



IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FAMILY DIVISION

FAM 102 of 2012

BETWEEN

“A”

APPLICANT

v

“R”

RESPONDENT

**Amanda Minto of Travers Thorpe Alberga for the Applicant**

**The Respondent in person**

**Coram: Hon. Chief Justice**

**Date: 8 August 2022**

**JUDGMENT**

1. This matter comes before the Court on the Applicant Mother’s (hereinafter “A”) summons for enforcement of child maintenance Orders. The first of the Orders is that of Swift J (Acting), delivered on 12 December 2014.
2. To the extent relevant for enforcement purposes, that Order provided as follows:
  - “1. *The Respondent shall pay to the Applicant for the benefit of the children ‘N’ and ‘K’ child maintenance at the rates and for the terms as set out below:*
    - (a) *From 31 July 2013 to 1 August 2014 at the rate of CI\$700.00 per child per week;*
    - (b) *From 1 August 2014 at the rate of CI\$630.00 per child per week.*
  2. *The child maintenance payments are to be:*
    - i. *Paid monthly to the Applicant on behalf of the Children;*
    - ii. *In the total sum of CI\$5,460.00;*
    - iii. *On the 15<sup>th</sup> business day of each month;*
    - iv. *By electronic transfer;*
    - v. *Into the Applicant’s bank account at Cayman National Bank (Account Number 01112863).*
  3. *The Respondent shall, in addition, pay forthwith to the Applicant the sum of CI\$8,775.00 made up of the following individual amounts:*
    - i. *Maintenance arrears for 5 previously missed payments in the sum of CI\$3,000.00;*
    - ii. *The CUC invoice paid by the Applicant in the sum of CI\$509.00;*
    - iii. *Costs incurred with reference to N’s operations in the sum of CI\$3,266.00*
    - iv. *A lump sum payment of CI\$2000.00”*



3. There was an appeal by the Respondent (hereinafter “R”) against the Order of Swift J (Acting) but the Court of Appeal refused leave to appeal on the quantum of payments (ie: as set out above). A’s application for enforcement, is therefore made on the basis that the Order of Swift J (Acting) of 12 December 2014 (and subsequent related Orders to be discussed below) comprise a binding and appropriate dispensation as between the parties and expressed in terms with which R has been obliged strictly to comply.

4. There was nonetheless, by 2 December 2015, an already developing history of non-compliance. On that date, the matter returned before the Court on a summons and Notice for Committal filed by A against R, for failure to pay. The matter then came before me and on the same date, I settled an order by consent of the parties expressed in the following still relevant terms, including the recitals:

*“ And upon the Parties agreeing to compromise the sums due by the Respondent under a Judgment of Swift J (Acting) of 12 December 2014 (“the Judgment”), as recorded in two orders of the Court dated 12 December 2014 (“the Order”) and 13 February 2015 (“the 13 February 2015 Order”);*

*It is hereby ordered by consent that:*

1. *The Respondent shall pay to the Applicant CI\$8,775.00 due under paragraph 3 of the Order in three tranches as set out below:*
  - (a) *The first tranche in the amount of CI\$3000.00 shall be paid to the Applicant on the 8<sup>th</sup> day of December 2015;*
  - (b) *The second tranche in the amount of CI\$3000.00 shall be paid to the Applicant on the 15<sup>th</sup> day of January 2016; and*
  - (c) *The final tranche in the amount of CI\$2,775.00 shall be paid to the Applicant on the 15<sup>th</sup> day of February 2016.*
2. *...*
3. *The Respondent shall pay CI\$30,000 into a trust on the following terms and conditions:*
  - (a) *The beneficiaries of the trust shall be the two children of the Parties, “N” and “K”. The children shall be able to access the capital once each child is 18 years of age.*
  - (b) *The parties shall be the Joint Trustees of the trust;*
  - (c) *The Clerk of the Court shall act as the Protector of the trust;*
  - (d) *The Respondent shall make an initial capital payment of CI\$1,000.00 to set up the trust fund; and*
  - (e) *The balance of the capital in the amount of CI\$29,000.00 shall be paid into the Trust by the Respondent on or before the 30<sup>th</sup> day of June 2016.*
  - (f) *The final details of the Trust shall be agreed between the Applicant and the Respondent, and in the absence of Agreement as to the terms, shall list the matter for determination of the same to be finalized by the Chief Justice*
4. *...*
5. *The Notice of Motion for Committal dated 20 November 2015 is hereby dismissed by consent.*



6. *The Respondent shall refrain from making an application for variation of child maintenance for a period of 9 months of the date of this Order.*
7. ...
8. *Save as varied by this Order, the Order shall remain in force.*
9. *There shall be liberty to apply in connection with the working of this Order.”* [emphasis added].

5. The Order, the 13 February 2015 Order and this last mentioned Order made by me on 2 December 2015, are together hereinafter referred to as “**the Orders**”.

6. A now complains that, except for eight (8) monthly payments the last of which was made on 31 August 2016, there has been gross non-compliance with the Orders by the failure of R to make any other payment. She therefore now seeks enforcement of payment of unpaid maintenance in the amount of CI\$377,140.00, as set out in the following Schedule of Arrears filed on her behalf:

Date Payment Made	Payments Made	Balance Owed
17-Dec-15	\$ 5,440.00	\$ 20.00
20-Jan-16	\$ 5,440.00	\$ 20.00
22-Feb-16	\$ 5,400.00	\$ 60.00
29-Mar-16	\$ 5,400.00	\$ 60.00
19-Apr-16	\$ 5,400.00	\$ 60.00
26-May-16	\$ 5,400.00	\$ 60.00
22-Jun-16	\$ 5,400.00	\$ 60.00
Jul-16	\$ -	\$ 5,460.00
31-Aug-16	\$ 5,400.00	\$ 60.00
Sep-16	\$ -	\$ 5,460.00
Oct-16	\$ -	\$ 5,460.00
Nov-16	\$ -	\$ 5,460.00
Dec-16	\$ -	\$ 5,460.00
Jan-17	\$ -	\$ 5,460.00
Feb-17	\$ -	\$ 5,460.00
Mar-17	\$ -	\$ 5,460.00
Apr-17	\$ -	\$ 5,460.00
May-17	\$ -	\$ 5,460.00
Jun-17	\$ -	\$ 5,460.00
Jul-17	\$ -	\$ 5,460.00
Aug-17	\$ -	\$ 5,460.00
Sep-17	\$ -	\$ 5,460.00
Oct-17	\$ -	\$ 5,460.00
Nov-17	\$ -	\$ 5,460.00
Dec-17	\$ -	\$ 5,460.00
Jan-18	\$ -	\$ 5,460.00
Feb-18	\$ -	\$ 5,460.00
Mar-18	\$ -	\$ 5,460.00
Apr-18	\$ -	\$ 5,460.00
May-18	\$ -	\$ 5,460.00



