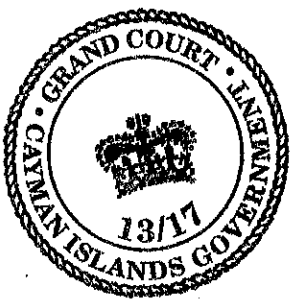
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO: D 168 of 2002

BETWEEN:	**GARDEAN JOHNSON**	**Petitioner**
AND	**LEBERT JOHNSON**	**Respondent**

Appearances:	Mrs. Reid of McKinney Reid & Co. for the Petitioner Mrs. Facey-Clarke of Facey-Clarke & Associates for the Respondent
Before:	Hon. Mr. Justice Richard Williams
Heard:	17 October 2018
Ex tempore Ruling:	17 October 2018
Transcript of Ruling Provided:	18 October 2018



HEADNOTE

Proposed Application to the Court of Appeal to vary ancillary relief orders made by Court of Appeal - Enforcing Court of Appeal Order

EX TEMPORE RULING

The Applications and Related Hearings

1. At the outset of the hearing I believed that there may be three Summonses before me. The first is the Summons filed by Gardean Johnson, the Petitioner wife, dated 9 April 2018, which was supported by an affidavit sworn by her on 6 April 2018. That Summons was served on Lebert Johnson, the Respondent husband. In her Summons the Petitioner sought:

(i) an order that the Respondent be ordered to permit a valuation of the property registered at West Bay West Block 4D, Parcel 67 ("Parcel 67") by the appraiser instructed by Scotiabank and, in the alternative, to deliver up a full set of keys to the Petitioner so that she can make arrangements and facilitate the evaluation; - *This order is no longer sought as the valuation has been obtained.*

(ii) an order that the Respondent do pay or arrears of $2,900 on the mortgage account (ending xx63) for the property registered at West Bay North West Block 1D, Parcel 223 ("Parcel 223");

(iii) an order that the Respondent repay the Petitioner $26,149.27, which represents the sums paid on the mortgage account (ending xx63) by the Petitioner from August 2014 to February 2018 and continuing;

(iv) an order that the Petitioner be given control of Parcel 67 to have sole control of the renting of those apartments, the collection of rent, and the maintenance of Parcel 67 in order to pay the outstanding mortgage on Parcel 223 until those apartments at Parcel 67 are refinanced or sold; - *In light of what was clarified to be the remaining issues at the June hearing, it is not clear whether the position has changed and whether this order is now being sought. I do not deem it appropriate to determine that issue today.*

(v) an order that the Respondent not harass, annoy or otherwise interfere with the Petitioner as she performs any duties in relation to the renting, collection of rent and maintenance of the apartments; *In light of what was*

clarified to be the remaining issues at the June hearing, it is not clear whether the position has changed and whether this order is now being sought. - I do not deem it appropriate to determine that issue today. and

(vi) an order that in the failure to obey the provisions in paragraphs (i)-(iii) above the Respondent shall be in contempt of court and a warrant for his arrest shall be issued.

2. That Summons came on before me on 20 April 2018. At that hearing, the Court directed the Petitioner to file and serve an affidavit exhibiting all the receipts for the mortgage payments and any affidavit from her witnesses by 14 June 2018. The Respondent was directed to file his affidavit evidence by the same date. The Respondent was ordered, if 24 hours' notice was given to him, to permit entry to a valuer instructed by Scotiabank to Parcel 67 for a valuation to be conducted. A penal notice was attached to this provision. The matter was then listed for mention on 28 June 2018 and the Respondent was reminded that he remained responsible for paying the mortgage every month as and when it fell due.

3. The Petitioner belatedly filed her affidavit on 19 June 2018. The Respondent failed to file an affidavit at all. As a consequence, at the hearing on 28 June 2018, I retrospectively extended the time for the Petitioner's affidavit to be filed and I extended the time for the Respondent to file his affidavit to 20 July 2018. I gave leave to the parties to fix a final hearing of the Summons, but I emphasised that it should be listed for a one day hearing. At the hearing a copy of the affidavit

sworn by the parties' daughter, Shanda Mae Johnson, on 30 May 2018 was served on the Respondent as he had refused to take it when an attempt had been made to serve him. At the hearing the Court was informed that there were two persons interested in purchasing Parcel 67 pursuant to the orders made by the Court of Appeal on 21 October 2014. The Court made it clear to the parties, and they appeared to accept, that the only issue remaining was determining the level of credit to be given to the Petitioner for mortgage payments she had made, determination of any arrears of mortgage and the level of credit to be given to the Respondent due to non-payments of house insurance by the Petitioner. The Respondent was again reminded that he was obliged to pay the mortgage payments as and when they fell due.

4. On 17 July 2018 Facey-Clarke & Associates came on the record for the Respondent. Over a month later, on 24 August 2018, a Summons which is in the Court file was belatedly filed by the Respondent. It appears that an unsealed copy of that Summons was provided by the Respondent to the Petitioner's former attorneys. Having regard to the history of the matter including the terms of the clear Court of Appeal Order and their Judgment given in 2014 and my directions given on 19 June 2018, a number of surprising orders were then sought. In his Summons the Respondent sought:

(i) a variation of the order made by me on 20 April 2018 to extend time for him to file and serve his affidavit: Although the Respondent has today indicated that he seeks to withdraw this Summons, **I make that order on**

my own motion, extending the date for filing and serving to 17 October 2018;

(ii) a variation or setting aside of paragraphs 1, 2 and 3 of an order of Quin J. dated 29 October 2013 so that "*the Respondent's apartment where he resides is not put up for sale*";

(iii) a variation of paragraph 3 of the Consent Order approved by Levers J. on 17 February 2016 so that the Petitioner becomes responsible for making the payments for the outstanding mortgage on the former matrimonial home located at Parcel 223 and/or the Petitioner be responsible for paying at least half of the mortgage;

