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 for the Applicant** **Ms. Amanda Minto & Mr. Bhavesh Patel of Travers Thorp Alberga for the Petitioner**
Before:	**Hon. Mr. Justice Richard Williams**
Heard:	**9 June 2022**
Draft Ruling circulated:	**23 June 2022**
Judgment provided:	**13 July 2022**

HEADNOTE

Ancillary Relief - Consent order – legal issues hearing (i) concerning application for declaration as to true agreement in the order relating to a joint tenancy (ii) concerning lack of clarity as to whether an application expressed by the Applicant to be one for a variation of the order is actually a variation application or ort whether it is a set aside application or an appeal - legal issue hearing at request of Petitioner to determine whether the variation, declaratory relief and disclosure orders claimed in the Applicant's Summons are as a matter of law available to the Applicant – The procedure in relation to the submission of and approval of consent ancillary relief orders

JUDGMENT

The primary applications in the summons and the legal issues for determination at this hearing

1. The hearing before me 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 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 Geremis 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. The Applicant submits that, due to the way that the Petitioner has construed the Order and due to events that have occurred following the approval of the 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"*. She 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 (referred to as 'Copper Falls Steakhouse' in the Order) ("the Business")[2], 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 of the financial dealings between the present parties.

3. In the Summons, the Applicant 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

[1] He passed away on 17 December 2017. Letters of Administration were granted to the Applicant on 12 February 2018.

[2] 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.

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 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:

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

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

c. 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);

d. 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

e. 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").

4. The Applicant characterises the remedies 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.

5. 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 is 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 concerning the Land Registry[3], that the claim for delivery up of the Land Certificate[4] and that the injunction claim concerning the

[3] Paragraph b. in the Applicant's Summons.

Strand Property[5] 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.

c. that the claims to rectify or alternatively vary the Order relating to the Strand Property[6] and for an unspecified variation of the Order *"In such manner as the Court consider fair"*[7] 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;

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.

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[4] Paragraph c. in the Applicant's Summons.
[5] Paragraph d. in the Applicant's Summons.
[6] Paragraph e. in the Order.
[7] Paragraph f. in the Order.

6. 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, a number of the contentions that would have been better made in a striking out application were resurrected in the present hearing before me.

7. At the case management hearing held on 25 February 2022, the Court acceded to the Petitioner's request that there be a legal issues hearing fixed at which the Court should make a determination as to whether the relief claimed in the Summons is, as a matter of law, one that is available to the Applicant.

The legal issues hearing

8. At the legal issues hearing held in my Chambers on 9 June 2022, I received oral submissions from Counsel for each party. At the end of the hearing, I adjourned the matter in order to prepare and then deliver this reserved written judgment. When determining the issues dealt with in this Judgment, I have considered the written and oral submissions filed on behalf of the Applicant and the Petitioner as well as the content in the four provided bundles.

Background - The divorce proceedings and the Order

9. The Petitioner and the Respondent formed 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, to their credit, remained in business with each other. The Petition was unopposed, and was proved on 2 July 2015. The Decree of Dissolution of Marriage was granted on 30 September 2015. Having regard to the length of their relationship, it can be regarded as being fairly long marriage. At that time, the Petitioner was represented by different attorneys and the Respondent was unrepresented.

10. 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")[8]. 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.

11. 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 have to 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:

> *"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."*

[8] 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 the Petitioner's attorney. I note in an email dated 17 August 2015 sent to the Judge's Personal Assistant that the Petitioner's then attorney stated that he 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 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.

12. 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.*
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> *(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.*
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> *(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."*[9]

This information gave sufficient detail to the Court about what the relevant assets were and what the valuations of the same were. This Schedule was provided at the Court's request and attached to the final version of the Form. That proactive request was made because, when I reviewed the draft order and the Form[10], I was not willing to approve it because I felt that additional information was required about the assets and valuations to enable the Court to properly consider the s.19 factors.

