IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: D0055 OF 2006

BETWEEN	**ANNIE ROSE MOXAM**	**APPLICANT**
AND	**FRANK BENARD MOXAM**	**RESPONDENT**

IN CHAMBERS
THE 21ST APRIL 2016
BEFORE THE HON. CHIEF JUSTICE

Appearances: Ms. Sheridan Brooks of Brooks and Brooks, Attorneys-at-Law for Mrs. Moxam
Mr. Alistair Walters of Campbells for Mr. Moxam

Order made by consent of the parties for division of matrimonial assets – wife's notice of motion for committal for husband's failure to comply with consent order – husband's cross-application to vary or revoke consent order on grounds of common or mutual mistake as to value of matrimonial assets – whether husband's application should be struck out as an abuse of process of the court or whether it should be allowed to proceed and if so, on what terms – jurisdiction of court to hear applications to vary or revoke consent order.

RULING

1. By consent of the parties, both having been represented throughout the proceedings, this Court made an order on 12th September 2013 for the division of matrimonial assets which the husband, Mr. Moxam, now seeks to set aside or vary. He seeks to do so on the basis that the consensual agreement of the parties was premised upon a fundamental mistake as to the value of some important matrimonial assets.

2. These assets comprised share-holdings in companies which held valuable commercial properties and enterprises in Central George Town ("the Companies").

3. On behalf of Ms. Moxam, Ms. Brooks seeks an order to strike out Mr. Moxam's application on the basis that it amounts to an abuse of the process of the Court for him

to now seek to interfere with the Consent Order. She makes a number of points which I will discuss below.

4. Before so doing, however, I describe more fully the premise of Mr. Moxam's application.

5. It relies upon a recent valuation of the matrimonial assets, as those assets are said to have existed at the date of the Consent Order on 12 September 2013.

6. That valuation undertaken by Mr. Theodore Bullmore, MA, FCA, shows the following:

Residential properties: (CI$2,362,000 (less CI$460,000 for properties held in trust by Mrs. Moxam for youngest son)	$1,902.000
Companies	2,359,000
Bank and Brokerage Accounts	2,979,000
Other Assets	619,000
	CI$7,859,000

7. Compared to that valuation, assets of the following value were or are to be transferred to Mrs. Moxam under the Consent Order:

Residential properties: ($2,362,000 (less $460,000 for properties held in trust by Mrs. Moxam for youngest son)	$1,902,000
Companies (ascribed value)	2,700,000
Bank and Brokerage Accounts	1,724,774
Other Assets	34,424
	CI$6,361,198

8. Thus, by virtue of the Consent Order, Mrs. Moxam would get some 80% of the assets based on Mr. Bullmore's valuation of the assets at CI$7,859,000 as at the date of the Consent Order.

9. Based on Mr. Bullmore's valuation, if given an even share of the value of the Companies, Mrs. Moxam would have received CI$1,179,500 instead of the CI$2,700,000 ascribed value and the difference of CI$1,179,500 would have been allocated instead to Mr. Moxam. That division would have given him a settlement of CI$3,018,302 instead of the CI$1,497,802 (CI$7,859,000 – CI$6,361,198) which, based on Mr. Bullmore's valuation, it appears he received.

10. Consequently, Mrs. Moxam would have received CI$4,840,698 (CI$6,361,198 – CI$1,520,500), giving her roughly 62% of the assets (as valued by Mr. Bullmore at CI$7,859,000) and Mr. Moxam the other 38% as shown in the following table.

TABLE BASED ON MR. BULLMORE'S VALUATION BUT SHOWING AN EVEN SHARE OF THE COMPANIES' VALUE

Particulars	**Anne Moxam**	**Frank Moxam**	**Total based on Valuation**
	CI$	CI$	CI$
Residential Properties	1,902,000	-	1,902,000
Companies	1,179,500	1,179,500	2,359,000
Bank and Brokerage Account	1,724,774	1,254,226	2,979,000
Other Assets	34,424	584,576	619,000
TOTAL	**4,840,698**	**3,018,302**	**$7,859,000**
	Approx. 62%	Approx. 38%	

11. On the face of the matter and taking Mr. Bullmore's valuation as conclusive, there would seem therefore to have been a lopsided settlement in favour of Mrs. Moxam by the allocation to her of more than 80% of the assets.

12. But this outcome, by itself, would be no proper basis for the Court setting aside or varying the Consent Order.

13. As mentioned above, what Mr. Walters asserts and relies upon on behalf of Mr. Moxam, is a common or mutual mistake of the parties which vitiated the agreement upon which the Consent Order is based[1]. He submits that if the Court is satisfied that such a mistake in the understanding of the true values and division of the assets, in particular the Companies, did in fact occur, there is jurisdiction in the Court to set aside or vary the Order and it would be just to do so.

14. The statutory jurisdiction to vary the Consent Order appears from section 23 of the Matrimonial Causes Law which provides that:

> *"Either spouse or the personal representative may make an application for variation of any order made under section 21, and the court, after hearing the parties, may make such variation."*

15. It was said of this provision by the Court of Appeal in *Range v Range*[2], that whatever the intentions of the parties on agreeing an order (and unlike the position in England and Wales under section 25A of the Matrimonial Causes Act 1975): *"...no clean break principle can therefore be said to be established by the legislation and the Grand Court has jurisdiction to vary all ancillary orders. In our view however, that*

[1] An earlier assertion by Mr. Moxam, that he was suffering emotional or mental distress at the time of entering into the Consent Order, seems no longer to be pursued.
[2] 1988-89 CILR 437.

jurisdiction ought to be sparingly exercised where the order itself appears to contemplate finality and is made by consent of the parties."

16. There is, as well, strong and compelling dicta subsequently from the Court of Appeal in *McTaggart v McTaggart*[3] that, notwithstanding this difference between the English and in the Cayman legislation in that regard, the clean break principle is to be preferred. The Court of Appeal declared that:

> "A*n object of the modern law is to encourage divorced parties to put the past behind them and begin a new life which is not over-shadowed by the relationship which has broken down. It would be inconsistent with this principle if the court could not make, as between the spouses, a genuinely final order...."* (citing the dictum of Lord Scarman from *Minton v Minton* [1979] A.C. 593, at 608).

17. Thus, it seems to me that a consequence of that combined dicta from these Court of Appeal decisions, is that the desirability of achieving a "*clean break*", is itself a strong reason for regarding the statutory jurisdiction to re-open a case as one to be exercised only sparingly. But the jurisdiction to vary an order undoubtedly exists and so the issue confronting me now is whether Mr. Moxam – if his application were allowed to proceed instead of being struck out – would be able to show proper grounds for the exercise of the jurisdiction.

18. I emphasize that I approach this question in the context of Mrs. Moxam's strike out application, being very mindful, as Bennett J wisely reminded in *Rose v Rose* [2003] EWHC 505 (Fam) that:

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[3] 2011(2) CILR 366, para 43-45.

"...it is absolutely essential in ancillary relief cases that the court should be able to put a stop to applications seeking to reopen matters already decided by a court, whether by consent or after a contested hearing, if the court is satisfied that no useful purpose will be served by reopening the matter".

19. It is already plain that Mr. Moxam is confronted with serious difficulties, some of which are evident from the points of objection raised on behalf of Mrs. Moxam.

20. In the first place, while he asserts that the mistake in valuation of the Companies – that which he claims so severely skewed the outcome in favour of Mrs. Moxam – was a common or mutual mistake, she does not accept that. In this regard, Ms. Brooks asserts on her behalf that Mr. Moxam controlled the Companies and that there are serious concerns of her client that there never was any proper disclosure given about the affairs of the Companies, in particular about the income which they generated.

21. The parties had been estranged for some seven years before the Consent Order was settled on 12 September 2013, the petition for divorce having been filed in 2006. During that period of separation, it is said by Ms. Brooks that Mr. Moxam alone benefitted from the income or dividends derived from the Companies before they were sold in 2011 and 2013[4] and there has been no accounting for any of it. Such was the level of income that Mrs. Moxam is concerned that although its present day value would be very significant, she would be severely prejudiced by a revision of the Consent Order, as she would not be able to establish the facts now, years after the events. Moreover, as the values ascribed to the Companies in September 2013 were

[4] IHCP, a holding company of a number of other trading companies, said by Mr. Moxam to have been sold for USD5.79 million on or about 25 August 2011 and Island Companies Ltd., another valuable trading company, said by him to have been sold for USD3 million in 2013.

those ascribed by Mr. Moxam himself, he would have taken account of information in entering into the Consent Order which was not available to Mr. Bullmore for his recent *ex post facto* valuation. She had had no dealings with the Companies and was in no position to assess or dispute those values ascribed by Mr. Moxam. Indeed, she says that so egregious was Mr. Moxam's failure to respond to her requests for disclosure that the Companies were sold without any prior notice to her.

22. Her ultimate concern therefore, is that, had the income and dividends received by Mr. Moxam over the years been factored into Mr. Bullmore's valuation, the sum of CI$2,700,000 granted to her in respect of the Companies by the Consent Order would not be regarded as representing an unfair division.

23. And so, while she does not accept that there was any mistake as to the valuation of the Companies, if mistake there was, it was neither a common nor a mutual mistake but one which was the result only of Mr. Moxam's arrogation of the knowledge about important matrimonial assets and their control, entirely unto himself.

24. Further in this respect, and in support of what in effect would be an objection based on estoppel, Ms. Brooks points to her client's change of position by reliance on the Consent Order. She protests that she has arranged her financial affairs having regard to her entitlement under the Order. It would be very difficult, if not impossible she asserts, to reconstruct the state of affairs as they would have been revealed had the matter gone to trial instead of Mr Moxam's proposals having been accepted and adopted in the Consent Order.

25. And this would be grossly unfair, says Ms. Brooks, because Mr. Moxam it was who chose to settle the matter by his offer which came to inform the Consent Order

instead of going to trial and so was able to avoid having to give the disclosure which may well now be impossible to obtain.

26. In summary then, the objections are that the valuation of the matrimonial assets which should have been used by the parties (in particular of the Companies and Bank and Brokerage accounts), may well have been much greater than disclosed for the purposes of Mr. Bullmore's recent valuation and Mrs. Moxam would, upon a review of the Consent Order, be at great risk of not being able to establish that fact.

27. As but an illustration of this concern, Ms. Brooks points to bank records which show that in the months leading up to the Consent Order in September 2013, Mr. Moxam dissipated or expended some $629,000 at the rate of $78,625 per month. There has been no accounting for that money, says Ms. Brooks, nor does the history of Mr. Moxam's expenditure since the Consent Order on 12 September 2013 support his contention that the settlement was unfair. She asserts that while on numerous occasions Mr. Moxam cited cash flow problems as the reason for non-payment of the outstanding sums under the Consent Order, he never challenged its fairness nor the accuracy of its underlying premise until after Mrs. Moxam brought the present motion for his committal for failing to comply with the Consent Order.

28. There is some support for this assertion in the records before me: on a number of occasions Mr. Moxam affirmed his intention to comply with the Consent Order, citing only his need for more time to comply.

29. Nonetheless, on his behalf, Mr. Walters says that Mr. Moxam had, from much earlier before her filing of the motion for committal, been protesting the unfairness of the Consent Order with Mrs. Moxam.

30. I note in this regard, that it was held in *Foster v Foster* 2011 (2) CILR 89 by the Court of Appeal, that significant delay since the making of a consent order will preclude an order setting it aside entirely. That principle must apply with even more force in this case where, during the period of delay, the party who seeks to set it aside has affirmed the Consent Order by his subsequent conduct. This indicates that at most, Mr. Moxam can only hope for a variation of the Order, not a setting aside entirely.

31. Given all of that background, do I now strike out Mr. Moxam's application as doomed to fail and as being an abuse of the process of the Court or do I allow it to proceed to a hearing on the basis of common or mutual mistake as argued?

32. This argument will rely on certain English cases, in particular *Fallon v Fallon* [2007] 1 FLR 910 and *Holmes v Holmes* [2007] EWCA Civ. 1141. These are cases in which incorrect valuations of properties resulted in mistaken views of their values by the parties and so, in orders being made to set aside. In coming to their decisions, the Courts held that there is jurisdiction to set aside a consent order upon grounds such as mistake which invalidate the agreement expressed in the order.

33. So too, in *Thompson v Thompson* [1991] 2 FLR 531, there was a mutual mistake about the value of a business and the English Court of Appeal held that the interests of justice called for a reappraisal of the order "*in light of the new state of affairs*".