Jun-18	\$	-	\$	5,460.00
Jul-18	\$	-	\$	5,460.00
Aug-18	\$	-	\$	5,460.00
Sep-18	\$	-	\$	5,460.00
Oct-18	\$	-	\$	5,460.00
Nov-18	\$	-	\$	5,460.00
Dec-18	\$	-	\$	5,460.00
Jan-19	\$	-	\$	5,460.00
Feb-19	\$	-	\$	5,460.00
Mar-19	\$	-	\$	5,460.00
Apr-19	\$	-	\$	5,460.00
May-19	\$	-	\$	5,460.00
Jun-19	\$	-	\$	5,460.00
Jul-19	\$	-	\$	5,460.00
Aug-19	\$	-	\$	5,460.00
Sep-19	\$	-	\$	5,460.00
Oct-19	\$	-	\$	5,460.00
Nov-19	\$	-	\$	5,460.00
Dec-19	\$	-	\$	5,460.00
Jan-20	\$	-	\$	5,460.00
Feb-20	\$	-	\$	5,460.00
Mar-20	\$	-	\$	5,460.00
Apr-20	\$	-	\$	5,460.00
May-20	\$	-	\$	5,460.00
Jun-20	\$	-	\$	5,460.00
Jul-20	\$	-	\$	5,460.00
Aug-20	\$	-	\$	5,460.00
Sep-20	\$	-	\$	5,460.00
Oct-20	\$	-	\$	5,460.00
Nov-20	\$	-	\$	5,460.00
Dec-20	\$	-	\$	5,460.00
Jan-21	\$	-	\$	5,460.00
Feb-21	\$	-	\$	5,460.00
Mar-21	\$	-	\$	5,460.00
Apr-21	\$	-	\$	5,460.00
May-21	\$	-	\$	5,460.00
Jun-21	\$	-	\$	5,460.00
Jul-21	\$	-	\$	5,460.00
Aug-21	\$	-	\$	5,460.00
Sep-21	\$	-	\$	5,460.00
Oct-21	\$	-	\$	5,460.00
Nov-21	\$	-	\$	5,460.00
Dec-21	\$	-	\$	5,460.00
Jan-22	\$	-	\$	5,460.00
Feb-22	\$	-	\$	5,460.00
Mar-22	\$	-	\$	5,460.00
Apr-22	\$	-	\$	5,460.00
			<b>\$</b>	<b>377,140.00</b>



7. A now acknowledges and accepts however, that this sum of arrears of \$377140 must be reduced to reflect the fact that the elder child N, turned 17 on 22 January 2020 and that, in keeping with paragraph 3(1) (a) of the First Schedule to the Children Act (2016 Revision), in the absence of any provision in the Orders extending their effect, the provisions for payment may not extend beyond that age. Accordingly, as of 22 January 2020, the liability for payment was reduced by half, from \$5460 per month to \$2730 and thus A's claim for payment of arrears to April 2022, is reduced from \$377140 by \$76440 to \$300700.

### **Background and brief chronology**

8. A and R were in a relationship from 2001 until their separation in 2011. They have two children, N (now 19) and K (16). N is still in full time education at St. Ignatius High and is due to commence University studies in England in September 2022. K remains in full time education at Cayman Prep and is also expected to attend University in due course. While the Orders do not extend to provide for their tertiary education, R has expressed his commitment to ensuring that this is provided.
9. In response to A's claim for enforcement of arrears, R asserts that responsibility for the children's physical care has changed since the time of the hearing before Swift J in 2014, such that he should be regarded as having become, for some considerable time, the primary care giver. In disputing the sum of arrears claimed, he invites the Court to place great emphasis on the fact that the children reside at his home for two weeks of each month and return to his home each evening after school to be fed a meal by his helper, until they are picked up by A in the evening during her 'Week 1 and 3'.
10. However, as A retorts, this is not a new arrangement, nor is it a change of circumstance that has occurred since the making of the Orders. Indeed, this arrangement for after school care, is reflected by Swift J (Acting) at [5] and [6] of his Reasons for Judgment:

*"[5]...The Applicant has been criticized both in the course of the hearing before me and in the Respondent's contributions to these proceedings...on the grounds that she "refuses to support in/assist in supporting the children" and I am satisfied she felt under pressure eventually to take some form of full time employment..."*

*[6] Ironically, full time employment has interfered substantially with the Applicant's relationship with the children. Instead of being able to look after them as before and to take a full part in their lives, she now (for the past 3 months) has had to depend upon the Respondent's helper to collect them from school, take them to after school activities, look after them and feed them at the Respondent's home...to return the children to her at 7.30pm each weekday"*



11. As the circumstance of the children being looked after at his home each afternoon after school was known to Swift J (Acting), it must be regarded as having been taken into account by him. In the absence of any variation of the Order, R will therefore not be entitled to rely upon any such associated costs, to offset the maintenance payments he was ordered and throughout remained obliged to make. Whether the Court should now take into account, in the exercise of discretion, those and other circumstances relating to R's care of the children and his own financial circumstances, will be the subject of discussion below.
12. As set out below from his written submissions, it is however, an entitlement in this regard upon which R bases his primary response to A's application for enforcement.
13. When considering enforcement of the Orders and his response, an understanding of the chronology in this case is important. It is therefore briefly set out as follows:

12.12.2014	Order of Swift J.
27.01.2015	Notice of Appeal by R: in part against quantum.
16.02.2015	Court of Appeal refuses permission to appeal on quantum.
5 November 2015	A's summons for enforcement.
20 November 2015	A's Notice of Motion for Committal
27 November 2015	R's summons opposing A's summons of 5 November 2015 and Notice of Motion and seeking variation of Order of 12.12. 2014.
2015	On A's case, regular payments cease and arrears start to accrue.
2015	A's first application to enforce, including by way of bankruptcy petition in respect of R.
02.12.2015	The Court resolves these applications by consent of the parties. As part of the compromise, R is ordered to pay \$8775 due to A personally (as stipulated originally in paragraph 3 of Swift J's Order) in three tranches and in relation to arrears then accrued, that he pays \$30k into Trust for the children (representing 50% of the arrears due). R is prohibited from bringing another application to vary for 9 months. In return, on the basis of the foregoing, A agreed to withdraw the Bankruptcy Notice and by her agreement it was ordered expunged by the Court. So also was agreed to be dismissed the Notice of Motion for Committal of R for non-compliance with the Orders.



2015- to date R, as he admits, has failed to pay money into Trust for the children.

2015 – August 2016 On A’s case, R pays only 8 months of partial maintenance and then ceases altogether.

16.12.2016 A files her second application for enforcement.

Dec 2016 R asserts, in correspondence, drastically reduced income of only \$10k per month as the consequence of changes to his law practice and openly in an email of 16 December 2016 to A’s lawyer (then Mr Graham Hampson), offers 50% of the maintenance payments. But R does not pay this sum. While this email and responses from Mr Hampson invited a compromise, the discussion ends with an email from R in which he adumbrates his claim to a set-off of arrears of maintenance against his expenses said to be undertaken on behalf of the children.

13.12.2017 Hearing of A’s second enforcement summons comes on before Williams J. At the hearing for enforcement, R claims that the 2.12.2015 Order was meant to operate as an adjournment of his summons for a variation application, thus implying that the enforcement of arrears should be regarded as having been in abeyance pending determination of his summons. Williams J does not agree that the 2.12.2015 Order indicates an adjournment of such an application, but refers matter to the Chief Justice whose order it was. Williams J also sets directions for R to proceed to apply by way of his summons, if wishing to pursue his variation application. R to date, has not made such an application despite his summons being filed in court.

2018-2022 On A’s case, no maintenance has been paid by R for this entire period, as shown in the Schedule of Arrears above.

11.03.2022 R informs Walters J (Actg), on the matter coming before that judge for directions, that he intends to issue a variation application but does not do so.

08.04.2022 R further informs the Court (per the Chief Justice at the final case management hearing) that he intends to issue a variation application but does not do so.

20. 04. 2022 R files an affidavit of means in which he reasserts his claim that no maintenance is due as the children spend a fourth-night each month with him and he provides meals for them each evening after school, an arrangement which he describes as ongoing since 2016 when he also asserts that N came to live fulltime with him and in which arrangement A has acquiesced. In



essence, he asserts in his affidavit, that the children have two homes for one of which he has had to maintain full responsibility. He laments A's apparent pursuit of her "vendetta" against him, evidenced he asserts, by her refusal to allow the children to visit him at the hospital during a prolonged bout of serious illness. He attests to a drastic reduction in income from his practice due to circumstances beyond his control, including illness.

As at 27.04.2022 R fails to respond to A's letter regarding paying monies into Trust for the children despite, on 11.03.2022, giving an undertaking to Walters J (Actg), to use his best endeavours to progress this matter.

14. Against the background of that chronology, A's reasonable apprehension is that R has never accepted his obligation to comply with the Orders and has at every stage since August 2016 (when the last payment was made) failed to comply. She emphasizes that over the past 8 years, as shown in the Schedule of Arrears above, R has only paid approximately eight months of the ordered maintenance. She apprehends that by failing to prosecute an application to vary the Orders in his favour, R seeks to secure the same outcome nonetheless by a tactic of delay and obfuscation.

#### **R's case**

15. R's case proceeds essentially on the basis of an alleged acquiescence by A in the asserted changed arrangements for the care of N and K, and is best explained by extraction of his own words from [3] to [5] of his written submissions:

*"3. It is pertinent to quote in full the operative aspect of Swift J's Reasons for Judgment so that there is an appreciation for the full context of the matters that have arisen since. At paragraph 17 Swift J stated as follows with respect to the application for maintenance pursuant to Schedule 1 of the Children Act (2012 Revision) (the "Act"):*

*"17. My conclusion therefore is that, in accordance with the Schedule, the Respondent should pay for each child the weekly sum of CI\$630.00. This sum is to be paid in weekly or monthly tranches (as the parties agree) by electronic transfer into the Applicant's bank account. The increase applies with immediate effect. Obviously, the payments will only continue whilst the children live with the Applicant and are subject to change if, for example, they go to boarding school abroad. Changes will however be either agreed in writing between the parties or will be subject of an application to the court" [emphasis added by R].*

4. *The unchallenged evidence before this Honourable Court (since this matter was first adjudicated upon) is that the de facto position with respect to the living arrangements for "N" and "K" (qualitatively and quantitatively) is that they reside with the Respondent. The metric by which this is measured is a combination of time spent by N and K as*



*evidenced in the previously filed Affidavit since 2015 and the concession made by Mr Graham Hampson on the Applicant's behalf to this Honourable Court; in effect therefore, there can be no credible challenge to the fact that "N" and "K" have resided, effectively and substantively, full time with the Respondent for a period from 2015 right through to the initiation by the Applicant of these "enforcement proceedings" [emphasis added]*

5. *Even if the Applicant now seeks to resile from the concession made on her behalf the extract excised from Swift J's Reasons for Judgment is clear that the obligation on the Respondent to make payments for the Children's maintenance was delimited by their continued residence with the Applicant which residence, if changed (by agreement or otherwise) would either terminate the payment obligation or alternatively moderate it. Whilst the Applicant rests her case on the strict terms of the Order, it is both inequitable, unreasonable and unconscionable for her to now assert a breach of the payment obligation whilst not ever challenging the status quo. Further, the Respondent's case is that even if no express agreement was entered into by the Applicant and the Respondent in relation to residence, by conduct, the Applicant has agreed to and facilitated the status quo. To that extent, therefore, she is estopped from pursuing a claim for arrears when the factual basis of an entitlement to such a claim, namely residence, has been altered."*
  
16. The alleged concession by Mr Hampson on A's behalf on 2.12.2015, (emphasized above) that maintenance payments should be abated or discontinued (it is not clear which), was being here asserted by R for the first time. Likewise, his assertion that A should be estopped by the alleged concession (or her "facilitation"), from pursuing a claim for arrears.
  
17. The notes of the proceedings on 2 December 2015 when checked by me during this hearing (with a photocopy provided to R and A) do not bear out R's assertions. Rather, the notes record an agreement reached between the parties which substantively comports with the description of the outcome of that hearing as set out in the Order of 2.12. 2015, the terms of which are as described at paragraph 11 above.
  
18. The notes do however, record R's submission to the Court on 2 December 2015, to the following effect that: "*on a daily basis the children are taken to school by (A). I pick the children up, (K) around 2:20 -2:30 pm (if I am not here my (colleague) Mr C picks her up). N walks home to (R's home) from Middle School. They have their main meal at (my home). I have a helper who assists me- home work is done invariably with me- I assist the children. They are with me until 7:45- 8pm when they are dropped off. They are with mother every night but for the majority of the day when they are not in school they are with me. If they are ill I take on their care. I pay \$5600 per month every month to (A) directly on or around the 15<sup>th</sup> of the month which coincided with the time I was paid by my former employer. Those payments do not take into account payment I make on behalf of the children in respect of their daily lives – food, clothing, alternate week end care, going to restaurants, buying*



*books etc. Since September - \$6000 on 15 October, \$6000 on 15 November 2015. I have over paid every month”*

19. Thus, rather than insisting on any concession having been made on behalf of A, R was arguing on the 2 .12. 2015 that the alleged changed circumstances which resulted in “overpayments” by him, should be accepted by the Court as a basis for varying the terms of the Orders. It must be emphasized here however, that, whether or not those assertions of over payment are correct, R has not sought to prosecute an application for variation of the Orders nor does he refute the claim that no payments have been made to A directly since August 2016, as shown in the Schedule of Arrears above. His unsupported assertion of an abandonment of her claim per Mr Hampson and an estoppel aside, what R’s defence to A’s claim amounts to therefore, is an entitlement to the expenses he has been incurring for his care of the children, being offset against the unpaid accruals under the Orders, even in the absence of an application by him for variation of the Orders.

#### **A’s case**

20. A’s case in support of her enforcement application is in turn, best explained by extraction from [18] to [33] of her written submissions, as follows.

*“The original order*

18. *[A] seeks that the terms of the order are upheld in full. The order follows fully contested proceedings and a final hearing at which findings of fact were made. The order has not been subsequently varied or discharged by the court. There is no application to vary pending.*
19. *The facts underpinning the original order as they pertain to the children and the reasons for it have not changed, as is set out in [A’s] fifth affidavit. [A] still provides the primary home for the children, even though the children visit their father’s home after school. [A] provides the main care and control for the children by running their errands, managing their medical and dental appointments, attending parent/teacher evenings and taking them out to special events. [A] continues to struggle to meet the needs of the children and to run the household in which they live for the majority of the time without child maintenance from [R].*
20. *The extent to which [R] pleads a change in circumstances following his own voluntary resignation from Stuarts and alleged impact on his income must be treated with caution given his failure to proceed with a variation application. This issue will be dealt with further below.*
21. *It must also be noted that the order for child maintenance was always intended by Swift J to be in addition to the payment of school fees and health insurance. The fact that [R] agreed to meet these costs did not affect the determination that an additional sum of*



money was required to enable [A] to meet the needs of the children and to be able to provide a home for them.

22. Part of [R's] resistance to any form of enforcement is that he is paying the children's school fees and health insurance premium (though not in fact the deductibles, as he originally agreed to at court). The principle of a parent making direct payments and whether that negated an order for child maintenance was considered by Ramsey-Hale J in *JT v MT* (2020)<sup>1</sup>. Though in slightly different circumstances the principle derived from this judgment is directly applicable to the index matter, as set out at [22]:

*"Given the Respondent's clear preference for making direct payments to the child, I would remind him that an **Order for child maintenance seeks to secure, for the custodial parent, the periodical payment of a sum of money to defray the costs of providing a home for the child, pay for food and other miscellaneous outgoings including costs relating to grooming and personal hygiene...regular clothing, school outings, outings with friends and a host of small expenses related to child rearing...**" (emphasis added)*

23. Swift J's order was intended to do exactly that: to assist [A] in the child-related costs in running her household and meeting the needs of the children in circumstances where her income is not sufficient to do so.

*Breach of the Order/Impact of the breach*

24. [R] does not deny that he has failed to make the payments of child maintenance as set out in the schedule of arrears. He must accept –and did accept at the last hearing – that the order of Swift J has not yet been varied or discharged by way of further order of the court and that he has not been making payments pursuant to that order. He accepts that he has not yet paid the sum into Trust that was ordered (on 2.12.) 2015. To that end, it is submitted that the breach of the order is proved.

25. The breach of the order has had a significant impact on [A] and the children. She has set out in evidence the state of disrepair of her property in which the children live, she is unable to maintain her car, has struggled to meet the co-pay for dental and medical work for the children, has not had a vacation with the children for many years, is unable to take the children to see their elderly relatives in the UK and is not able to provide the children with the daily experiences here in Cayman that they ought to have. She has a total of CI\$298 in her bank accounts, has depleted her pension fund, must borrow from friends/family to meet any unexpected expenses and continues to incur debt up to her maximum limit on a regular basis as even her trimmed, basic outgoings exceed her income (including her averaged commission payments).

*[A] sets out the full impact of the breach on the children in her fifth affidavit.*

26. There are clear policy reasons as to why an order for child maintenance should be obeyed, which are all the more acute due to [R's] position as a practising attorney. As [R's] own counsel submitted to the Court of Appeal in his skeleton argument seeking to appeal the quantum of Swift J's order: "...the Applicant is at risk of being in breach, default or contempt. Plainly as an officer of the Court and in his capacity as head of a

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<sup>1</sup> *JT v MT* (Fam) 97 of 2016, Ruling delivered 24 February 2020.



litigation department at a local law firm, this is likely to have serious, adverse consequences for him”

27. [R’s] failure to pay following a final hearing and a failed appeal is nothing short of circumventing the decision of the court. It is in effect a further appeal by the back door whereby he has simply taken matters into his own hands and decided he will not pay.
28. Ramsey-Hale J endorsed the decision of the English Court of **Prest<sup>2</sup> in JT v MT<sup>3</sup>** and cited the following passage:

“It cannot be acceptable for a husband persistently to fail to discharge his responsibility under a court order to make periodical payments, whilst at the same time choosing to make payments on his own terms...**if the court were to acquiesce and to condone such conduct, the result might well substantially undermine the authority and reliability of orders for such payments made under the Matrimonial Causes Act 1973**”. (emphasis added)

29. For practical purposes there can be no difference between a husband discharging periodical payments pursuant to the Matrimonial Causes Act than there is to a father discharging periodical payments pursuant to Schedule 1 Children Act. The principles underpinning each are the same, save that it might be argued a failure to pay child maintenance is the most serious form of breach given that the payments are made for the express benefit of the child. It is for this reason why in those jurisdictions [(such as England and Wales pursuant to the Child Support Act 1991)] where child maintenance is collected by government departments, that any persistent and deliberate failure to pay the sums due are dealt with in the realm of the criminal courts. It is a serious matter indeed.

30. It is also arguable that [R] ought to be held to an even higher standard of conduct, in his capacity as officer of the court.

*Lack of application to vary*

31. [R] at every hearing presents arguments claiming there ‘is no debt due’ because of a change to the children’s care arrangements. In his ‘affidavit of means’ he suggests that his income has reduced for the last year. He claims that his law firm is now ‘defunct’. He suggests his expenses are high. None of these assertions are properly evidenced.

32. The important point is this: had [R] issued an application to vary the child maintenance order (at any point between 2017 and 2022) he would have been required to support that application with evidence. By raising the same points to rebut an enforcement application, without actually applying to vary, [R] seeks to escape the terms of the order without the burden of proving his case, on the basis of bare assertions and a lack of proper evidence in support. (A) has at all stages raised the issue of [R’s] ‘litigation tactics’ and sadly this is yet another example.

33. [A] would point out that [R] is still in breach of the order of Walters J (Actg). dated 11<sup>th</sup> March (perfected 25<sup>th</sup> March) and his undertaking given to the Chief Justice on 8<sup>th</sup> April (when this hearing came on). As [A] has set out in her sixth affidavit, [R] has still failed to provide details of the account into which the proceeds of sale of his land were paid, he

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<sup>2</sup> **Prest v Prest** [2015] EWCA Civ 714

<sup>3</sup> Ibid at 1



*has failed to disclose all bank accounts and statements and has failed to evidence his business interests, as ordered”.*

### **Discussion on R’s claim for changed circumstances and estoppel by acquiescence**

21. A’s criticism of R’s litigation strategy, by which he invites the Court without an application by him supported by reliable evidence to vary the Orders, even while having regard nonetheless to changed circumstances as grounds for non-enforcement, must be accepted as soundly based. As already noted above, this is a criticism which R seeks to deflect by repetition and reliance at [32] of his written submissions, on Justice Swift’s earlier indication as to the width and duration of the Orders but which, in reality, speak to the opposite effect as shown in emphasis here: *“Obviously, the payments will only continue whilst the children live with Applicant and are subject to change if, for example, they go to boarding school abroad. Changes will however, be either agreed in writing between the parties or will be the subject of an application to the court.”* [emphasis supplied].
22. The plain meaning of that passage from the learned Judge’s Reasons for Judgment, is that a variation of the obligation to pay maintenance for the children, can only be effected by written agreement between A and R or by Order of the Court; neither of which has occurred.
23. Soundly based also, is the criticism of R’s claim for an estoppel, raised for the first time in his written submissions at this hearing but which finds no support in the notes of the hearing of 2.12. 2015, at which the alleged concessions relied upon are asserted to have been made on A’s behalf. On the contrary, the notes of that hearing show that at the conclusion of R’s submissions as mentioned at [21] above, the matter was stood down for a proposal for a compromise of the judgment debt which had accrued *“per the Judgment of Swift Acting J.”* On the resumption, R is noted as having indicated to the Court, in agreement with Mr Hampson on behalf of A, that the terms of a compromise had been reached, as would be reflected in the terms of what was on the same day settled as the 2 .12. 2015 Order.
24. I am therefore satisfied that R’s claim for an estoppel, based on A’s alleged consent or acquiescence in his greater assumption of expense arising from a change in the arrangements for the care of the children, must be rejected.



### **Alleged delay or “warehousing” of A’s claim**

25. As shown in the chronology above, it is the case that no hearing of A’s enforcement summons took place between December 2017 when it came before Williams J. and March 2022, when it was brought before Walters Acting J. for directions to trial. This lapse of time, some four and a half (4 1/2) years, is cited by R as evidence of inordinate and inexcusable delay and so as a basis for dismissing A’s summons as an abuse of the process of the Court.

26. Here too it is most convenient to take R’s submissions as written:

*“We address, now, the issue of delay which raises two points which individually or collectively give rise to the proposition that the Application must be struck on abuse of process grounds. The first point is a long established matter of principle/practice recently enunciated in the recent English case of **Q v Q** [2021] EWHC 1757 (Fam). The relevant principle concerns, in the context of maintenance payments, the delay by an applicant to proceed with such a claim. Inarguably in this case, having been directed by the Court in November 2017 to proceed, expeditiously with her claim, the Applicant waited for four and a half years (4 1/2). No explanation has been proffered for the delay and indeed, it does not appear that the issue has been considered by either the Applicant or her legal advisers. It is respectfully submitted, for the reasons clearly enunciated in **Q v Q** that the Applicant’s delay in the prosecution of “her” claim is, irrespective of the merits thereof, an abuse of process.”*

27. Before turning to R’s citation of the case law on this issue of delay, it is convenient to set out here A’s response, as taken from [39] to [42] of her written submissions:

*“39. ... (A) has set out at length the reasons for the delay in her fifth affidavit, but would ask the court to take account of the following:*

- a. She took the first set of enforcement proceedings promptly in 2015 after immediate non-payment by (R) following the final hearing. This concluded by way of consent in [December] 2015 and (R) has still not complied with the terms of that order.*
- b. She took the second set of enforcement proceedings (2016 – the current application) promptly. This did not come on for hearing until 2017.*
- c. She attempted to exchange offers with (R) in 2016 – as below, to no avail. (R) did not even put into effect his own offer.*
- d. She attempted to secure a court date through 2018 via her previous attorneys but was advised by the court in September 2018 that the court diary was “very busy”*
- e. During 2019 she lost her legal representation. In 2020 Covid impacted [this I take to be a reference to the resultant restrictions upon the conduct of in-person litigation before the courts].*



- f. She finally managed to secure legal representation. (R) ignored all correspondence from them including the draft summons, which was issued in 2021, bringing the matter on for hearing in 2022.
40. (A's) evidence is that she feels worn down by (R's) conduct. She has not had the resources to pay legal fees to pursue this matter in the intervening years. Even when she has had attorneys (R's) conduct has made the matter extremely difficult to pursue given his constant defiance of court orders and refusal to engage. (A) has exhibited a great deal of evidence showing the attempts both she and her legal advisors have made in trying to engage (R) over the years to deal with this matter [Core bundle.D1-72]. It is of great concern that despite ignoring (A) and failing to pursue his own application to vary, (R) seeks to use (A's) "delay" as a reason why the court order should not be enforced.
41. There is no general principle in Cayman that arrears are automatically remitted after a certain period of time per *Franklin*<sup>4</sup>: the court in fact went so far as to determine that the court was "unable to remit or "cancel" the amounts owed" without a clear statutory power.
42. A has always been open to dealing with this matter pragmatically. Exhibited to her first affidavit is a chain of correspondence between Hampson & Co and (R) [Core bundle.D36 – D41]. In that correspondence, (R) (openly) states that his income has reduced to just \$2,500 per week and so proposed to pay (A) half of the child maintenance ordered [Core bundle D41]. Though this was not accepted it was queried by A's advisors why (R) did not pay at least that sum in the interim. He never responded."

#### Discussion on alleged delay and "warehousing" of A's claim

28. It is a settled rule that inordinate and inexcusable delay in the prosecution of a claim can amount to an abuse of process and may be a basis for striking out the claim: *Allen v McAlpine* [1968] 1 All E. R. 543; *Birkett v James* [1978] A. C. 297 and *Grovit and Others v Doctor and Others* [1997] 1 All ER 417<sup>5</sup>. The obvious questions here are first, whether there has been such delay and secondly, if there has been, whether the explanations given by A as set out above, should be accepted as taking her case outside the rule. However, while it seems to me that one might well so regard her explanations, R's further submission is that a special rule of practice or convention, applicable to maintenance enforcement claims over one year old, requires A to have first obtained the leave of the Court to bring her claim and, in the absence of such leave, applies so as to require the Court now to refuse enforcement of A's claims.
29. This latter rule has found statutory expression in England and Wales, in the aforementioned section 32(1) of the Matrimonial Causes Act. However, as recognized by this Court in *Franklin v Franklin*

<sup>4</sup> *Franklin v Franklin*, Cause D183 of 2011, Judgment delivered 13 June 2014.

<sup>5</sup> Often followed and applied by this Court. See for instance: *Sandcroft v Reliable Industries* 2019 (1) CILR 77 and *Geninvest S.A. v Bank of Butterfield* 1999 CILR 223.



(above, at [9]) and relied upon here by A, the statutory provisions in section 32(1) which require a party to first get the leave of the Court before bringing enforcement proceedings in respect of arrears which are due for more than 12 months<sup>6</sup>, have not been adopted as part of the laws of the Islands.

30. Faced with this obstacle to his argument, R invites the Court to resort to the special rule “of practice or convention” in its pre-statutory form, derived from its origins in the ecclesiastical courts. Again it is most convenient to quote from R’s written submissions. To set the context, it is to be noted that, for a recent example of the application of the rule, R cites the case of *Q v Q*, a case with a factual context very different from the present. It was a case in which the wife was found to be pursuing a plethora of claims but which claims the Court found to have been largely propelled by “*paranoia and delusional thinking*” on her part. The case had had an extremely long history of litigation, having been listed in front of at least 20 judges at all tiers over a period of 31 years. One of those extremely protracted claims was for arrears of maintenance and it was in that context that Cobb J (citing earlier cases) expressed the dictum upon which R seeks to rely as follows [at 21] to [25] of his written submissions:

“ 21. In *Q v Q* (ante) Cobb J in the context of an application to enforce a debt addressed the impact of section 32 of the Matrimonial Causes Act 1973 and the overarching principle derived from ecclesiastical courts until the establishment, in England of a discrete Family Court. In his review, Cobb J addressed the following at paragraphs 34 and 35:

“...section 32 of the MCA 1973, which provides as follows:

*“A person shall not be entitled to enforce through the High Court or any county court the payment of any arrears due under an order for maintenance pending suit, an interim order for maintenance or any financial provision order without the leave of that court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.”*

35. Within this context, Sir John Donaldson MR in *Russell v Russell* [1986] 1 FLR 465 said this:

*“... the rule of practice in relation to the non-enforcement of 'stale arrears' dates from the days of the ecclesiastical courts (see *Kerr v Kerr* [1897] 2 QB 439 at p. 443), when bank accounts and savings were no doubt much rarer than they are today and maintenance orders were literally a hand (or pocket) to mouth matter. The philosophy underlying the rule must therefore have been that if the complainant waited a year to seek enforcement of the order, she did not need the money, or at least had managed well enough without it, and the husband might reasonably regard the liability as something which he could forget about. This is not to say that the rule has changed in modern times*

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<sup>6</sup> Section 32(1) is quoted immediately below.



when a wife might reasonably live on her savings for a period and expect to be reimbursed by a single large payment. However, it does point to the fact that the courts should take account of the extent to which the complainant has sought to assert her rights." [emphasis added by R]

36. Insofar as the wife seeks to enforce a judgment debt (i.e., arrears which have been crystallised as a debt under an enforcement order) she is barred, under Section 24(1) of the Limitation Act 1980 which provides that 'an action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable'. Further, and insofar as the wife seeks to recover interest, she is debarred under Section 24(2) of the Limitation Act 1980 which provides that 'no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'. The wife cannot, therefore, pursue any interest which accrued more than 6 years after (any) crystallised judgment debt.
37. Thirdly, the wife has also claimed alleged arrears of financial provision for the children of the marriage; it is notable that Baron J made the order under Schedule 1 of the Children Act 1989 – both children were intervenors and parties before the court in 2006. It is therefore in my judgement for the adult children to pursue any alleged arrears owed to them, not for the wife." [emphasis added by R].
22. Two broad points flow from the excerpts taken from **Q v Q**: firstly the present application is "stale" within the accepted meaning ascribed in Family Proceedings; and secondly, as previously adverted to in the context of N, given that he is 19 years old, any claim for arrears is for him (as a beneficiary), to make and not the Applicant. The issue of "staleness" was previously underscored in the review of its underlying principle / genesis in the English Court of Appeal in **Ross v Pearson (D.C.) [1976] WLR 228** in the enforcement context of arrears of maintenance and the long-established practice, per Sir George Baker P.

"The wife, the respondent to this appeal, does not appear and is not represented. Consequently we have not had the advantage of argument in respect of what could be difficult points. The essence of the case put by the husband is that it was the practice in the Probate, Divorce and Admiralty

Division, carried through to the Family Division, not to enforce arrears for more than a year backwards.

In *Pilcher v. Pilcher (No. 2)* [1956] A 1 W.L.R. 298, 302 Lord Merriman P. said:

"There is another consideration which I think should apply, and that is that, not, I think, as a matter of law but as a matter of practice, it is usually considered by courts which are asked to enforce orders of this sort, and it certainly is the practice in this division when men are brought up before its courts for committal in respect of maintenance orders, that there should be a time-limit retrospectively. The custom in this division is not to enforce arrears for more than a year backwards."

23. Note the word "usually." In *Freeman-Thomas v. Freeman-Thomas* [1963] P. 157, 159, Scarman J. referred to *Pilcher v. Pilcher (No. 2)* 1 W.L.R. 298 in these words:



*"It is pertinent to observe that, had these [school] fees been the subject of a maintenance order made by this court, it is extremely unlikely that in 1962, some three years after the last of them and eight years since the first, the court would have tolerated enforcement of the order: see Pilcher v. Pilcher (No. 2)."*

24. Finally, in *Luscombe v. Luscombe* [1962] 1 W.L.R. 313, 315, Ormerod L.J. D referred, with approval, to *Pilcher v. Pilcher* (No. 2) in these terms:

*"It is true that Lord Merriman P., in that judgment, was referring to the form of enforcement which may result in a committal to prison; and that in a later paragraph, in his judgment, he gave as one of the reasons, if not the reason, for the existence of this rule that it is pointless to make an order committing a man to prison for so large a sum that the man would go to prison rather than pay. That, of course, does not apply in this case because here clearly there is no question of committal of the husband to prison; it is an application for a garnishee order in respect of funds which are in the possession of the bank as garnishee, but at the disposal of the husband, and therefore, the consideration may be different. But there would appear to be no doubt that that practice of enforcing arrears in the Divorce Division for one year only is a practice which is commonly adopted in that Division; and it may well be that the registrar, in considering this order, had in mind that such was the practice."*

25. Note that he uses the words "for one year only." This has raised the question whether in a case like the present, where several years have passed since the substantial part of the arrears came into being, the court should enforce only one year of the outstanding arrears, or should remit all the arrears as having been incurred more than one year ago, or more than one year, at any rate, before the complaint. Some guidance on that may be derived from the provision of section 13 (5) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, which was added to that Act by section 32 of the Matrimonial Proceedings and Property Act 1970. Section 13 (5) is in the following terms:

*"A person shall not be entitled to enforce through the High Court or any county court the payment of any arrears due under an order made by virtue of this Act without the leave of that court if those arrears became due more than 12 months before proceedings to enforce the payment of them are begun."*

### **Conclusion on R's reliance upon the 12 month delay rule.**

31. As mentioned above, this rule of practice and convention originally developed by the ecclesiastical courts but which came to find expression in statutory form in England and Wales, was the subject of consideration by this Court in *Franklin v Franklin* (above). In that case, the question was whether or not maintenance arrears the recovery of which had not been pursued for more than a year, could simply be remitted or "cancelled" by the Court by its adoption and application of the 12 month delay



rule. This Court, following its earlier decision in *A. T v T. T.*<sup>7</sup> then expressed its conclusions in the following terms which R has here wholly failed to address:

“[9] *The statutory provisions in section 32(1) of the Matrimonial Causes Act 1973 which require a party to first get the leave of the Court before bringing enforcement proceedings in respect of arrears which are due for more than 12 months*<sup>8</sup>, have not been adopted as part of the laws of the Islands.

[10]. *The imposition of such a requirement should not be done by the Court of its own motion merely as a matter of practice or by “convention”. Such a requirement could substantively alter the rights of parties to sue for enforcement of maintenance orders. The requirement could also operate to deny the benefit of a maintenance order to children for whose benefit they are ultimately to be enforced.*

[11]. *The interpretation of the statutory provision in the United Kingdom has indeed resulted in what is now an established practice of the family courts not to enforce arrears which are more than a year old – see *Fowler v Fowler* (1981) 2 FLR 141 and *B v C* [1995] 2 FCR 678.*

[12] *In my view, before this Court could seek to adopt and establish such a practice, nothing less than an equivalent statutory provision would be required.”*

32. At footnote 2 to the judgment in *Franklin*, the following commentary, also wholly unaddressed by R, appears:

*“There is no provision in the Matrimonial Causes (Act) (2006 Revision) (“MCA”) or in the Matrimonial Causes Rules which would limit the time frame for enforcing maintenance orders. On the contrary, section 20 of the MCA could be read as mandating the enforcement of such orders; as could section 8 of the Maintenance (Act) in respect of orders made under that Act. Section 30 of the Limitation (Act) (1996 Revision).. provides, if applicable, a limitation period of six years for the enforcement of judgments. One aspect of the present judgment that makes the applicability of the Limitation Act debatable is the ongoing nature of the maintenance obligation created by the judgment and so the difficulty in determining when the limitation period begins to run.”*

33. Neither the decision in *Franklin* nor that in *A.T v T.T.* has been disturbed on appeal and so the principle for which they stand must be followed and applied now. Nor is their reasoning, to my mind, controversial. Properly understood, these decisions are not to be taken as in any way condoning delay in the enforcement of maintenance orders. Nor do they purport to interfere with the Court’s well-established discretion to be exercised according to the circumstances, when called upon to enforce such claims. Rather, as *Franklin* explains, the so-called 12 month rule of practice or convention which would routinely operate in England and Wales to bar claims which fall on the wrong side of it, and so

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<sup>7</sup> Cause Fam. D13 of 2002

<sup>8</sup> Here setting out the terms of section 32(1).



itself a fetter upon the well-established discretion of the Court, has not been adopted in this jurisdiction.

34. It follows, that to the extent the discretionary power for the enforcement of maintenance orders is appropriately to be exercised in the present case, it remains available to be exercised as the circumstances require.
35. With that conclusion in mind, it seems to me unnecessary to deal at any length with R's further point, which he describes as "an analogue to the first", namely that A's "warehousing of the claim she now seeks to enforce, if such claim exists, gives rise to the Court's jurisdiction to strike out that claim". As the following discussion reveals, this is in reality but another way of addressing concerns about delay as a species of abuse of the process of the court, such that, in my view, nothing from the dicta from the cases cited by R and quoted following, should be regarded as controversial.
36. Whether warehousing justifies invoking the Court's jurisdiction to strike out a claim was considered fully by the English Court of Appeal in *Alibrahim v Asturion Foundation* [2020] EWCA Civ 32 (24 January 2020) per Arnold LJ:

*"In my judgment the decisions in Grovit v Doctor (above and below), Arbuthnot, Realkredit and Braunstein show that a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason may be or the length of the delay.*

*Although we were referred to a number of decisions of High Court Judges, both sitting at first instance and on appeal from Masters, it is only necessary briefly to mention two of these. The authority which comes closest to supporting the contention advanced by counsel for Ms Alibrahim is Société Générale v Goldas Kuyumculuk Sanayi [2017] EWHC 667 (Comm), in which Popplewell J (as he then was) held that the claimant's conduct was an abuse of process for three reasons, one of which was that it had decided to recover the sums it claimed were due from the defendants not in the English proceedings, but in proceedings in Turkey, leading to a delay of some eight years which was only brought to an end by the defendants' strike out applications. In that context (which is unaffected by the subsequent decision of the Court of Appeal [2018] EWCA Civ 1903, [2019] 1 WLR 346) Popplewell J stated at [63]:*



*"For a claimant unilaterally to warehouse proceedings is therefore an abuse of process, and may be a sufficiently serious abuse to warrant striking out the claim in appropriate cases under the line of authority from Grovit v Doctor [1997] 1 WLR 640; see Solland International Ltd v Clifford Harris & Co [2015] EWHC 3295 (Ch) at [54]. It is not necessary to decide in this case whether if Goldas had been validly served, the warehousing of the proceedings was an abuse of sufficient gravity to warrant striking out the claim. What is clear is that the decision to put the proceedings on hold for such a long period was an abuse, and a serious abuse, which militates against there being a good reason for granting the relief sought on this application."*

*Notwithstanding the phrasing of the first sentence, I do not think that Popplewell J can have meant to say that unilaterally putting proceedings on hold is always an abuse. Such a statement of the law would not be supported by his citation from Solland International Ltd v Clifford Harris & Co [2015] EWHC 3295 (Ch) at [54], where I said that "it may be an abuse of process for the claimant unilaterally to 'warehouse' the claim for a substantial period of time, even if the claimant subsequently decides to pursue it [emphasis added]" (and see also [69]). Furthermore, Popplewell J evidently regarded the length of the delay as germane to this question.*

*Finally on the law, I should address a more minor dispute between the parties. Counsel for Ms Alibrahim suggested that an application to strike out on the ground of abuse of process by "warehousing" fell to be analysed in three stages. The first stage was to consider whether the claimant's conduct was an abuse of process. The second stage, if an abuse of process was found, was to consider whether the abuse was sufficiently serious to entitle the court to strike out the claim. The third stage, if the abuse was sufficiently serious, was for the court to exercise its discretion as to whether in all the circumstances striking out was the appropriate remedy. In the course of argument, however, he accepted that an alternative view was that there were only two stages to the analysis: first, the court should determine whether the claimant's conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim. Counsel for Asturion supported a two-stage analysis. In my judgment the better reading of the authorities is that the analysis falls into two stages, and not three. Furthermore, this is supported by the structure of CPR rule 3.4(2)(b), which provides that the court "may" strike out a statement of case if it "is an abuse of the court's process" (it is perhaps worth noting that the authorities have added the gloss "in all the circumstances of the case", particularly the claimant's conduct).[emphasis supplied]*

### **Analysis of argument on staleness and warehousing**

37. I accept that *Alibrahim v Asturion Foundation* stands for the uncontroversial proposition that the Court may, in appropriate circumstances, strike out a stale or "warehoused" claim. And that it further stands for the proposition that a claimant has a duty to explain to the Court why he / she has not prosecuted a claim, if held in abeyance, "sword of Damocles-like" for an inordinate period – in this case posited by R to be in excess of 4 ½ years. It follows also I think, that in examining A's conduct in the context of this case, the Court can take into account the factors that would inform the exercise of the English Courts' discretion exercised even in the context of cases such as *Q v Q* and *Ross v Pearson*,



(both discussed above) as well as the *Russell v Russell* rationale, supporting the practical determination of whether or not the enforcement proceedings should be struck as an abuse of process.

38. None of the foregoing however, leads me to the conclusion contended for by R, which is that in the circumstances of this case, A's claims should be regarded as having been abusively "warehoused" or delayed and so should be struck out. In this regard, I note specifically, R's complaint that William J's Minutes of Order dated November 2017 operated as an adjournment of A's Summons subject to the direction that the matter be brought before this Court to be determined both as to the merits of her claim and what R describes as his "*extant November 2015 Summons for a downward variation of the quantum of maintenance payments and a concomitant claim with respect to overpayment and / or extinguishment of any arrears claimed*".
39. Having read the detailed notes made by Williams J on 13 December 2017 (an occasion it must be emphasized when it was A who was seeking enforcement of the Orders), it is clear that the learned judge was there giving directions for the due prosecution of both parties' summonses. The subsequent delay in bringing the case before the Court may therefore be as much attributed to R's inaction in prosecuting his summons for variation, as to A's inaction (which as we have seen she seeks to explain), in prosecuting her claims.

### **Disposition**

40. As a matter of enforcement according to the strict terms of the Orders, there is no avoiding the conclusion that R owes the amounts claimed by A as unpaid maintenance. Indeed, R has not asserted that he made any payments directly to A in keeping with the terms of the Orders since 31 August 2016 when the last amount of \$5400 was paid, as shown above in the Schedule of Payments.
41. In the absence of any basis, as I find to be the case, for striking out A's claim due to inordinate or inexcusable delay, the amount of \$300700 claimed is *prima facie* due and payable. However, while as I have explained, R's other arguments for estoppel by acquiescence, set off and the like as a complete bar to A's claim must be rejected, I regard factors raised by him in his affidavit of means, as being relevant to the exercise of discretion now, that is: as to the extent to which A should recover the amount claimed. Here I have in mind in particular, R's evidence, at least implicitly acknowledged by A, of his assumption of significant expense for the care of the children each day after school and while they spend their alternate weeks at his home. These are expenses which, had he pursued his summons for variation downward of the payments, would likely have resulted in a significant



reduction of the monthly sum. This would likely have been so even while A would still have been allowed a reasonable amount to support her in the maintenance of her home where the children also resided (and in the case of K who is still the subject of the Orders, continues to reside).

42. I also have regard to R's evidence, belatedly filed and incomplete though it was, relating to changes in his earnings. It seems nonetheless tolerably clear from [10] and [11] of his affidavit of means, that his earnings from his practice of law have been negatively impacted by circumstances beyond his control, including prolonged illness.
43. And so, even while R's failure to prosecute his summons for variation justifies A's skepticism about its merits, there is, in my view, sufficient evidence on which to conclude that some reduction in the monthly payment would have been warranted had either party pressed their summons to conclusion circa end 2017 or early 2018, such that R's obligation to pay arising since then may now be reconsidered.
44. As regards the exercise of the Court's discretion in this way, a further comment about the decision in *Franklin*, as helpfully explained by Williams J in *Manderson v McField*, should be made here. In that case, the learned judge was called upon to remit accrued liability for maintenance of a child or to vary the order with retrospective effect. The following excerpts from his judgment beginning at [22] are applicable:

*"22. In his written judgment dated 13 June 2014 in Franklin v Franklin D 183 of 2011, the Chief Justice, citing his decision in A.T v T.T., again refused an application to remit arrears of maintenance for want of jurisdiction. At paragraphs 56 and 57 of his Judgment, the chief Justice stated:*

*"23. To be clear, I recognize the undoubted jurisdiction of the Court to vary maintenance orders made both under the MCL and the Children's Law and to do so retrospectively in circumstances where a party is shown to have been no longer able to meet the terms of the order<sup>9</sup>. I also recognize the jurisdiction to be exercised in the manner (as I read the case) spoken of and approved in Warden v Warden (above) to make a variation of a maintenance agreement (that is: effective from the date specified in the order). The remission of sums which are accrued and owing and so are properly already due to a party under an order, is altogether a different matter. That in my view, requires that the Court's jurisdiction is clearly vested by law before it might be engaged for the making of such orders. In the absence of a clear statutory power, that jurisdiction is not to be grasped and for the reasons explained in A.T v T.T. it would, in my view, be*

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<sup>9</sup> Emphasized by Williams J.

*inappropriate for the Court to invoke its inherent powers to bridge the jurisdictional gap.”*

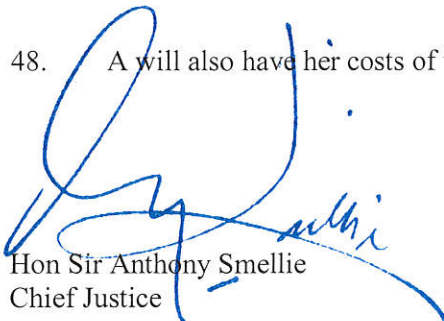
26. *Adopting the Chief Justice’s above guidance in Franklin, although the Court may not remit arrears, I am satisfied a variation made to any periodical payments order may be applied retrospectively. As the Order was one made in divorce proceedings, an application for variation is an application for ancillary relief. The general principle of ancillary relief applications is that an order may be backdated to the date of application. However, there are instances where it can be backdated further if the facts justified it.”<sup>10</sup>*

45. While at [29], reaffirming the principle that a parent having an obligation to pay may not simply ignore that obligation but if wishing to obtain a variation of an order must actively pursue such an application, Williams J nonetheless decided that the subject order could be varied with effect retrospectively from the date when an application for variation was in fact made.

46. Taking a similar approach here, it seems a fair exercise of discretion, to have regard to the circumstances of this case, including in particular R’s summons for variation which could have been resolved either upon an application by him or by A had either pressed the matter when directed by the Court at end of 2017. In light of the circumstances already then prevailing, it is likely, in my view, that the amount payable would have been reduced by one-half. This means that for the 52 months between December 2017 and April 2022, the Orders should be varied so that the claim is reduced by \$141,960, giving the amount of \$158,740 (ie: \$300,700 - \$141,960 = \$158,740). This is the amount which I now order R to pay to A immediately.

47. A will be at liberty to secure the amount by way of a second charge against R’s Hinds Way residential property and may apply for an order to secure that outcome in the event R does not offer satisfactory arrangements for payment within 30 days of the date hereof.

48. A will also have her costs of these proceedings to be taxed on the ordinary basis, if not agreed.



Hon Sir Anthony Smellie  
Chief Justice

8 August 2022

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<sup>10</sup> Citing *MacDonald v MacDonald* (1964) P. 1; *Morley-Clarke v Jones (Inspector of Taxes)* [1986] CH 311.