[9] 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 13 below.
[10] The first Form (dated 12 August 2015 and submitted on 14 August 2015) did not identify the individual assets or their separate valuations.

13. 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.

14. 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."*

15. The Order was also signed by the parties and included in its preamble the standard 'clean break clause' as to spousal maintenance 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*[11] *(sic.) decision to ask the Court to approve the below terms, pursuant to the requirements of Practice Direction No.1 of 2013."*

16. 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 contained the following terms:

> *"Former Matrimonial Home ("FMH")*

[11] The word "*information"* may have been intended to be the word "*informed"*.

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.*
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")

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 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 followed in relation to consent ancillary relief orders

17. It seems that the Applicant may be wrongly imputing 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.

18. The Applicant may also be imputing that insufficient disclosure was given by the Petitioner. However, it is not clear whether at this stage she is primarily focusing her disclosure concerns to 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"*.[12] 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 the majority of 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 would be inconsistent with that confidentiality and impracticable.

19. 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

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

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 said:

> *"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.*[13] *It is clear, however, that this was intended to be an assertion of 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.[14] 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".*

[13] 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 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].

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

20. 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."*

21. I trust that if the Applicant's Summons is heard, that the above guidance about the procedures surrounding the submission of and approval of consent orders will assist the parties in their preparation.

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

22. 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 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*[15]*…"*

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

If it is now being contended that I was wrong in reaching the above conclusions and that I exercised my discretion incorrectly in approving the Order or I approved provisions in the order which the Court did not have the jurisdiction to make, then that does not ground a variation application, but should instead be challenged by an appeal.

23. I note that, on one hand, it is 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 be via the appeal route. This is one example of the lack of clarity about the basis for the applications being made.

24. As the above comment has been made about the terms contained in the Order, one should recognise that there are a number of 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 to meet the specific circumstances of the parties which by their nature may not be characterised as being standard provisions (as long as the Court has the jurisdiction to make that order). This is because, the parties are best placed to tailor the terms of the order which will govern the division or utilisation of their assets upon divorce to best meet their circumstances rather than having a potentially less practicable order imposed on them by the Court.

25. In this case, it was evident on all of the material then before me that the parties had approached the divorce proceedings in an amicable manner. 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 the primary source of both of their incomes. Therefore, I approved the Order being satisfied that it was a fair order, reflecting the parties' wishes and meeting the short and long term needs of the divorcing parties.

Background – Events following the approval of the Order

26. Until the Respondent's unexpected passing, he and the Petitioner seemed able to operate the Business in the intended manner and consistent with the terms of the Order. 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.

27. On 5 January 2018, the Petitioner transferred the Strand Property into her sole name as registered proprietor. 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 Respondent's passing and her legal right to ownership as sole survivor.

28. 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

states that, after they had jointly obtained legal advice from Campbells attorneys, the Strand Property had been purchased in November 2009 by the Petitioner and the Respondent as joint proprietors.[16] Although a part of the Strand Property housed the Business, the Petitioner highlights 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.

29. 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. It is not for me to determine that issue on the limited submissions received by me at this hearing. 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.

30. 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 challenges 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 management and affairs of the Business. Therefore, the Estate presented the Winding Up Petition against the Company on 24 July 2018. That Petition seems to have been brought on the basis that

[16] Purchased for CI$875,000 with a mortgage from RBC which was paid off in full in January 2017.

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.

31. 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 result 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 that it was a Company asset. 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.

32. In the end, by consent, the Company was placed into liquidation and this flowed from the restaurant's closure due to the Covid-19 pandemic. Graham Robinson was appointed as Official Liquidator and he prepared a report on 30 June 2020. 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 regards to the ownership of the Property. 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."

Seemingly, it was after the Official Liquidator had shared that information that the Applicant changed her views expressed in the winding up proceedings about who had the interest in the Strand Property to the views now being expressed within these Family Division proceedings.