34. It is immediately apparent that the present case will be strongly argued to be distinguishable on the basis that it cannot be said that any mistake as to valuation, was either a common or a mutual mistake. There would be cogent reasons for such an argument, if, as she asserts, Mrs. Moxam is able to establish that she was deliberately kept in the dark about the affairs of the Companies by Mr. Moxam; that Mr. Moxam

did not wish her to know, made no proper disclosure and pressed for the matter to be settled by way of the Consent Order so as to avoid going to trial, in which context disclosure would have been obligatory.

35. In noting this distinguishing feature of this case, I must however recognise that I am not in a position to pass conclusively or definitively on these particular assertions of Mrs. Moxam. They are matters which, after proper enquiry, may well persuade a judge that the Consent Order should not be re-opened. I have not held such an enquiry; all I have been able to do is hear the arguments about the concerns *in limine* on her pre-emptive strike out application, in which context Mrs. Moxam's assertions are as yet only that – assertions.

36. There is also the consideration that although a jurisdiction to be only sparingly exercised, the circumstances under which the Court may re-open an order or to refuse to enforce an order, are not closed.

37. As was said in another English case cited by Mr. Walters – *Thwaites v Thwaites* [1981] 2 All E.R. 789 – the Court may refuse to enforce an order for division of assets if it thinks it would be inequitable to do so. This speaks to the other side of the coin – that presented by Mrs. Moxam's motion for committal – because, if it appears inequitable from all the circumstances, that Mr. Moxam should be committed for not fully complying with the Consent Order, the Court may refuse to commit him and so dismiss Mrs. Moxam's motion for committal. This could happen even if Mr. Moxam's application fails and the Consent Order is left fully intact.

38. In all probability, the Court would then instead make orders for Mr. Moxam to comply by payment over time in keeping with what the Court is satisfied he could

pay. Under the terms of the Consent Order, it is said by Ms. Brooks that at least CI$2.9 million is still owing.

39. What this all points to, in my view, is the inevitability of a further inquiry in this case. I am not satisfied, for the reasons explained above, that things are yet at the stage where it is plain that Mr. Moxam's application to, at least vary the Consent Order, is doomed to fail[5]. Nor is it yet plain that Mrs. Moxam's application to commit him for non-payment is bound to succeed.

40. In the circumstances, I am persuaded to refuse Mrs. Moxam's strike out application. Instead, I will give directions for the speedy hearing of Mr. Moxam's application to vary the Order; failing which application, Mrs. Moxam's application for committal can be restored. What I will say immediately though, is that as a condition of being allowed to proceed with his application, Mr. Moxam will be required to give such disclosure as would be relevant to ascertaining what assets have been available to him before and since the making of the Consent Order. He will also be required to make good any outstanding orders for payment of Mrs. Moxam's costs and must pay her costs up to and including the hearing of his application to vary the Consent Order. I make this order as to costs now as I am satisfied, at least, that if there was a genuine mistake in valuation of the assets, it was not one to which Mrs. Moxam in any way deliberately contributed. There is therefore no reason why she should bear any of these costs of an enquiry to vary the Order in favour of Mr. Moxam.

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[5] The test for striking out under Grand Court Rules O.18. r.3 and the appropriate analogous test for application here in exercise of the inherent jurisdiction of the Court to protect its process from abuse: See *Foster v Foster* (above) where the Court of Appeal confirmed the existence of the inherent jurisdiction.

Conclusion and Directions

1. Mr. Moxam's application to vary the Consent Order may proceed before another judge[6].

2. Mrs. Moxam's notice of motion for committal will be stayed pending the outcome of Mr. Moxam's application.

3. Mr. Moxam is required to provide full and frank disclosure of all documents relative to the affairs of the Companies for the period between the filing of the petition and the entry of the Consent Order.

4. To the extent that he has not yet done so, Mr. Moxam is required to provide full and frank disclosure of all Bank and Brokerage accounts for the same period and up until the present time.

5. As regards items 3 or 4 above, Ms. Brooks on behalf of Mrs. Moxam will be at liberty to specify or particularise in writing what items should be disclosed but without prejudice to Mr. Moxam's general duty and obligation to provide full and frank disclosure.

6. Liberty to apply as to any further directions for the hearing of Mr. Moxam's application to vary the Consent Order.

7. Orders for costs to Mrs. Moxam as expressed above, to be taxed if not agreed.

GRAND COURT CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

May 12 2016

[6]I am satisfied that I should recuse myself, having dealt with the matter and having had to form certain views of the evidence and arguments necessary for dealing with these applications *in limine*.