons and my provisional view is that the Applicant should be responsible for paying the Petitioner's costs. In relation to the June 2022 legal issues hearing my provisional view is that there should be no order as to costs in relation to that hearing. However, if the parties wish to be heard on the issue of costs then they should inform the Court in writing within 14 days of the delivery of this sealed Judgment.

THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT