IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
FAMILY DIVISION

CAUSE NO: FAM 265 OF 2010

BETWEEN:

TANIA ANN DAVIES

Petitioner

AND

BRYNLEY L'ANSON DAVIES

Respondent

Appearances:	**Mr. David McGrath from Samson & McGrath for the Petitioner**
	Ms. Laura Hatfield from Solomon Harris for the Respondent
Before:	**Hon. Mr. Justice Richard Williams**
Heard:	**4th November 2014**
Written submission received:	**14th November 2014**
Date of Circulation of Draft Judgment:	**10th February 2015**
Date of Judgment:	**13th February 2015**

HEADNOTE

Family Law – financial ancillary relief – requirement for full and frank disclosure of all material facts- inferences may be drawn if failure to give full and frank disclosure – the three requirements to be satisfied before making disclosure orders - Court's jurisdiction to vary ancillary relief consent orders – application of B v B [1978] Fam 181 when considering disclosure orders relating to third parties and companies - application to vary ancillary relief consent order and duty to consider section 19 Matrimonial Causes Law (2005 Revision) - KSO v MJO & Ors [2008] EWHC (Fam) 3031 and the responsibility of parties to litigate in a manner proportionate to the assets and issues involved – the Overriding Objective and the Court's obligation to ensure proper use of court time for the benefit of all prospective court users.

JUDGMENT

Introduction

1. This is an application, brought by way of Summons dated 29 September 2014, seeking financial disclosure from the wife made by the husband. The husband contends that the disclosure sought is required to enable the Court to properly determine his Summons dated 9 May 2014 to 'vary' the final Consent Ancillary Relief Order of 25 June 2012. The parties reached settlement during the course of the final hearing. The settlement terms were in principle approved by the Court, leaving the parties to submit the final draft of the order.

2. The husband's Summons has been met by a Cross-Summons filed by the wife on 29 October 2014, in which she seeks disclosure from the husband.

3. I hope that the parties do not view me as being discourteous if, for convenience, I herein still refer to them as the husband and the wife.

Observations Concerning Case Management and Requirement for Parties to Provide Full and Frank Disclosure

4. Regrettably, the parties appear unable to get on with their lives without frequent recourse to the Courts to resolve financial and the minutiae of children issues. Following the making of the comprehensive ancillaries consent order, reached by the parties assisted by experienced on-Island family law practitioners and two of the most eminent Family Bar Queen's Counsel from England and Wales, the

husband has filed eight Summonses/applications (the first being within a month of the Order) and the wife has filed two Summonses.[1] The husband has filed six affidavits and the wife has filed seven affidavits since the 25 June 2012. There have been six hearings before me[2] since June 2012. The Children Law issues, which had supposedly been agreed at the ancillary relief hearing in May 2012, had to be further clarified following a great deal of 'toing and froing' and my meeting with the children, by an Order of 25 August 2014.

5. The parties need to understand that this perpetual litigation must come to an end. That is the intention behind, and the purpose of, a final consent order reached by parties at arm's length with the benefit of high quality legal representatives who advised based on their and the parties' satisfaction about the level and nature of disclosure given at that time. There is a reason, which needs no elaboration, why paragraph 1 of the consent orders contains the standard provision that "*this order is intended to be in full and final settlement of both parties' claims arising from the marriage whether under the Matrimonial Causes Law 2005 ("the Law") or otherwise.*" The liberty to apply provision at paragraph 12 of the order is not intended to offer encouragement to the parties to run to the courts whenever they have a disagreement or to undermine the agreed basis or foundation of the comprehensive agreed order reached after lengthy negotiations.

[1] As of 4 November 2014.
[2] Up to and including 4 November 2014.

6. The wife's position leading up to the final ancillary relief hearing had been that it would not be realistic to expect her to work. The husband's position set out in his evidence was that he believed she had an earning capacity of CI$75,000 to CI$85,000. The Court was not privy to the content of the lengthy out of court negotiations held between the parties.

7. When the parties reached a comprehensive agreement, their experienced legal advisers did not prepare a document containing the factual basis upon which the agreement was reached, including but not limited to the position taken in relation to each party's income which is one of the specific considerations set out in section 19 of the Law[3]. Unfortunately, this case predated the issuing of Practice Direction No. 1/2013 Consent Orders in Ancillary Relief Proceedings which requires parties to complete a standard form in which the parties must declare their agreed income figures and a confirmation signed by both parties that they have made and received sufficient disclosure to enable them to make an informed decision. Although I recognise and am sympathetic to the problems the attorneys faced during the protracted and difficult negotiation stage in 2012 due to the manner in which their clients were then litigating, if heed is paid in the future to the following guidance given by Lord Oliver of Aylmerton in ***Dinch v Dinch*** (4) [1987] 1 W.L.R at 255, the possibility of the situation we now find ourselves in may hopefully be reduced:

> *"It is in all cases the imperative professional duty of those invested with the task of advising the parties to these unfortunate disputes*

[3] "... actual and potential earning power...".

> *to consider with due care the impact which any terms they agree on behalf of their clients have and are intended to have upon any outstanding application for ancillary relief and to ensure that appropriate provision is inserted in any consent order made as will leave no room for any future doubt or misunderstanding or saddle the parties with the wasteful burden of wholly unnecessary costs."*

8. A party's responsibility to provide full and frank disclosure is ongoing and includes any foreseeable change of circumstances known at the time that a consent order is reached. As Thorpe J. put it when sitting in the Court of Appeal in ***Bokor-Ingram v Bokor-Ingram*** [2009] 2 FLR 922 at paragraphs 11 and 18, in the last sentence of each paragraph:

> *"11 ..... Any information that is relevant to the outcome must be disclosed."*
>
> *"18 .... **The** duty to disclose extends beyond what is certain on the date that the order is made to any fact relevant to the court's review of the foreseeable future."*

9. In July 2012, approximately a month after the Consent Order had been approved, the husband became aware that the wife had commenced employment. On 11 February 2013 I ordered that she provide disclosure to the husband concerning her employment. There was a regrettable delay in the wife providing sufficient detail in relation to her employment. In her affidavit sworn on 31 July 2014 the wife states that she contacted the employment agency on the 24 May 2012, had an interview on 13 June 2012 and was offered employment by Atlas Insurance on 19 June 2012. This all predates the approval of the Consent

Ancillary Relief Order on 25 June 2012. Although the contract of employment was not signed until 10 July 2012 and her probation period as an accounts officer would not end until 25 January 2013, there is no doubt that the wife was obligated to provide details of her intended employment to the husband before the consent order was perfected. The offer of employment dated 19 June 2012 indicates that for a 30 hour week the base salary is US$70,000 per annum with the possibility of a performance bonus payable in April of each year. The employee will be covered by the Company's health plan and will be enrolled on the contributory pension plan. The husband contends that it is these circumstances which were not known to the husband at the time of making the consent order that justify a review and variation of that order.

10. I note that the husband contends that the orders he seeks are primarily orders for variation and he does not seek to set aside the order or contend that the whole order is fundamentally flawed due to non-disclosure. The wife contends that the Court should be careful, when considering the applications, to not permit the matter to become in effect a full rehearing the final ancillary relief issues. I note that Lord Brandone of Oakbrook stated in ***Livesey v Jenkins*** 1985 A.C. 424 at 445G that:

> *".... It will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case was setting aside can possibly be made good."*

11. Although, a party may be entitled to challenge a consent order reached where there has been a lack of full disclosure, I feel it necessary to make some concluding general comments about the conduct of these proceedings, especially after June 2012. The parties have since June 2012 chosen to litigate some of the interim applications in person, in my view often making applications for determination of issues which by their nature do not merit the use of valuable court time at the expense of other court users. They may not have had legal representation to save costs or one hopes that it may have been because it had been communicated to them by their attorneys that such applications are not of the type that should trouble the courts or attorneys.

12. I accept that this is not a big money case, but as a great deal of money and time has already been squandered on these proceedings, the parties should pay heed to the sentiments of Munby J. ***KSO v MJO & Ors*** [2008] EWHC (Fam) 3031 when he stated:

> *"The picture is deeply dispiriting. And it is not as if it is only the adults who suffer from the consequences of such folly. The luckless children do as well. The present case is a sobering, and for me deeply saddening, example. If, instead of spending – squandering – over £430,000 in costs, the wife and the husband had been able to resolve their differences at a more modest and, dare I say it, more seemly level of costs, there might very well have been enough left in the matrimonial 'pot' to house the wife and children and to enable the children to remain at their school, whilst still leaving something more than a mere consolation prize over for the husband. ……the mother and the father, for that is what they are –*

are faced now with the wretched and thankless task of trying to explain to their daughters how it has all come to this."

13. This sentiment was echoed by the Sir John Chadwick, President Court of Appeal in ***B v B*** CICA (Civil) No. 16/2013 when he stated:

> *"As both Lord Hoffmann and Lord Hobhouse of Woodborough pointed out in Piglowska (supra), it is important not to lose sight of the principle of proportionality. The father and the mother need to ask themselves whether it is really in the best interests of the children to dissipate the limited resources available to them in protracted litigation."*

14. It may be helpful for the parties to also pay heed to the following remarks of Jackson J. in ***TF v FF [2013] EWHC*** (Fam):

> *"In my view, the court has a responsibility to discourage currently profligate wasted costs, particularly in a case with a track record like this. It is a matter for each party to decide what they want to spend, but they cannot expect it to be recoverable if it exceeds that threshold."*

I would only add that the Court has a duty pursuant to the Overriding Objective set out in the Preamble to the Grand Court Rules to ensure that valuable court time is properly used and not abused by parties.