(iv) an order that the Petitioner be ordered to sign the transfer document transferring Parcel 67 into the sole name of the Respondent in compliance with paragraph 3 of the Consent Order approved by Levers J. on 17 February 2016;

(v) an order setting aside paragraph 2 of the Order of Foster J. dated 7 December 2017 that the Respondent be held in contempt of court;

(vi) an order that the Petitioner do comply with the second sentence in paragraph 3 of the Order of Foster J. dated 13 October 2008 that the Petitioner shall pay all monies for the home insurance in respect of the former matrimonial home;

(vii) an order that the Petitioner shall immediately refund to the Respondent all monies that he paid to Scotiabank as home insurance since 13 October 2008;

(viii) an order that the Petitioner be held in contempt of court for disobeying the Order of Foster J. dated 13 October 2008; and

(ix) an order that the Petitioner provide the Respondent with all receipts that were handed over to the Petitioner's attorney since 2008 in accordance with paragraph 3 of the Order of Foster J. dated 13 October 2008.

5. Upon review of the Court file, I was astonished to see that a Listing Form was submitted on 28 August 2018 in which the parties sought a half-day hearing of the original Summons and the above-mentioned Respondent's Summons filed, after the last directions hearing, on 24 August 2018. A Notice of Hearing was sent to the parties by the Listing Officer on 28 August 2018 with a half-day time estimate, which regrettably makes no reference to any Summons, but is presumably in relation to both Summonses. As a consequence, I directed the Listing Officer to write to the parties. In her email to them of 12 October 2018 she highlighted my indication that my directions had not been complied with, especially in regard to the Respondent's affidavit evidence. She informed the parties that the Respondent's Summons should have been brought to my attention before it was issued, and that it should have been listed for a mention. The Listing Officer also highlighted to the parties that the Respondent had failed to provide an affidavit in support of his Summons and that the parties had ignored the Court's direction that the Petitioner's Summons alone be listed for a one-day hearing. The Listing Officer indicated to the parties that the hearing before me today would therefore be listed as a CMC/mention hearing at which, if required, structured

directions in relation to both Summonses would be given. The parties were warned that there may be an issue of costs and wasted costs for the attorneys due to non-compliance with my directions and due to the total disregard of the direction concerning the length of the hearing. Although not mentioned to the parties in the emails from the Listing Officer, they should be aware that at a CMC hearing the Court must exercise case management responsibility pursuant to the Overriding Objective. Accordingly, during this hearing and in this Ex Tempore Ruling, I intend to deal with this matter in a manner that is aimed at securing the just, most expeditious and least expensive determination of the matter on its merits.

6. Later on 12 October 2018 Counsel for the Respondent wrote to the Listing Officer indicating that she had been on sick leave and that she had a medical appointment in the US on the date of this hearing. Her medical arrangements have since changed, and I am grateful to Mrs. Facey-Clarke for attending this hearing from her home in the Cayman Islands by video-link. She stated that she had failed to serve the Respondent's Summons on the Petitioner, but in any event it appears that a draft had already been provided to the Petitioner's former attorney. Although that Summons has today been withdrawn at Court, as a part of my case management responsibilities and having regard to the Overriding Objective, I intend to make comment upon that Summons herein because its content gives great insight into, and is illustrative of, the Respondent's ongoing motivation and ongoing approach to this case and the past clear orders. Unless Counsel was

referring to the Summons filed by the Petitioner on 12 October 2018, the attorney, despite her client being at Court for the two mention hearings relating to the Petitioner's initial Summons, stated that her office had not been served with any application on behalf of the Petitioner. Her client had of course been served with the April 2018 Summons, so there would be no service of that earlier Summons on her office. The attorney stated that she "*intended to inform*" the Listing Officer to remove the Respondent's Summons from the Cause List on the basis that it had not been served. She did not state that it was to withdraw it permanently. The attorney indicated that she had started to draft the Respondent's affidavit, but had been unable to complete it because her client was still searching for receipts and:

> "*due to the lack of a proper retainer coupled with the fact that I had to spend a lot of time reading the court file which is quite huge in order to understand the case.*"

The attorney added that:

> "*I have to say that my client does not appear to be very bright and I had difficulties taking proper instructions from him. There was a lot of information I gathered from the court file that my client tells me he was not aware of until I told him. I do not mean to under mind (sic.) my client, however, I do appreciate that no two persons are the same or should have the same level of intelligence or understanding.*"

She then stated that:

> "*I am therefore asking that the matter be removed from the List as a result of nonservice of the summonses on both sides.*"

Adding that, due to her medical condition, she would not be able to attend. I did not permit that Summons to be removed from the Cause List and be adjourned to a new date and, as I mentioned, although an application is made by the Respondent to withdraw it today, I intend to comment upon the same. The Respondent's attorney indicated that her client would make the apartment at Parcel 67 available to any prospective purchasers who may wish to view it and that the Petitioner's attorney should contact her to make arrangements for any such viewing. There was a viewing yesterday. Although it was agreed by the attorneys that Mrs. Facey-Clarke should be there to ensure that there was no incident, when the viewer asked the Respondent questions about the home unfortunately the Respondent's attorney told him not to answer any questions.

7. McKinney Reid & Co., who came back on the record for the Petitioner on 3 October 2018, filed on Ex Parte Summons on 12 October 2018. The unissued Summons was placed before the Court to see if it was appropriate to also list it for today's date, the Court being informed that it was an Ex-Parte Summons because of the Respondent's attorney's declared inability to attend this hearing due to her medical condition. That was not a reason for notice not to be given to the Respondent. In that Summons, which was eventually issued yesterday as an Ex Parte Summons on Notice, the Petitioner seeks the following orders:

(i) that in furtherance/enforcement of the Order made by the Court of Appeal on 21 October 2014, the Petitioner be allowed access to Parcel 67

forthwith for the purpose of allowing a potential purchaser to view the interior of the property;

(ii) that, if the purchaser wishes to purchase Parcel 67, that he be allowed to do so and that the Petitioner (if needed) and the Respondent shall sign the transfer forms and if either fails to do so, the Clerk of Courts is empowered to sign said Transfer forms; and

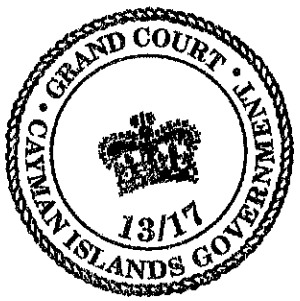
(iii) that the Respondent do pay forthwith the arrears of mortgage payments totalling $3,782.30 plus the late fees totalling $1,525.