33. 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 Solicitor and sanctioned by the Court. She was able to acquire the fixtures and fittings and stock from the Business.

34. 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[17] in the Civil Division[18] 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 and her criticisms of the Respondent, 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.

[17] As the Respondent's liability passed to the Estate.
[18] Cause No. G171 of 2019.

35. The Petitioner also issued a Writ[19] against the Estate seeking damages in respect of mortgage payments alleged to have been made solely by her for which it is said that the Estate is 50% responsible under the Order.

36. Both of these actions remain contested by the Estate, and they are both stayed until the determination of the applications in the Summons issued in the matter before me.

37. 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.[20] 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 Petitioner's parents and the Respondent and Petitioner would apply the remaining 90% at a 60% and 40% split respectively.[21]

38. 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

[19] Cause No G 124 of 2020.
[20] This is at paragraph 22 in the Order.
[21] Paragraph 21 of the Order

also failed to transfer his share. There is no evidence from the Petitioner's parents about 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. This state of affairs is of course more to the detriment of the Estate than it is to the Petitioner's side of the family. 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 in relation to the Strand Property, which the Estate appears to argue were due to it as a result of the rental provision in the Order.

39. 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 85.25% of the assets and the Respondent obtained 14.75% of the assets. The Respondent 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.

The legal issues

40. When considering the legal issues it is important to have in mind that it is not the Court's function at this hearing to determine the primary dispute between the parties by making findings on the merits of the matters raised in the Summons. Although some of the submissions received have strayed into that area and been recorded in this Judgment (in more detail than I had hoped), that has been necessary because the legal issues have had to be put into context.

The declaration sought

41. The 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.

42. The Applicant submits that the Court has an inherent power to grant declarations, and may do so in relation to the Order. Reference is made to s.3 of the Act and the Judgment of Mangatal J in ***Henning v Henning*** (Unreported) Cause G250 of 2014.

43. The Petitioner contends that s.3 of the Act does not provide an express permission for declarations to be made in matrimonial proceedings. Although that may strictly be true, it does provide the Court dealing with ancillary matter under the Act with the powers of Court of Chancery in England necessary to enable it to exercise the jurisdiction conferred upon it. Declarations are remedies originally vested in the Court of Chancery. Therefore, in principle, the

Court does have the power to make declarations in matrimonial proceedings brought under the Act.

44. In England and Wales declarations, in particular concerning status, legitimacy, initial legitimacy of marriage are applied for and, as the authors of Rayden and Jackson on Divorce (15th Ed) ("**Rayden**") indicate on page 87, paragraph 48 under the heading 'Declaration of Status – Jurisdiction of the Court':

> *"A court is empowered both under its inherent jurisdiction under statute to make declarations as to status in proceedings which are brought for relief alone. Prior to the Family Law Act 1986[22] declarations in family matters were made at the discretion of the court under RSC Order 15, rule 16."*

45. GCR Order 15, rule 16 mirrors the same RSC provision. However, Order 15 is not one of the limited Orders that are listed at GCR Order 1, rule 2(4)(a) as being applicable to the matters governed under the Matrimonial Causes Rules (2005 Revision). I note that RSC Order 1, rule 2 is a non-application rule, whereby the RSC are not applied to matrimonial proceedings except where the Family Proceedings Rules provide that they do. A review was not carried out at the hearing to see how RSC Order 15 remains applicable, but I am aware that in England and Wales it was established that the High Court had powers to make declarations as to matrimonial status using the RSC Order 15, rule 16 procedure. However, as stated in the Law Commission Report Family Law Declarations In Family Matters (Law Com. No. 132)[23]:

> *"That rule does no more than make clear that the rules of court do not prevent the exercise of a declaratory jurisdiction: it does not create any such jurisdiction or specify what declarations are available. One must look at the cases to discover the nature of the jurisdiction and the declarations that a court can make."*

[22] Amended by the Family Law Reform Act 1987 which provides a legislative code by which declaratory relief in matters of matrimonial status, legitimacy, legitimation and adoption is available.
[23] 22 February 1984.

46. Some insight into whether it would be appropriate to make a declaration in relation to property matters in ancillary relief proceedings relying upon GCR Order 15, rule 16, may be obtained if one considers the approach and effect of the provisions of the Married Women's Property Act 1882 in England and Wales, some of which are mirrored in our Married Women's and Property Act (1997 Revision). Section 17 of the English Act enables proceedings to be brought by a spouse, at any time during the marriage or within 3 years of its dissolution or annulment, to obtain a declaration of proprietary interest. In exercising its jurisdiction under s.17, a court has power to ascertain the respective rights of a husband and wife to disputed property, and may make such order as may be appropriate for its return or for restitution. As stated in ***Rayden*** the Court:

> *"has no power under this jurisdiction to vary established rights, not varied by subsequent agreement, merely because in the light of subsequent events it thinks that the original agreement was unfair. The section is a procedural provision only: it does not confer any new substantive rights on either of the parties, and the question for the court is "Whose is this?" and not –'To whom shall this be given?'' Once having declared the established rights of the parties the court still has no power to vary them under this section although it may do so under the discretion vested in it under section 24 of the Matrimonial Causes Act 1973 if such proceedings are before the Court."*

It is generally unnecessary to run such a property application in tandem with a divorce suit, as the Court has ample powers to deal with property under the Matrimonial Causes Act 1973. The same situation applies with cases in the Grand Court with the Act. What is evident is that if declaratory relief is being sought in relation to property interests in ancillary proceedings, then Married Women's and Property Act (1997 Revision) may be a route for doing that.

47. Section 17 of the Married Women's and Property Act (1997 Revision) is similarly worded to the same English provision. It provides the Grand Court with the jurisdiction to make a declaration in relation to property matters in ancillary relief proceedings. The English Act was brought to

Counsel's attention by the Court at the outset of the hearing and neither sought to make any submissions regarding that Act or the Cayman Act. Therefore, no research has been conducted as to whether there is (as there is in England and Wales) any time limit post-dissolution restricting the application of s.17 the Cayman Act. In the absence of fuller argument, I do not at this stage feel it necessary or appropriate to make a finding that s.17 would be a suitable avenue for an applicant to use if she were to seek seeking a similar declaration to the one that is sought in this matter. I mention the reliance placed on s.17 in relation to declarations in matrimonial proceedings to question whether GCR Order 15 Rule 16 actually is the way of seeking declarations about property interests in ancillary relief proceedings.

48. The Applicant relied upon the case of ***Henning***, where there was already an order for sale and for the division of the proceeds of sale, as being an authority that the Estate may following the death of a party to ancillary relief proceedings obtain declaratory relief where issues of fairness and reasonableness are involved. In ***Henning*** there was no claim made for declaratory relief and it appears that, if any, only very limited submissions were made on the point. The declarations were made in what was a Registered Land Law matter pursuant to CGR Order 15, rule 16. However, the Learned Judge was not considering an application brought under the Act or whether, in light of GCR Order 1, rule 2(4), GCR Order 15, rule 16 was even applicable to matrimonial proceedings. She was not considering whether GCR Order 15, rule 16 created a declaratory jurisdiction to ascertain property interests in ancillary relief matters. ***Henning*** can be distinguished and I am not satisfied that it can be regarded as creating a precedent that GCR Order 15, rule 16 should be regarded as being recognition of the matrimonial court's power to grant declaratory relief.

49. Although it may be arguable that GCR Order 15, rule 16 does not apply to these proceedings due to the effect of GCR Order 2, rule 2(4)(a)[24] and due to the views expressed by me in paragraphs 45-48 above, only relying upon s.3 of the Act, I am satisfied that a Judge sitting in the Family Division is not prevented in principle from exercising declaratory jurisdiction in matrimonial matters. I agree with the Applicant in that regard.