15. Before I move on from these observations to deal with the substance of the applications, I see merit in repeating the following insightful statement made by the highly regarded divorce lawyer Ayesha Vardag of Vardags who had conduct

of the well-publicised ***Pauline Siew Phin Chai -v- Tan Sri Dr Khoo Kay Peng*** matter[4]:

> *"People can step into a world of madness when they enter the divorce courts. There are so many scenarios in which costs can spiral out of control. It can be because unscrupulous lawyers milk the case by firing up the client to be vindictive or difficult. Or it can be because one or both parties become deeply emotional about something small, and they lose sight of the cost.[5] Or it can be because one party becomes uncooperative or greedy. There's something wrong with family law, but it's also about human nature. Sometimes you just get people who won't stop fighting until everything is destroyed."* [6]

The Summonses

16. The substantive application for which the disclosure is sought is one contained in the husband's Summons dated 9 May 2014 in which he seeks a "variation" of the 25 June 2012 Consent Order pursuant to section 23 of the Law. In that Summons the husband seeks the following orders:

> *"1.1 that the cost of repairs to the former matrimonial home, 616 South Church Street arising from events occurring during the Petitioner's occupation are joint matrimonial liabilities and should be shared by the parties.*
>
> *1.2 that the Petitioner shall pay 50% of the utility bills (i.e electricity, gas and water), mortgage interest in cleaner costs ("property costs") for 3 Reece Mews, London,*

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[4] Chai v Peng [2014] EWHC 3519 (Fam).

[5] My emphasis by underlining.

[6] My emphasis by underlining.

England ("Reece Mews") for the period from 1 January 2013 until sale;

1.3 that the Respondent should since the date the Petitioner commenced employment cease to pay to the Petitioner for the benefit of (the two youngest children) the sum of $18,000 per annum for each child pursuant to paragraph 10 of the Order;

1.4 that from the date the Petitioner commenced employment the Petitioner should pay 50% of the children school fees are set out at paragraph 7 of the Order.

2. The Petitioner shall pay to the Respondent 50% of all costs in relation to running and maintaining Reece Mews.....incurred since 25 June 2012. [7]

3. .....[8]"

17. In a Summons dated 9 July 2014 the husband sought the following directions for disclosure which he contended was required in relation to his 9 May 2014 Summons:

"*1. That the Petitioner provide disclosure as to her employment details as set out below to the Respondent by 17 July 2014:*

1.1 the date of the Petitioner's job application for her current job (including the first date of contacting the employer and the employment agency that she used to find the job);

1.3 the date of the job offer;

[7] The application referred to in the latter part of paragraph 2 of the Summons is no longer being proceeded with – see paragraph 33 of the 'Respondent's Supplemental Skeleton Argument Prepared 14 November 2014.'

[8] The application referred to in paragraph 3 of the Summons is no longer being proceeded with – see paragraph 33 of the 'Respondent's Supplemental Skeleton Argument Prepared 14 November 2014.

1.3 copies of any correspondence and/or minutes of all meetings between the Petitioner and her current employer that refers to her current employment;

1.4 a copy of the Petitioner's employment contract;

1.5 the Petitioner's last three months' payslips."

18. On 21 July 2014, upon considering the above-mentioned two Summonses, I gave case management directions to a one day hearing on the first open date after 17 October 2014 of the 9 May Summons. I gave leave to both parties to file additional affidavit evidence and to serve Requests for Further and Better Particulars. I made an order requiring the wife to provide the following financial disclosure in affidavit form exhibiting supporting documents:

"1.1 the date of the Petitioner's job application for her current job (including the first date of contacting the employer and the employment agency that she used to find the job);

1.2. the date of the job offer;

1.3. copies of any correspondence and/or minutes of all meetings between the Petitioner and her current employer that refers to her current employment;

1.4. a copy of the Petitioner's employment contract;

1.5. the Petitioner's last three months' pay slips."

19. The wife provided her affidavit with disclosure on 1 August 2014. Both parties supplied their Request for Further and Better Particulars on 15 August 2014 and their Replies to the same on 22 September 2014. The husband was not content with the wife's Reply and therefore on13 October 2014 he filed a Summons for

Disclosure dated 29 September 2014. It is that Summons upon which he asked me to now rule. In the Summons he seeks the following directions:

> *"1. That the Petitioner provide responses to the Respondent's Request for Further and Better Particulars dated 15 August 2014 as set out below:-*
>
> *1.1 All information set out in Children Law (2012 Revision) Form C 10 and to the extent that it is not provided in the C 10:*
>
> *1.1.1 Schedule of all income received from all sources, (incorporating an itemised schedule of the total income received from Atlas since 25 June 2012 and documenting how the income has been received (e.g. basic salary, bonus, overtime etc)) including interest on the Petitioner's bank accounts and investments, dividends, commission or any other payments, from 25 June 2012 to date;*
>
> *2. Complete set of bank statements for all accounts in which the Petitioner has an interest or has the use of from 25 June 2012 to date;*
>
> *3. Documentary evidence in support of the Petitioner's property valuations;*
>
> *4. Valuation of the Petitioner's investments at:*
>
> *4.1 30 July 2012*
>
> *4.2 25 June 2013*
>
> *4.3 14 September 2014*
>
> ***5. Schedule of any other capital or personal belongings not listed** above that are valued at $1,000 or more, whether they are held in the Petitioner's sole name, jointly with another, or in which she has an interest;*

6. Outline any significant changes to the Petitioner's financial circumstances from 1 July 2012 to date."

20. The wife was also not satisfied with the husband's Replies to her Request for Further and Better Particulars. She therefore filed a Cross-Summons on 29 October 2014 seeking an order that the husband responds to the following:

"1. That the Respondent shall provide responses to the Petitioner's Requests for Further and Better Particulars dated 15 August 2014. In particular, the Respondent should respond to the following:

<u>Bank Accounts</u>

i. The following bank statements remain outstanding pursuant to Request no. 1:

a) FCIB Hurricane account no. 10447488 - August 2013 ***and October 2013 to January 2014 statements;***

b) HSBC UK account no. 00336890 - February 2013 statement;

c) HSBC UK account no. 10241296 - last page of August *2014 statement;*

d) HSBC Premier *(Mastercard) Account no. 5140-1161-0001-1505 - statement for Billing cycle closing date 2/21/13;*

e) HSBC *Cayman Account no. 100-016203 - page 7 of 31 July 2014 statement;*

f) HSBC Jersey Accou*nt– statements from 1 May 2012 to date;*

g) Barc*lays Premier UK Account – statements from 1 May 2012 to date.*

ii. Please provide proofs in support of the following banking transactions:

a) Copy bill of sale from Christies detailing all items sold (which resulted in various sums payable to the Respondent);

b) Copy of Land Registry documents (including register of title) in respect of property on which a deposit was paid by the Respondent in July 2014.

Image Group

iii. Detailed responses and supporting documents in respect of Requests 2 to 18 and Request 21.

Travel

iv. A detailed response to Requests 24 and 25, including but not limited to a full and complete travel itinerary for the period in question.

Bliss

v. Detailed responses and supporting documents in respect of Requests 29-33."

The Law In Relation to Disclosure Applications

21. As rightly pointed out by Quin J. in ***Robert Earl Gibb v Brenda Mae Gibb*** D50/2006 26 January 2009 (unreported), the classic dicta governing the question of disclosure of matrimonial property can be found in ***Livesey*** where Lord Brandone states:

> *"Each party concerned in claims for financial provision and property adjustment (other forms of ancillary relief not material to the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the Court."*

22. At paragraph 32 in ***S v S*** [2013] EWHC 991 (Fam) when referring to ***Livesey,*** Sir Hugh Bennett reminded the parties that the reason why the courts have placed and continue to place such emphasis on the duty of parties to make full and frank disclosure is that *"unless the parties give full and frank disclosure of all material facts to each other and to the court, the court cannot "lawfully or properly exercise its discretion" in the manner ordained by S25(1) of the Matrimonial Causes Act, 1973."*

23. Such disclosure must be given by a party, whether it is helpful or detrimental to that party's case to enable the Court to properly exercise its duty set out at section 19 of the Law. It has long been held[9] that if a Court rules that disclosure has not been complied with, due to findings of fact correctly arrived in the light of admissible evidence, that an adverse inference may be drawn. Such an approach has been adopted in the Cayman Islands as can be seen from the ruling of Foster, Ag. J. in ***Hydes v Hydes*** [2009] Note 6. The Note states:

> *"When there has been an obvious material failure by the husband to make full and proper disclosure of his financial dealings and his assets for the purpose of determining ancillary matters on divorce – despite court orders requiring him to do so, the court, if appropriate in the exercise of its discretion under the Matrimonial Causes Law (2005 revision), s.19, may infer the existence of assets denied by the husband to exist or which he has failed to disclose. The court does not have to be in a position to quantify the non-disclosed assets or those dissipated but may draw on the inferences*

[9] See (i) ***J v J*** [1955] P 215; (ii) ***Baker v Baker*** *[1995] 2 FLR 829; (iii)* ***Al-Khatib v Masry*** *[2002] 1 FLR 1053: and (iv)* ***Payne v Payne*** *(1968) 1 ALL ER 1113 at 1117.*

*it has made to ensure a fair division between the parties (**Baker v Baker**, [1995] 2 FLR 829 followed). The court may also make inferences about the husband's future prospects, based on the demonstration of his business acumen in the past (**Rye v Rye** [2002] 2 FLR 981, followed)."*

24. Certain requirements should be satisfied before the Court makes any disclosure orders. Firstly, the documents requested must relate to the proceedings, in other words, they must be relevant and assist the Court in determining the substantive application. Secondly, the person against whom the discovery is sought must be a party to the proceedings, which clearly is the case in relation to the non-company related disclosure in the Summons and Cross-Summons. The next requirement is whether or not the documents are in the relevant parties' possession, custody or power.

25. When considering the relevancy of the discovery sought, some consideration should be given to the content of the husband's 9 May 2014 Summons[10], analysing the parts of the consent order which he seeks to 'vary' and to determine whether in fact the application is to vary or to add a new previously unconsidered provision. The Court should have regard to the general principles to be considered when a party seeks a variation of a consent order. When doing so the Court is not, at this stage, to make a final determination of the merits of the variation application, but should inquire to see if they are arguable. It is for

[10] See paragraph 16 above.

this reason that the parties were invited at the end of the hearing to submit written submissions on the issue of variation.

26. The Court's jurisdiction to vary ancillary relief order is found in section 23 of the Law which states:

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

27. The Court when exercising its discretion in the variation application should have regard to its duty set out in section 19 of the Law, namely:

> *"In dealing with all ancillary matters arising under this Law, the Court shall have regard first of all to the best interests of any children of the marriage and thereafter to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties."*

28. The Court when exercising its discretion should have regard to the sentiment expressed by Zacca P. in the Court of Appeal case of ***Range v Range*** [1988-89 CILR 437]. The President acknowledged that there was a power to vary a final ancillary relief order, including orders in relation to capital, but quite rightly stated that the "*jurisdiction ought to be sparingly exercised where the order itself appears to contemplate finality and is made by consent of the parties.*"

29. Zacca P. reached this conclusion after reviewing case law concerning the approach to be taken to consent orders. Due to the passage of time since his judgment I see merit in reiterating in full his review from page 441 paragraph 22 to page 442 paragraph 20:

> *"In Dinch v. Dinch (4), Lord Oliver referred to the following dictum of Lord Herschell, L.C. in In re South American & Mexican Co., ex p. Bank of England (6) ([1987] 1 W.L.R. at 263):*
>
> > *"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."*
>
> *He also referred to Brown v. Kirrage (2) in which Brandon, L.J. regarded the dismissal of a wife's claim for ancillary relief as a matter of such seriousness that the court ought to be extremely cautious about implying a dismissal where none is actually expressed in the order concluded. He observed (ibid.):*
>
> > *"One has, as it seems to me, simply to look at the order and any admissible material available for its construction, and determine what the court intended—or, in the case of the consent order, what the parties intended—to effect by the order. If the conclusion is that what was intended was a final and conclusive once-for-all financial settlement, either overall or in relation to a particular property, then it must follow that that precludes any further claim to relief in relation to that property."*
>
> *At the same time de Lasala v. de Lasala (3) does establish (per Lord Diplock, [1980] A.C. at 560) that in matrimonial cases:*
>
> > *"Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court,*

> *once they have been made the subject of the court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order. . . . "*

In Thwaite v. Thwaite (7), Ormrod, L.J. observed ([1981] 3 W.L.R. at 101):

> *"The effect of eliminating the contractual basis of these consent orders should simplify the problems. If their legal effect is derived from the court order it must follow, we think, that they must be treated as orders of the court and dealt with, so far as possible, in the same way as non-consensual orders."*

Bearing these considerations in mind, it was necessary for the learned trial judge to decide whether in the particular circumstances it was appropriate for him to vary the consent order. In doing so he appears to have concluded that the fact that no payment was or could now be made to the wife under the order was to change of circumstances which entitled her to apply for variation."

30. In ***Robert Don Foster v Ann Rosalind Owen Foster*** CICA (CIVIL) 05/2011 Sir John Chadwick, President referred to the observation of Munby J. in ***L v L*** [2008] that it was not a necessary prerequisite to a variation application that there had to be some change of circumstances, even if the order had been reached by consent. The President noted that Munby J:

> *"...observed that the court would usually be reluctant to intervene absent some change in circumstances where the order was made by consent and where less than a year had elapsed since the order was made; but that went a discretion and not to jurisdiction."*

I agree with the approach taken by Munby J.

31. I have regard to all of the above principles when considering whether I have the jurisdiction to make the orders sought. If I do, then today is not the time to decide what orders, if any, I will make at the substantive hearing of the husband's May 2014 Summons. If I have the jurisdiction to make the orders applied for then I have to consider whether the disclosure is relevant and proportional to enable determination in the exercise of my section 19 duties.

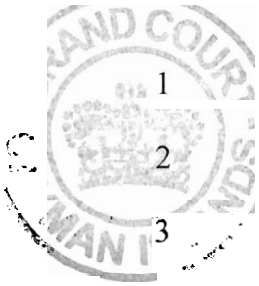
32. During the hearing, I invited Counsel for the husband to go through each paragraph of his 9 May 2014 Summons and highlight which paragraphs of the June 2012 Consent Order that he sought to vary. From that exercise it was deduced that Paragraph 1.2 and the first part of paragraph 2 of the May Summons relate to paragraph 4.2 of the Consent Order. The Summons seeks a variation of the arrangement for payment for the bills and running costs of Reece Mews in London from at least 1 January 2013 to the date the property was sold.

33. Paragraph 1.3 of the Summons relates to paragraph 10 of the Consent Order and is an application to vary child maintenance for the parties' two youngest children.

34. Paragraph 1.4 of the Summons relates to paragraph 7 of the Consent Order and seeks a variation of the payment for school fees for the two children.

35. I am satisfied that the applications referred to in the preceding three paragraphs are for variation and not for fresh or hitherto unconsidered orders, despite the contentions made on behalf of the wife in relation to paragraph 1.2. As a consequence, appropriate and proportional levels of disclosure to address the issue of variation of these paragraphs may be appropriate.

36. The attorney for the husband rightly accepts, at paragraph 29 of the supplemental skeleton argument dated 14 November 2014, that paragraph 1 of the May Summons seeking the cost of repair to the former matrimonial home from the events occurring during the wife's occupation is not a variation application. It is submitted by the husband that it is a breach of paragraph 2 of the Order which simply provided for the wife to enjoy exclusive occupation of the property prior to giving up vacant possession of the property to the husband upon his payment of a lump sum on or before 31 July 2012. There is absolutely no provision in the Consent Order relating to payment for the damage to the property, and upon considering the submissions made on behalf of the wife, the attorney indicated at paragraph 20 of the supplemental skeleton argument that the husband's May Summons might be amended to show that this part of the application was based on breach and not variation, this has not been done. It is highly questionable whether one should infer such a provision into this Order which was intended by the legally represented parties to be a comprehensive and final order. If the husband feels that his property has been damaged, then any action he may have would likely be better brought in a civil action and not in



ancillary relief proceedings which have been concluded by a comprehensive Consent Order. In any event, this paragraph of the May Summons does not relate to any of the disclosure sought.

37. Some of the orders seek backdating prior to 9 May 2014. It is submitted on behalf of the wife that if any variation is made, orders should not be backdated prior to May 2014. This is an arguable point, especially as the wife failed prior to or during June 2012 to disclose her upcoming employment and failed to provide proper disclosure in relation to her employment, despite the number of requests made by the husband, until 10 December 2012. If the wife had made appropriate disclosure about her foreseeable income prior to the hearing, it may well have formed a part of the negotiations and deliberation about the relevant paragraphs, now raised in the May 2014 Summons, leading up to the consent order.

38. Having regard to all of the above I will now turn to the specific disclosure sought by the parties. The Court is entitled to form the view that at the time that the Consent Order was concluded their attorneys were satisfied that they had sufficient disclosure to enable them to properly advise their clients and that the husband and wife were content to reach a comprehensive agreement based upon it. When considering discovery today it is important that the parties understand that a variation hearing is not the opportunity for them to now run a full ancillary relief hearing which, with hindsight, they now may feel should have

been conducted back in 2012. When the parties divided the matrimonial capital, it was not intended that their day-to-day needs would necessarily be met by them 'eating into' those assets post-divorce. Of course, some of the capital received would be used to purchase and fully furnish a new home or to re-establish one's base in the matrimonial home, to possibly purchase a vehicle if required and to make long-term investment provision including for retirement.

39. I will first deal with the husband's Summons dated 29 September 2014 (filed 13 October 2014). The husband has provided a completed version of form C10 Statement of Means form and seeks an order requiring the wife submit the same with supporting documentation. With supporting documentation this standard form is designed to provide the necessary information for Schedule 1 proceedings under the Children Law. Unlike in the proceedings brought by the Summons currently before me, Schedule 1 applications may involve capital orders, especially in relation to provision of housing for the children. Despite this, it can be a useful form, especially if the proper supporting documentation is provided, as it can concentrate the parties' minds on what may be helpful disclosure and upon review quickly lay out the financial position of the party. Although it is submitted by the wife that the Consent Order was reached when the husband was contending that the wife had an income capacity of CI$75,000-CI$85,000, she was at the same time saying that she did not have an income capacity for the foreseeable future. It is unclear, in the absence of any agreed schedule prepared by the parties, on what factual basis the parts of the Order

now under review were reached. What is clear, is that when the Court approved the Order it did so only on the evidence then before it, which made it appear that at the time the husband was the only person with an income from employment and therefore that only he was able to financially provide for the children's day-to-day needs and for the running costs of Reece Mews. The husband's case in the variation application is not that he did not and still does not have sufficient means to pay for the running costs of the property or to pay the child maintenance, but is that he should not have to bear the full responsibility for all those payments in light of the wife's income and the failure of her to provide proper disclosure of the same at the time the consent order was reached.

40. When the Court has to consider paragraphs 1.2, 1.3 and 1.4 of the May 2014 Summons it may have to consider both parties' current income and outgoings as well as during the pleaded backdated period. Having regard to paragraph 1.1 of the husband's September 2014 Summons for Disclosure I direct the wife to provide a schedule of her current outgoings. Although I do not direct that she must provide all the information in a C10 form, she would likely be guided by a number of the entries listed in the outgoing section in that form. The wife is directed to provide details and supporting evidence of all of her income, including bonuses, received from her employment with Atlas from its commencement to date. I am satisfied that she should also provide a schedule of all other income to include, but not limited to, interest on her bank accounts, investments, dividends from 25 June 2012 to date.

41. In relation to paragraph 2, I am not satisfied that it is proportionate to the issues raised in variation proceedings for the wife to have to produce three years of bank statements from all of the accounts that she has an interest in. The fact that the wife may have sought three years bank statements from the husband and the fact that he has provided them, does not in itself mean that the Court will or should automatically order the same disclosure from the wife. The wife is directed to provide bank statements for these accounts from 1 January 2014 to date. However, the wife must provide appropriate documentation to verify the information set out in the schedule ordered in paragraph 40 above, and if this cannot be done by any other means then she should produce the relevant bank statements.

42. Paragraph 3 of the husband's September Summons relates to property valuations. Any property that the wife has would have derived from the capital settlement and how she has used the capital is not relevant to the variation application. I make no order in relation to paragraph 3.

43. Paragraph 4 of the husband's September Summons relates to the wife's investments. These investments would no doubt have been made from the capital settlement. How she has invested that capital is not relevant to the variation application and I make no order in relation to paragraph 4.

44. Paragraph 5 seeks a schedule of the capital personal belongings valued at $1,000 or more, this is not relevant to the variation application. Even if it were relevant, to set a figure of $1,000 would make it, in the circumstances, too onerous and disproportional. I make no order in relation to the disclosure sought in paragraph 5.

45. Paragraph 6 of the Summons is too vague and it may be something that is better addressed in cross-examination.

46. I now turn to the wife's October 2014 Cross-Summons for Disclosure. I understand that the disclosure set out in paragraph 1.i of her Summons has been provided and I need not consider whether to make an order.

47. I am satisfied that the disclosure sought in paragraph 1 ii. of her Summons, namely documentary clarification in relation to the outlined payments, may be relevant and direct the husband to make it.

48. The disclosure sought at paragraph 1 iii. of the wife's October 2014 Summons and requests 2-18 and request 21 of the wife's Request for Further and Better Particulars dated 15th of August 2014 in relation to Image Group is a repeat of a request made in the disclosure phase prior to the final ancillary relief hearing.[11] The disclosure raises the issue of the third requirement to be met before an order

[11] The wife's contentions in relation to disclosure and Image Group were detailed at paragraphs 43 to 51 of Counsel's written submissions for the pre-trial review held on 11 November 2011.

can be made, as mentioned in paragraph 24 above. The Court has to determine whether or not documents are in the relevant parties' possession, custody or power.

49. The wife contends that the documents sought are under the control of the husband who they contend is really the person who runs the Company(ies) and that it is in effect the 'alter ego' of the husband. The wife highlights possible concerns emerging from the single joint expert report commissioned by the parties for the ancillary relief hearing in May 2012.

50. The husband states that he does not have any ownership interest in any company in the Image Group and that his father is the sole shareholder. Therefore, the husband contends that he does not have financial information in respect of any company in the Image Group in his custody, possession or control. In making this submission he refers back to disclosure on 14 June 2011 and the single joint expert report. He contends that his father does not consent to provide any further access to the confidential financial information belonging to the Image Group.

51. The approach to the issues surrounding this requirement in such circumstances is helpfully set out by Dunn J. in ***B v B*** [1978] Fam 181 at 193D as follows:

> *"(1) A party to a suit must disclose all the documents in his possession, custody or power which are relevant to the matters in issue. The court has a discretion whether or not to order him to make such disclosure and also has a discretion whether or not to*

order him to produce the document for the inspection by the other party or the court.

(2) The documents of a company are in the legal possession of the company. If they are or have been in the actual physical possession of a director who is a party to litigation they must be disclosed by that director, if relevant to the litigation, even though he holds them as servant or agent of the company in his capacity as an officer of the company.

(3) Whether or not documents of a company are in the power of a director who is a party to the litigation is a question of fact in each case. 'Power' in this context means 'the enforceable right to inspect or obtain possession or control of the document.' If the company is the alter ego of such a director so that he has unfettered control of the company's affairs, he must disclose and produce all relevant documents in the possession of the company.

(4) Where relevant documents in the possession of a company disclosed by a director as being in his custody or power, the court has a discretion whether or not to order production of them.

(5) The discretion is a judicial discretion, and in exercising it the court will have regard to all the circumstances. The court will balance the relevance and importance of the documents and the hardship likely to be caused to the wife by non–production against any prejudice to the husband and third parties likely to be caused by production. It has not hitherto been the practice of the court to order production of company documents to which the board of directors objects on affidavit, provided that the court is satisfied that the objection is not contrived the purpose of frustrating the powers of the court. The court will not in the exercise of its discretion order parties to do that which they have no power to do the court will not order production unless it is satisfied that

production is necessary either for disposing fairly of the issues between the parties or for saving costs."

52. Counsel for the wife reminds me of the following extract on the production of company accounts taken from Rayden & Jackson on Divorce & Family Matters, 18th Edition. For completeness sake I set it out herein, although it greatly repeats the content of ***B v B***:

> *"One of the parties to a marriage is frequently the director of a private family company, and company documents are often relevant to an application for ancillary relief. Where discovery is sought of documents which are in the legal possession of a company, the following considerations apply: (i) if they are or have been in the actual or physical possession of a director who is a party to the litigation (for practical purposes the husband or the wife) they must be disclosed by that director, if relevant to the litigation, even though he holds them as servant or agent of the company in his capacity as an officer of the company; (ii) whether or not company documents are in the director's 'power' is a question of fact in each case. 'Power' in this context means 'the enforceable right to inspect or obtain possession or control of the document.' If the company is the alter ego of such a director so that he has unfettered control of the company's affairs, he must disclose and produce all relevant documents in the possession of the company; (iii) where company documents are disclosed, the court has a discretion whether or not to order production which it must exercise judicially, having regard to all the circumstances and balancing the relevance and importance of the documents and the hardship likely to be caused to the applicant by non – production against any prejudice to the respondent and third*

parties likely to be caused by the production. It has not hitherto been the practice of the court to order production of company documents to which the board of directors objects on affidavit, provided that the court is satisfied that the objection is not contrived for the purpose of frustrating the powers of the court. Finally, the court will not order production of company documents unless it is satisfied that production is necessary either for disposing fairly of the issues between the parties or for saving costs. Whether the documents of a subsidiary company are within the control of its parent company is a question of fact."