The orders sought at paragraphs (i)-(ii) are seemingly made pursuant to the Court of Appeal Rules (2014 Revision) where Rule 27 provides that the "court below" shall enforce the Judgment of the Court of Appeal. The Certificate of the Order of the Court of Appeal was given and sealed on 21 October 2014. By Paragraph 3 of the Order of the Court of Appeal, the Petitioner is already permitted to have the necessary access for the purposes of the sale of Parcel 67 and this clearly includes allowing potential purchasers to view the property. It appears that both orders are highly consistent with the Order of the Court of Appeal and are enforcement mechanisms to enable that Court's orders to be put into effect.

8. The Court, having been provided with the updated email exchanges and the latest Summons by the Listing Officer on 12 October 2018, directed the Listing Officer to again write to the parties concerning today's hearing. The position taken in that email was on the premise that the Respondent's attorney had stated that she was

having surgery today in the US and that she could play no part in today's hearing. In that email, which was not sent until 15 October 2018, the Listing Officer set out my following comments:

*"**The Wife Summons 9 April 2018***



The wife's original Summons of 9 April 2018 (which is due to be heard on Wednesday) does not need to be served on the husband again. That Summons has already been served on him and directions were given on it by me on 28 June 2018 (including extending time stated in the order of 20 April 2018 for the Respondent to file serve his affidavit from 14 June 2018 to 20 July 2018). The Notice of Hearing of that Summons was served on Brady Attorneys around 28 August 2018 by Listing.

The husband's Summons 23 August 2018

I am not sure what Mrs. Facey-Clarke is saying about her client's Summons issued way back on 23 August and for which there has been a failure to serve in the last 7 weeks! The fact the husband has failed to serve it does not mean that it is not before the Court on Wednesday and that failure to serve should not be rewarded by it being used as a justification of further delay of any sale of the property following the Court of Appeal's 2014 order for sale.

...

Conclusion on the two Summonses

I do not have an issue administratively adjourning next Wednesday's CMC in relation to the above 2 Summonses. ***However, unless the parties submit an acceptable agreed directions order for the Court to review, then that CMC should be re-listed to come on before any Judge within 28 days.***

Wife's Summons 12 October (not yet issued)

The wife's latest summons filed on 12 October 2018 is still to be issued and served. I had directed that it also be listed for next Wednesday. I see from Mrs. Facey-Clarke's email that the husband agrees with para 1 in the Summons. However, it unclear if he also agrees with para 2 in the Summons. If he does, then a consent order should be submitted and the Summons will not need to be listed.

If the husband does not agree to the orders sought in the Summons, then (on basis that a consent order will in the interim still be submitted in

relation to paragraph 1) ***the hearing of para 2 of that Summons can be delayed for up to a further 14 days*** ***before any Judge*** *- If Mrs. Facey-Clarke is unable to attend that hearing due to ill-health then she will need to have another counsel attend and be adequately prepared to hold for her and to deal with the Summons.*

Although I am sympathetic to Mrs. Facey-Clarke's health issues, in light of the very dated and clear cut order of the Court of Appeal from 2014 which has already concluded the majority of the issues raised in the husband's Summons and which supersedes the majority of the orders sought to be varied in the Husband's Summons and the fact that apparently ready buyers may be lost if there is too great a delay, the hearing of that Summons cannot wait to be heard at an indefinite date awaiting Mrs. Facey-Clarke's recovery."

9. Having regard to the Court's earlier indication about putting off consideration of this latest Summons to enable Ms. Facey-Clarke to attend, the fact that she has, to her credit, attended today by video-link, enables me to consider the content of all of the Summonses. The parties have agreed in principle to an order that deals with paragraph 1 of the Petitioner's latest Summons relating to access to Parcel 67. As they cannot agree the wording I will make the following order. The Respondent is to permit access to the Petitioner and/or her realtor and/or her agents for the purpose of viewings of Parcel 67 in relation to the sale of Parcel 67. Such notice must be given to the Respondent's attorney at least 48 hours in advance of the viewing by either email or telephone. If no reply is received to that notice, then the viewing appointment will take place at the stated time.

10. I adjourn paragraph 2 and paragraph 3 of the said October Summons to be dealt with at the date to be fixed for a one day hearing of the Petitioner's April Summons. Those should all come on promptly before any Judge if I am not

available, especially if a sale is imminent. In the absence of any order made by the Court of Appeal to vary its Order, the Petitioner is still entitled, pursuant to that Court's Order, to sell Parcel 67. The Court of Appeal made it patently clear that any application to vary be made to it, albeit by November 2014. The likely importance of paragraph 2 of the Respondent's latest Summons will arise if the Respondent then fails to sign the Transfer form.

11. On 15 October at 5:21 PM, without leave being granted, an affidavit sworn by the Respondent on that day, wrongly stated to be made *"in compliance"* with paragraph 4 of my Order made by me nearly 6 months ago on 20 April 2018, was sent to the Court by email. A copy of that email with attachment was copied in to Petitioner. The hard copy of the affidavit was filed yesterday and, as I have already mentioned, I extend time for the filing and serving of that affidavit to 17 October 2018. In the absence of any related Summons, paragraph 2 of the affidavit states that it is also made:

> *"in support of a stay of these proceedings pending the outcome of the application to vary the Order of the Court of Appeal."*

The parties were then contacted by my Personal Assistant concerning details of any pleadings filed in the Court of Appeal. In reply, Mrs. Facey-Clarke stated:

> *"In regards to Court of Appeal, I have filed and served Ms. Reid with the required Notice of Intention to Proceed. I am in the process of preparing the application for a stay and will have it filed in the Court ASAP. My client will rely on his affidavit that was filed this morning."*

There is no formal application to stay the Grand Court proceedings before the Court. If there was, and even if the Respondent was able to persuade the Court to stay "*all of the proceedings*"[1] this would require a great deal of persuasion (having regard to the history of the proceedings, the prejudice of even further delay in any sale and the clear content of the Court of Appeal's Order and also the remarks in the President's Judgment concerning the intent behind the 2006 Consent Order), nothing would prevent the Petitioner having control of the sale and selling Parcel 67 pursuant to the Order of the Court of Appeal. As a Grand Court Judge, I cannot stay or, in the circumstances of this case, vary the Order of the Court of Appeal which is the Order directing the sale of Parcel 67 which I may be able to enforce, and which supersedes most parts of the earlier Grand Court Orders. In any event, as already mentioned the wording of the Court of Appeal Judgment and Order, made it clear that any variation should be made to that Court, albeit promptly with a November 2014 deadline for that to be done.

12. Mrs. Facey-Clarke has today indicated that there is a dispute about the sale price for Parcel 67. She contends that the valuation obtained by the Bank and the sale price is far below a recent valuation obtained by the Respondent. There is no Summons filed by her and she appears to seek a stay in the Grand Court of the execution of the Court of Appeal Order on that basis. There is therefore no formal application before me, so I am unclear what orders, if any, are actually being or are going to be sought.

[1] See paragraph 33 of the affidavit.

13. I have been informed today by the Respondent that a Notice of Intention to Proceed has been filed in the Court of Appeal. Upon hearing that, the Court of Appeal Registry was contacted by my Personal Assistant and the pleadings were provided to me. I note that the Notice of Intention to Proceed was filed on 9 October 2018. I also note that a draft Notice of Hearing was also filed which stated that a date is sought for:

"the hearing of an application by the Appellant for variation of the following orders pursuant to paragraph 5 of the Certificate of Order of the Court of Appeal dated 21st October 2014 which states that the Appellant has permission to apply to the Cayman Islands Court of Appeal for a variation of the order of sale."

The Notice of Hearing then sets out the orders made by the Court of Appeal. What is concerning is that the Notice of Hearing fails to identify what variation(s) to the Order is/are actually being sought. The Notice of Hearing has not been issued, as the Respondent's attorney indicated that there must be one month notice to the Petitioner. It appears that no application has been made to the Court of Appeal to abridge the notice period.

14. In his latest affidavit the Respondent seeks to provide an explanation for his continuing failure to comply with the Court Order concerning his obligation to pay the mortgage and the reasons why he should no longer have to make those payments. In the affidavit he attaches receipts which he says total CI$11,333 to verify payments made. In the affidavit he contends that the Bank has deducted

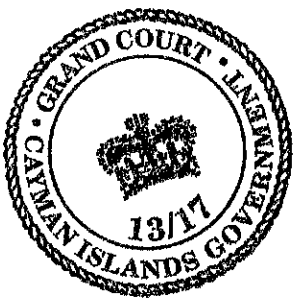
home insurance payments totalling CI$25,829.56 which the Petitioner had been ordered to pay and demands that she should "*return these amounts*' to him.

15. I hope that the parties will not be offended if from now on I refer to them, for convenience, as the husband and the wife.

HISTORICAL BACKGROUND

16. The parties were divorced over 12 years ago, namely on 18 April 2006, following the approval of their Consent Ancillary Relief Order by Levers J. on 17 February 2006. It is important to note that both parties were legally represented when the Consent Order was reached. The relevant part of the Order is found at paragraph 3 where the parties agreed that:

> *"The apartment registered at West Bay West Block 4D Parcel 67, be transferred to the Respondent. The Respondent is to be responsible for mortgage payments presently owed to the Bank of Nova Scotia and have apartments held as security for the mortgage. The matrimonial home located at West Bay North West Block 1D Parcel 223, is to be transferred to the Petitioner free of any charge to the aforementioned Bank."*



At that time each property was in the parties' joint names and they were subject to a mortgage to secure a joint loan with a balance of CI$180,000 with the Bank of Nova Scotia.[2] Sir John Chadwick, the then President of the Court of Appeal, at page 3 of his Judgment dated 21 August 2014 importantly stated that:

[2] Now known as Scotiabank.

"It was clear that the intended purpose of paragraph 3 of the consent order was that the wife would become the owner of the wife's property (parcel 223) free of any charge to the bank: and that the husband would become the owner of the husband's property (parcel 67) encumbered by the liability to the bank."

17. Regrettably, the husband failed to adhere to the terms of paragraph 3 of the Consent Order, which resulted in the wife issuing a Summons on 26 November 2007. When that Summons came before Foster J. on 7 December 2007, the Learned Judge directed that the husband was to comply with the Consent Order by obtaining the necessary valuation of the apartment at Parcel 67 and arranging with the Bank of Nova Scotia for the discharge of the mortgage on Parcel 223, either by transferring the mortgage to Parcel 67 or by paying off the mortgage, so as to be able to transfer his interest in Parcel 223 free and clear to the wife no later than 15 January 2008, and that the wife should transfer her interest in Parcel 67 to the husband in the exchange. Foster J. indicated that if the husband failed to comply with this order he would be in contempt of court and a warrant for his arrest would be issued.

18. On 1 August 2008 the wife felt compelled to issue a further Summons. At the relevant parts of the Summons she sought an order for the husband to make all mortgage payments to the Court Funds Office and to repay to her all the mortgage payments that she had to make. She also sought an order for the husband's committal for failing to comply with the order in relation to the payment of the mortgage payments and invited consideration of an order that she be granted

control of the property at Parcel 67 until all the mortgage payments had been completed and the mortgage redeemed or until the property at Parcel 223 was released as security for the bank loan.

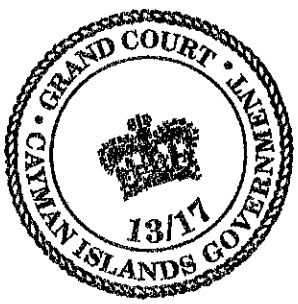
19. On 9 October 2008 the husband filed a Summons in which he sought an order that the wife pay him the sum of $6,320 concerning an obligation for her to make payments towards the house insurance on the property at Parcel 223.

20. These two Summonses came before Foster J. on 13 October 2008, when submissions were received from Counsel for each party. At the relevant parts of the Order, Foster J. directed the husband to instruct, within 30 days, an updated valuation of the property at Parcel 67 from the same valuer who had prepared the valuation in December 2007. That valuation was to be jointly paid for by the parties and be provided to the Bank with an application to discharge the mortgage on Parcel 223 and to transfer the mortgage solely to Parcel 67. The Learned Judge informed the parties that they were otherwise to comply with paragraph 1 of his Order made on 7 December 2007. Foster J. also directed the husband to pay the wife $8,650 in respect of mortgage payments made by her. Foster J. ordered, at paragraph 2 in his Order, that the husband had no liability for insurance payments in respect of the Parcel 223 and that these should be paid by the wife. At paragraph 3 in his Order the Learned Judge directed that, in future, the husband was to pay all mortgage payments in respect of the mortgage over Parcel 223 and that he shall submit the receipts for such payments to his attorneys as

such payments are made, and they shall provide copies of the same to the wife's attorneys.

21. Mrs. Facey-Clarke highlighted that the wife was subject to an order not to attend the husband's property and therefore she was restricted from attending at the husband's property, even if it related to the sale process. On review of the file I note that in Foster J.'s Order of 13 October 2008 he noted at paragraph 5:

> *"That, in respect of the respondent's application for a restraining order, the parties each undertake, through their respective attorneys, not to approach within 100 yards of each other, not to visit or contact each other, and not to criticise each other in the presence of the child of the marriage."*



Undertakings should be not open-ended and they should have a date or event upon which they will expire. Regrettably, no such expiration date was provided for. It cannot be right that an undertaking remain in place for 10 years. It could not have been the intent of Foster J. to accept undertakings to last for that duration. The Court of Appeal in 2014 "*made clear that the wife was to have the necessary access to the control of the property for the purposes of the sale.*" My notes from the hearing of 20 April 2018 indicate that I told the parties that for the avoidance of doubt, if there were any previous dated non-molestation orders that they were no longer in force. On the same day cross-non-molestation undertakings were given preventing either party from molesting, threatening, harassing the other or coming within 100 yards of each other. Although those were not intended to prevent the wife having prearranged access to Parcel 67 for

the purpose of the sale, I note that those undertakings come to an end on 20 October 2018. The wife is unwilling to agree to an extension of these undertakings or any variation thereof and therefore those restrictions on each party will end in 3 days' time.

22. On 30 October 2009, the proceedings came before Quin J. The Learned Judge directed that the Order made by Levers J. on 17 February 2006 and the Order made by Foster J. on 13 October 2008 "*stay in force*". In relation to Foster J.'s Order, Quin J. ordered that the matter should be adjourned for six months to try and give effect to paragraph 1 of that Order and to allow the husband to make applications to other financial institutions in an effort to discharge the mortgage over the home. Quin J. also found that the amount outstanding in relation to mortgage payment arrears ordered by Foster J. was $4,325. Quin J. directed the husband to pay a lump sum of $500 within seven days and to continue making monthly payments of $500 until the arrears were cleared.

23. On 22 June 2012, the wife filed a Summons seeking an order concerning the arrears in relation to the mortgage non-payments and she sought an order that the husband be found in contempt for failing to make the payments. In the Summons, the wife again invited the Court to make an order that she be granted control of Parcel 67 until the mortgage payments and all outstanding sums had been paid in full. The wife also sought an order that Parcel 223 be removed as security for the loan with the Bank.

24. That Summons came on before Quin J. on 27 July 2012. Quin J. made clear that the orders of Levers J. dated 17 February 2006 and Foster J. dated 13 October 2008 "*shall remain in place.*" At the relevant part of the Order, the Learned Judge directed that from 28 September 2012 the husband was to pay the sum of $1,362 in respect of mortgage payments to the Court Funds Office on the 28th day each month.

25. On 19 June 2013 the wife filed a further Summons seeking an order concerning the arrears in relation to the mortgage non-payments and she sought an order that the husband be found in contempt for non-payments. In the Summons, the wife invited the Court to make an order that she be granted control of the property at Parcel 67 until the mortgage payments and all outstanding sums had been paid in full or alternatively that Parcel 67 be sold and proceeds be used to pay off all the arrears of the mortgage and outstanding sums to her. The wife also sought an order that Parcel 223 be removed as security for the loan with the Bank.

26. At the hearing on 30 July 2013, Quin J. wrongly stated that as per the Consent Order, Parcel 67 had already been transferred to the husband and correctly noted that, although there were lengthy problems and delays with the transferring of Parcel 223 to the wife, that had eventually been done. The President of the Court of Appeal noted at paragraph 4 in the Court of Appeal Judgment that:

> "*the husband's property (parcel 67), is still in joint names; but the wife is ready, willing to transfer of her interest, (if any) in that property to the husband.*"

The wife has today indicated that is still the same position and that in the past she had signed the Transfer form and given it to the husband and that he had failed to register the transfer. She reiterates today that if the husband provides her with the Transfer form, that she will again sign it and provide it to him for him to register the transfer. I am satisfied that she has accurately detailed what has been happening in relation to that transfer and, upon her indication today, no further order is required in relation to the transfer.

27. At the hearing on 30 July 2013, Quin J. further noted that the Bank would not release its hold on Parcel 223, continuing to hold both properties as collateral for the mortgage loan, despite the Court ordering that only Parcel 67 should be held as collateral for the same. The Learned Judge expressed concern that the wife could not get a clean break because the husband would not pay the loan, despite his income from his employment and collecting rent from the apartments at Parcel 67. Quin J. was informed by the wife's attorney that in the ongoing circumstances the only way to protect her was for her to ask that Parcel 67 also be owned by her. In light of these concerns, a subpoena was issued by Quin J. to Scotiabank requiring a Senior Officer to attend a hearing on 20 August 2013 to discuss all personal bank records in respect of the parties. The Bank's officer was also required to discuss the order of Levers J. dated 17 February 2006 in which she ordered that Parcel 223 be transferred to the wife free of any charge to the Bank and that Parcel 67 be transferred to the husband and that he would be responsible

for mortgage payments to the Bank and to have the latter property held as security for the mortgage. In addition, the Bank's officer was required to attend to discuss the Order of Foster J. dated 7 December 2007 and the transfer of the husband's interest in Parcel 223 free and clear to the wife.

28. On 20 August 2013 and 11 of October 2013 Quin J. adjourned the matter to extend the time for the Bank's response. A letter was received from the Bank on 28 October 2013, in which the Bank indicated that Parcel 67, as a non-conforming property, was not eligible to be used as security over the mortgage. As a consequence, the Bank stated that they would not release Parcel 223 as a security over the mortgage. The Bank highlighted that the repayment history on the mortgage was "*extremely poor*" and that they would not be willing to release any of the property held as security as that would weaken their security position. The Bank concluded that the only other option for the wife was for her to seek financing from another financial institution.

29. When the matter came on before Quin J. on 29 October 2013 a Bank Officer was in attendance. Quin J. ordered that Parcel 67 be put up for sale with a reputable real estate agent. He ordered that upon sale of Parcel 67, if the husband failed to execute the transfer, that the Clerk of Courts was empowered to execute it. Importantly, the Learned Judge directed that paragraph 3 of the Consent Order of Levers J. dated 17 February 2006 and paragraph 3 of the Order of Foster J. dated 13 October 2008 remain in force. Quin J. ordered that this meant that the husband

remained responsible for the arrears of monthly mortgage payments until the completion of the sale of Parcel 67.

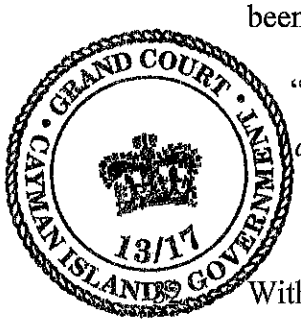
30. The husband sought to challenge the decision of Quin J. and filed a Notice of Appeal and Grounds of Appeal on 6 November 2013. In the Notice of Appeal he sought to set aside all of the orders of Quin J., set out in paragraph 29 above, and a discharge of paragraph 3 the Consent Order dated 17 February 2006. On 17 November 2014 an Amended Notice of Appeal was filed seeking a discharge of the 2016 Order:

"to the extent that it requires the Appellant to be responsible for the mortgage payments owed to Scotiabank and requires him to have block 1D parcel 67 held as security for the mortgage required to facilitate the removal of any charge against block 1D Parcel 23."

The Court of Appeal

31. The Court of Appeal heard the appeal on 21 August 2014, delivering its helpful and clear Judgment on the same day. The Court of Appeal highlighted that both Parcel 67 and Parcel 223 remained subject to the mortgage, but the husband was still responsible for making the mortgage payments under that mortgage. The Court of Appeal was satisfied that the husband had failed to make mortgage payments due to the Bank, and that he had told them that was because he had fallen on hard times and was unable to do so. I note with interest, that this is the same argument relied upon by the husband in his recent affidavit sworn on 15 October 2018. The Court of Appeal acknowledged that this put Parcel 223 at risk

of enforcement proceedings by the Bank as mortgagee. The Court of Appeal noted that, although the valuation of Parcel 67 was in the region of $220,000 and that the balance of the loan at the time was $156,000, giving a loan to value ratio of around 70%, the Bank, who took a commercial decision which it was entitled to do, could not be persuaded that "*a sensible way out*" was for the Bank to vary the loan arrangements so that Parcel 67 stood as sole security for the loan. The Court of Appeal set out the terms of Quin J.'s Order and noted that, although the wife refused the husband's request to stay the Order pending appeal, it appeared that the Order was not progressed as it did not specify who had conduct of the sale. The President pointed out that the parties knew why the husband had not been able to comply with paragraph 3 of the 2006 Consent Order and that was:



> "*because he had not been able to persuade the Bank to refinance the arrangement so as to release parcel 223 from the charge.*"

With some force, the President remarked in the Judgment that:

> "*It has not been explained - perhaps, because there is no explanation that could be advanced - on what basis the husband thought that this Court could be persuaded to discharge paragraph 3 of the 2006 order. That was an order entered into by consent: the only change of circumstances is that it has turned out to be more difficult than may have been anticipated to obtain a release of the wife's property from the Bank's Mortgage. The underlying purpose and intent of the 2006 consent order - that the wife should have Parcel 223 free of mortgage remains.*"

When addressing the terms of the Amended Notice of Appeal the President crucially stated at paragraph 13 that:

"*...if the husband were to be no longer responsible for the mortgage payments and were no longer to be required to procure the released wife's property from the Bank's mortgage, the underlying purpose and intent of paragraph 3 of the 2006 consent order would be defeated.*"[3]

That is still the position today. The husband and his legal team may want to think long and hard about that insightful observation and others made by the President which can be found at paragraphs 12 and 13 of the Court of Appeal Judgment in relation to their proposed application(s) before the Court of Appeal and potentially expending significant costs in relation to that same paragraph and in relation to the Court of Appeal's clear, and now historically dated, ruling in any proposed proceedings before the Grand Court at this late stage.

33. The President indicated at paragraph 17 in the Judgment that he felt the husband was attempting to persuade the Court of Appeal:

"*to allow this very unsatisfactory situation to continue - perhaps for another ten months or more - while the husband does nothing about obtaining refinance or selling the house in which he is living.*"

The President added that that:

"*Appears to me to be an unacceptable solution to the problem.*"

The President stated at paragraphs 18 and 19 in the Judgment:

"*18. The circumstances which I have described in this judgment point clearly to the conclusion that there are only two ways by which effect*

[3] My emphasis.

can be given to the common purpose and intent of the parties when they agreed the terms in paragraph 3 of the 2006 consent order: either (i) the husband's property (parcel 67) is sold to realise what is said to be its current value of around CI$220,000 - so that those proceeds can be used to pay off the Bank of Nova Scotia loan –or (ii) the loan be refinanced by borrowing from another lender secured only on the husband's property – so that the new loan can be used to discharge the Bank of Nova Scotia loan and so free the wife's property from its current encumbrance. Either the property has to be sold or the loan has to be refinanced."

19. Nothing in the material that has been put before this court suggests that the husband is likely to take any steps towards implementing either of those two possible solutions to the problem which has arisen by the Bank's refusal to release the wife's property from its security unless impelled to do so."

This insightful analysis of the circumstances, as they stood at that time, seems to be equally applicable now.

34. The Certificate of the Order of the Court of Appeal was given and sealed on 21 October 2014. The Court of Appeal understandably ordered that:

(i) Parcel 67 is to be sold in accordance with paragraph 1 of the order Quin J dated on 29 October 2013;

(ii) the wife is to have conduct of that sale;

(iii) the wife is to have the necessary access to and control of the property for the purposes of the sale;

(iv) the order for sale is not to be activated, no contract of sale to be entered into, and no transfer upon sale is to be made, until after the end of November 2014;

(v) the husband has permission to apply to the Court of Appeal at the beginning of the November 2014 session for a variation of the order. The President, at paragraph 20 in the judgment elaborated in regard to this part of the order when he remarked that " *the husband may apply to this Court - and I emphasise that the application (if any) is to be made to this Court - at the beginning of its next regular session in November 2014 to vary that order;*[4]

(vi) If the husband makes the application pursuant to paragraph (v) of the order, it must be supported by evidence of viable proposals for imminent refinancing of the Scotiabank mortgage against which Parcel 67 and Parcel 223 are secured; and

(vii) In the event that Parcel 67 is sold in accordance with the order, the proceeds of sale are to be used:

(a) to discharge the Scotiabank mortgage in full;
(b) to pay any associated realtors' and attorneys' costs; and
(c) the balance to be paid into Court pending agreement between the parties as to how the funds should be allocated, taking into consideration any payments made by husband towards insurance, which should have been paid by the wife, any arrears of child maintenance, and any payments made towards the mortgage by the wife, which should have been paid by the husband.

---

[4]My emphasis.

35. The President stated at paragraph 21 of the Judgment:

> *"If the husband is able to satisfy this Court at the beginning of November 2014 that there are viable proposals for refinancing the existing Bank of Nova Scotia loan which will have the effect of releasing the wife's property from the existing mortgage within a short Period - and by - short period I mean by or shortly after the end of November 2014 - then the court may be persuaded to vary the order which it now makes. If not - and, in particular, if no application to vary is made - then the order will stand and the wife can effect a sale of the husband's property without further order.*[5] *The proceeds of that sale will of course have to be paid, in part at least, to the Bank in order to discharge the mortgage which it now holds over the husband's property; and so enable that property to be transferred to a purchaser free of encumbrance. The effect of paying off the Bank of Nova Scotia loan will be that the wife's property (parcel 223) will cease to be encumbered by a mortgage as security for that loan."*

History Post-Delivery of the Judgment of the Court of Appeal

36. Following delivery of the Judgment, the husband failed to take up the opportunity afforded to him by the Court of Appeal. He made no application to the Court of Appeal to vary their Order by the beginning of November 2014. The President stressed that even if the husband made that application he would only be given a short period, which meant just after the end of November 2014, to have the Parcel 223 released from the mortgage. Now, almost four years later, on 9 October 2018, the husband has filed a draft Notice of Hearing in the Court of Appeal for a variation of that Court's 2014 Order, but significantly, he has failed to set out therein what variations are actually sought. At no time after the Judgment was

[5] My emphasis.

given, as required by that Court, has he filed any evidence demonstrating any viable proposals for a refinancing of the loan which does not require Parcel 223 to form any part of the security for that refinancing. If the undisclosed variations in the draft Notice of Hearing filed in the Court of Appeal are the same as those set out in his withdrawn August 2018 Summons filed at this Court, he instead seeks to go back to 2006 and fundamentally change the basis of the Consent Order and, using the words of the President, defeat:

"the underlying purpose and intent of paragraph 3 of the 2006 order."

37. It appears that at the time of the filing of the now withdrawn August 2018 Summons what the husband was then seeking to do, four years later, by paragraphs 2 to 3 of that Summons was to totally disregard the fact that the Court of Appeal brought the issues about the sale of Parcel 67 to a close when making their comprehensive Order which they stated reaffirmed and was consistent with what was the intention of the 2006 Consent Order. The Court of Appeal Order, of course, by its nature, endorsed paragraphs 1 and 3 of the Order of Quin J. concerning the sale of the Parcel 67. The Order of Quin J. reaffirmed that paragraph 3 of the Order of Levers J. dated 17 February 2006 remained in force, meaning that the husband was responsible for the monthly mortgage payments and the arrears. The Court of Appeal reiterated that at paragraph 7 of the Certificate of Order. At paragraph 13 of the Judgment the President made clear that for the husband to no longer be responsible for the mortgage payments would defeat the underlying purpose and intent of the 2006 Consent Order. It appears by

paragraph 3 of his now withdrawn Summons filed on 24 August 2018 that the husband sought to disregard paragraph 7 of the Court of Appeal's Order and paragraph 13 in the Judgment.