50. The Petitioner contends that should not be the end of the determination of the legal issue relating to the sought declaration issue, as she urges the Court to consider not only whether declaratory relief is available in ancillary family matters, but to go on and determine whether the actual relief (i.e. the specific declaration sought at paragraph 1 of the Summons) is one that is available to the Applicant or appropriate to make in this case.

51. The Petitioner relies upon ***Henderson v Henderson*** (1843) 3 Hare 100, 67 ER 313 to support a submission that the Applicant is estopped because in the winding up proceeding which were brought by her, she asserted that the Business was the owner or beneficial owner of the Strand Property. It is submitted that, as she failed to challenge the Official Liquidator's contrary conclusion (he having received legal advice) that the Business did not have any such interest in those proceedings, she cannot have *"a second bite of the cherry"* and now rely upon a different set of facts, namely that it was owned by the Petitioner and the Respondent, in these proceedings. It is contended that the Applicant's approach is *"tantamount to an abuse of process"*. Interestingly, abuse of process was pleaded frequently in the strike out Summons and would have been one that I would have had to consider if the strike out application had not been withdrawn.

52. The Applicant highlights that there is no basis for an estoppel. She contends that she has always argued that the Petitioner and the Respondent were equal beneficial owners of the Strand

[24] I am not going to make a determination of that issue herein due to the minimal submissions made by the attorneys on the same.

Property, whether due to their ordered 50% shareholding in the Business or otherwise. Sensibly, she rightly decided to no longer pursue her initial view after it became clear that it was contrary to the one expressed by the Official Liquidator following his receipt of a legal advice report. It appears that, in any event, the Judge hearing the winding up petition had little appetite to deal with the issue in the winding up proceedings.[25] The Applicant indicates, with some force, that the issue has never been actually litigated and determined by a Court and it should be considered in the ancillary relief proceedings in which the sought relief may be obtained.

53. In all of the circumstances this case, I am not satisfied that the Applicant should be estopped from fully arguing the declaratory relief claim contained in the Summons.

54. The Petitioner raises a number of issues about what she sees as being flaws in the Applicant's arguments concerning the declaration. She argues that the is no need for the type of clarity that declarations are designed to give, as the Order is patently clear when looking at the global effect of its terms that the intention was that the existing joint tenancy of the Strand Property was not to be severed. She argues that a declaration should not be used to infer or impute words or provisions that do not appear in the Order. However, such arguments are for determination at the hearing of the Summons and do not go to the question as to whether, as a matter of law, the declaratory relief claimed may be available to the Applicant.

55. The Petitioner suggests that proceedings could have been brought under the Registered Land Law by the Applicant. She also highlighted, rather briefly, in the oral submissions the contention that the Court has no authority to now alter the position concerning the Strand Property following the transfer by the Petitioner and that this is relevant to paragraphs 1 and 5 of the Summons. I accept

[25] See paragraph 31 above.

that this is potentially a very important live issue, but it is one that should be left to the hearing of the Summons when the parties are able to properly argue it with any relevant authorities.

56. Accordingly, I am satisfied that declaratory relief is in principle, as a matter of law, relief that may be available to an applicant in ancillary relief proceedings. However, whether it is appropriate to make any declaration or to make a declaration in the terms sought is something that should not be determined in the present legal issues hearing, but left for consideration at the hearing of the Summons following fuller argument (including on the law generally and on the effect of the Registered Land Act) and after consideration of the evidence and of the merits.

The variation application

57. The Applicant labels the application as being for a 'variation' of the Order. Section 23 of the Act permits a personal representative to apply to vary *"any order"* made in an ancillary relief order. This is wider than the variation provision in England and Wales. This section in principle enables the Grand Court to vary certain property orders made in final ancillary relief orders.