53. At the November 2011 pre-trial review hearing, the parties being aware of the above case law and the circumstances surrounding Image Group, felt that the way forward was to instruct a Single Joint Expert. Although it is submitted that:

(i) the husband and his father obstructed the expert in the preparation of his report by limiting disclosure of the documents to him by raising confidentiality issues;

(ii) the report had to be vetted by them before it was finalised and disclosed to the wife and the Court;

(iii) the expert highlighted inconsistencies in the figures provided to him;

(iv) the report raised significant doubts as to the husband's asserted level of income; and

(v) the Agreed Statement of Issues for determination at the final hearing included the performance of Image in recent years and in the foreseeable future and the level of the husband's recent income and bonuses from

Image Holdings and his future level of remuneration from all sources, the wife was still content to reach a consent order at the time.

54. The wife rightly contends that the Court, when deciding whether it should vary the order as sought, will need to determine each party's income and outgoings. It is submitted that the husband plays a crucial role in the Image Group and is a quasi-partner with his 80-year-old father. It is contended that the husband has deliberately and substantially minimised and redirected his income from the businesses for the purpose of this litigation. The wife submits that, as the matter was resolved by Consent Order and the Court did not make findings in the contested hearing in relation to the husband's income and foreseeable income, it would be appropriate for the Court to now order the substantial disclosure first sought (but not proceeded with) back in November 2011. It seems to be contended that although the parties and the representatives were content to resolve the matter by consent based on the disclosure available in June 2012, that the Court would not be able to properly deal with the more limited variation application on such information and should require the full disclosure from the Image Group.

55. On the submissions and evidence currently before me, although I am satisfied that the husband plays a significant role in the business, I am not able to find on the balance of probabilities that he has taken over from his father or that his father no longer takes the leading role in the business. This is not a small family

run business, where one can easily determine that it really is the alter ego of one of the spouses. I am satisfied that the current and historical earnings of the husband are relevant issues to this case. But I find as Bracewell J. did in ***G v G*** (1992) 1 FLR 40 that, although the wife is entitled to require from the husband such further information as is proper and necessary for the fair disposal of this matter, I do not have the jurisdiction to order a third party to provide the information sought.

56. Of course, it will be for the husband to satisfy the Court that the order should be varied. He must also satisfy the Court that what he states about his level of his current and foreseeable income is correct. If he chooses not to provide strong evidence backed up by sufficient supporting documentation to verify this and thereby satisfy the Court about his true income position or to counter any concerns that may arise from the experts report at the hearing, thereby leaving doubt as to his true income, then that is a matter for him if it then detrimentally affects his case.

57. The husband should use his best endeavours to obtain evidence which clearly confirms his income position, and he may be in a good position to do so as his father is in effect the person who could most likely make the decision about what disclosure can be made by the company to assist his son's application.

58. Regrettably, I do not feel able to make the orders sought in paragraph 1.iii of the wife's October 2014 summons. Of course, it is open to Counsel for the wife, armed with the expert's report, to cross-examine the husband in relation to his income and it is a matter for the husband if he wishes to disclose further evidence which might meet the likely issues raised when he is being so questioned.

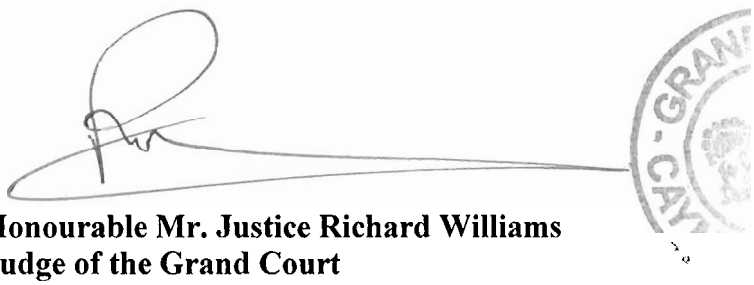
59. Similar issues are raised by the disclosure sought in paragraph v. of the wife's summons in relation to Bliss. The husband contends that he is not the owner director or an employee of Bliss. It appears that it is his girlfriend, with whom he says he is not cohabiting, who has the interest in that business. There is no evidence before me that suggests that the husband's contention is questionable. I am not satisfied that it would be appropriate to order the husband to answer paragraphs 30 - 33 of the wife's Request for Further and Better Particulars. However, he should give a full and proper answer in relation to paragraph 29 of the said pleading, as that would be information in his control and possession.

60. In relation to paragraph iv. of the wife's summons, if he has not already done so, the husband is directed to provide a detailed itinerary of all personal travel, and costing of all personal flights backed up with invoices for flights from 25 June 2012 to date. He should also provide a detailed itinerary of all business travel undertaken with the Company in the same period, as this may be relevant to making an informed determination about the degree of his role in Image. For the

1 avoidance of doubt, I do not order the other disclosure sought in paragraph 25 of the Request.

Costs

61. Having regard to the orders for disclosure made against both parties, unless I hear from the parties within seven days of the delivery of the perfected judgment that they wish to make further submissions on the issue, I intend to make no order for costs in relation to the Summons and Cross-Summons.



Honourable Mr. Justice Richard Williams
Judge of the Grand Court