38. Paragraph 6 of the husband's withdrawn Summons filed on 24 August 2018 has a degree of merit. Although it has been withdrawn, the issues raised in that paragraph still need to be determined by the Court. The Court of Appeal acknowledged by paragraph 7 of its Order that there was an obligation for the wife to make payments towards home insurance in respect of Parcel 223 and that this should also form part of the accounting post the sale of the property. The Court of Appeal has already designated how the maintenance and insurance obligations will be met, so the issue will be quantifying the various amounts.

Conclusions

39. There is no proper application before me for me to stay "all proceedings"[6]. In any event, the operative order relating to the sale of Parcel 67 is the 2014 Order of the Court of Appeal. No application has been made to the Court of Appeal to stay that Court's Order, but there is the draft application for that Court to vary its 2014 Order. Accordingly, for a number of reasons, it would not be appropriate for any stay order to be made today by this Court.

40. As I stated earlier, due to Mrs. Facey-Clarke's ill-health, I do not have an issue with adjourning paragraphs 3, 4 and 5 of the wife's April 2018 Summons. This

[6] See paragraph 33 of the Husband's affidavit sworn on 15 October 2018.

will enable Mrs. Facey-Clarke to attend in person or instruct another attorney to cover for her in person and to be in a better position to address the issues raised therein as well as any issue concerning credit to her client for the wife's non-payment of housing insurance. The substance of these paragraphs in the Summons do not adversely affect the process of the sale of Parcel 67.

41. The wife seeks an order to be made in relation to paragraph 2 of her April 2018 Summons, stressing that the Bank is putting pressure on her due to the arrears. Mrs. Facey-Clarke told the Court that her client accepts that the arrears are at least $3,000 and that she has urged her client to use his best endeavours to clear the arrears. In light of these indications from both parties, I am satisfied that an order should be made, namely for husband to forthwith pay $3,000 off the arrears on the mortgage account.

42. I do not have an issue with adjourning parts of the wife's Summons of 16 October 2018 to be heard at the same time as the remaining parts of her April 2018 Summons. Paragraph 3 of that Summons overlaps with the issues raised in the earlier Summons about mortgage payments and does not relate to the sale of Parcel 67. Paragraph 1 of the Summons has been resolved by consent, therefore, removing an obstacle to the sale process moving forward consistent with the intent of the Order of the Court of Appeal. In relation to paragraph 2 of that Summons, this Court need not give any purchaser permission to purchase Parcel 67, as the Court of Appeal has already ordered the sale and provided control of

that sale to the wife. In relation to the second part of paragraph 2 of the October Summons, although that does relate to the sale process, it is not something that needs to be resolved immediately. However, if a purchaser is found, that part of the Summons can be heard at the same time as the April Summonses or, if it becomes urgent as a sale might fall through, prior to the hearing of that earlier Summons.

43. A copy of this Ex Tempore Ruling will be perfected and provided to the parties. I hope that the full exploration of the history of the matter will be of assistance to them. I particularly have regard to the difficulties Mrs. Facey-Clarke outlined in her emails[7], which I mentioned at the beginning of my delivery of this Ex Tempore Ruling. I reiterate, for both parties' sake, that at the hearing on 28 June 2018, the Court made it clear to the parties that the only issues then remaining were determining the level of credit to be given to the Petitioner for mortgage payments she had made, payment of any arrears on the mortgage account and the level of credit to be given to the Respondent due to non-payments of house insurance by the Petitioner. A one day hearing should be allocated for the remaining issues arising from the wife's two Summonses to be determined, which for the avoidance of doubt, also relates to the level of credit for non-payment of housing insurance by the wife.

44. Apart from inviting both parties to carefully digest the content of this Ex Tempore Ruling and my observations herein, I respectfully suggest that the husband

[7] See Paragraph 6 above.

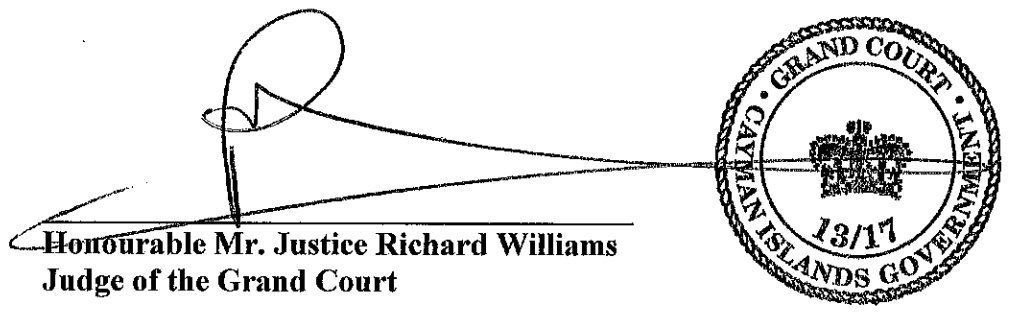
carefully note the final paragraph of the Court of Appeal's Judgment, where at paragraph 23 the President stated:

> *"I conclude by urging the husband to take seriously the observations that have been made in this Court. A policy of continued none - recognition of the common intent and purpose which underlies paragraph 3 of the 2006 consent order is unlikely to be to his advantage."*

45. I remind the husband that he is still obliged to pay the mortgage payments as and when they fell due into the Court Funds Office. A failure to make those payments, especially with the history of late or non-payment will be regarded as contempt of Court.

46. I will reserve the costs of this hearing.

47. A copy of the transcript of this Ex Tempore Ruling should be provided to the Registrar of the Court of Appeal. It will be a matter for the Court of Appeal as to whether the Court feels it appropriate for them to read this Judgment which touches on the proceedings apparently now being brought in that Court.



Honourable Mr. Justice Richard Williams
Judge of the Grand Court