58. Generally, for events arising at or before the order was made, a party should apply to set aside. For events arising after the order was made, a party will need to apply for the Court's permission to appeal after the time limit to appeal has expired.

59. The Applicant recognises 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.[26] She concedes that the Petitioner's actions and the change of circumstances (as currently argued being the death of the Respondent and the liquidation of the Business), 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. The

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

Applicant contends that a variation application would enable the change of circumstances to be taken into account and that 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. However, just because the appeal route is not available, it would not be appropriate to argue matters that should be dealt with by appeal 'through the back door' by labelling them as being variation proceedings.

60. The Applicant contends that *"variations"* are sought to (a) give effect to the "*true agreement"* between the Petitioner and Respondent and to *"disentangle the complex arrangement"* that exist between the estate's finances and those of the Business and (b) to achieve a clean break. The Applicant states that it seeks the Court's assistance with the interpretation of the Order, especially in light of the Petitioner's actions since the Order. It claims that the change of circumstances namely the unexpected passing of the Respondent and the winding up of the company are factors grounding a variation application. A determination of whether there is a change is not a matter for this hearing, but if a Court were to find that there had been a relevant change of circumstances, then arguably the Court may have the jurisdiction to hear the variation application.

61. The Petitioner highlights a lack of clarity from the Applicant about the nature of its application, namely whether the Applicant seeks a variation of the Order, or is in effect appealing the decision. The Petitioner views it as in reality not being a variation application, but an appeal:

> *"under the 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".*

62. 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. These are both live and arguable issues and are not suitable for determination at this hearing.

63. The variation provision 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 provision. It seems that the Applicant may be seeking the Court to almost 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. The Applicant has failed to state what paragraphs should be varied and has not suggested what those variations may be. Characterising or placing a label on an application to claim that it is a variation application does not in itself make, for example, a setting aside application become a variation application. Unless there is more specificity given before the hearing of the Summons (for example in the skeleton argument) to rectify this lack of clarity, this paragraph appears to serve little or no purpose in an application which is not a setting aside one.

64. The imprecise language used at various parts of the Applicant's (at times conflicting) submissions and evidence submitted presents some uncertainty about the nature of and basis of the challenges being made to the Order or for any changes to the Order. For example the use of the different words *"rectified"* and *"variation"* being used in the same sentence in paragraph 5 of the Summons. In civil proceedings, rectification is a remedy where there has been a common or unilateral mistake. For common mistake, a party must show that the agreement as drafted does not reflect the common intentions of the parties at the time that the contract was made and the agreement as rectified will reflect their intentions. It is rare for the Court to order rectification as it is often difficult to satisfy the test to do so. Mistake does not appear to have been raised by the Respondent as a basis for any order sought in the Summons and I have received no submissions concerning the availability of rectification as a remedy in concluded ancillary relief proceedings.

65. It is not for me to form any view at this legal issues hearing about what the parties' intentions actually were about the Strand Property. However, if the Court finds that the Order evinced the intention of the parties to change the registered joint ownership arrangement for the Strand Property (an arrangement which clearly existed at and pre the Order and pre the dissolution of the marriage), it is, on the limited submissions before me, at least arguable that certain terms in the Order may be capable of variation. Even if the Court found, after hearing fuller submissions from the parties (with supporting case authorities), that the law prevents, post the Petitioner having registered the death pursuant to her purported rights as the survivor in January 2021, any "*variation"* of the Order or change in the Register in the terms set out in paragraph 1 and 5 of the Summons, it is arguable that the Court may review the wider terms in an order having regard to fairness and need. However, the above comments are simply general observations at this stage and their importance should not be elevated above that.

66. There are a number of relevant submissions made by the Petitioner concerning the merits of some of the factors which a Court may take into account at a substantive variation application. These include (i) the effect of delay in bringing a variation application; (ii) what amounts to a change of circumstances in these applications; (iii) the construction of the Order, (iv) the nature of the exercise to be conducted by the Court (whether it be targeted or wider changes to an order); (v) the legal consequences flowing from the winding up of the Business to any application to vary the relevant provisions in an order. These are issues for the hearing of the Summons. Of course, there is a possibility that, as submitted by the Applicant, the Court finds that the construction of the Order is clear and that the parties intended the joint tenancy to remain in relation to the Strand Property. There are a number of cases which the parties should research concerning the consequences failing to sever a joint tenancy where there are divorce proceedings and one of the passes away.

67. In this case, when the Court has had the opportunity to hear the evidence and fuller submissions, it will be better placed to determine the nature of the Applicant's application, no matter what label is placed on it by her. 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.

68. Although I have expressed the above concerns, I do not accept the submission made by the Petitioner that, whilst there is a lack of clarity from the Applicant, the Court must dismiss the entire application at this stage on the basis that no reasonable cause of action is shown or because there is an abuse of process to seek the court to determine matters that have not yet been properly pleaded. To do so, adopting the wording used by the Petitioner, would be to treat this as being as strike out hearing *"in the guise"* of a legal issue hearing. Straying into areas of merits of orders sought in the Summons is not appropriate and is not what I intended the purpose of this hearing to be when acceding to the Petitioner's wish for such a hearing to be held.

69. When one looks at the Order there may well be a need to consider the provisions in the Order concerning the various mortgages. It is arguable that the global agreement intended by the parties

concerning their post marital financial affairs was linked to their desired cooperation in maintaining and running the business and the fact that the funds from the rent received by the jointly held Strand Property going into the RBC account bank account to service the loans. There is some force in the Applicant's submissions that there may be a need to vary certain provisions to disentangle the relationship between the Estate and the Petitioner to promote a clean break between the two.

Disclosure

70. The Applicant contends that the disclosure is sought to enable the Court to "*sensibly and fairly*" determine the applications to vary the Order. It is submitted that the present disclosure is insufficient because of the change of circumstances since the order was approved.

71. The order for disclosure sought in paragraph 8 of the Summons seeks an accounting and relates to enforcement of the terms of the Order, especially if no variation is made. No enforcement proceedings have been brought. Counsel for the Applicant indicated that such disclosure would assist her client in deciding whether there was any merit in enforcement or other proceedings being brought. This is not a good reason for the Court to order in this case and I do not make that order at this stage. The details about their income and assets were agreed by the Petitioner and the Respondent based on what they viewed to be satisfactory disclosure when they agreed the ancillary relief order. That detail can be found in the Statement of Information Form which the parties submitted with the Order.

72. Similarly, it would not be appropriate to order all of the disclosure sought in paragraph 9 of the Summons at this stage and, as termed by the Petitioner, the sought disclosure addressed in this paragraph is a *"fishing exercise"*. The wider disclosure sought is of the nature that one might see being requested for a full setting aside application or an appeal (for example of the basis of

failure to give full and frank material disclosure at the time of the agreement) and not for a true variation application. The Form provided with the Order, in its attached schedule, sets out what the Petitioner and the Respondent agreed (i) to be their assets at the time, (ii) to be the value of those assets and (iii) what their incomes were. That said, as it may be relevant to the question about the parties' intention concerning the Strand Property, I order that the Petitioner provide details of the written negotiations that took place leading up to the Order. This should include not only the documented negotiations between her lawyer and the Respondent which have not already been provided (the Petitioner states that she has already provided all of it to the Applicant) but (in light of paragraph 5 in the Form) also the same between the Respondent and the Petitioner.

Costs

73. I reserve the costs of this hearing and that order may be reviewed at the end of the hearing of the Summons.

Further directions

74. The parties should seek a listing with a realistic time estimate. In relation to directions to the hearing I invite the parties to prepare a draft directions order. I will consider that draft administratively and, if needed, amend it.

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