IN THE GRAND COURT OF THE CAYMAN ISLANDS

FAMILY DIVISION

CAUSE NO: FAM D 183 OF 2011

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| BETWEEN | LISA ANDREA FRANKLIN | PETITIONER |
| A N D | GARY OLIVER FRANKLIN | RESPONDENT |

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 26TH – 29TH MAY 2014

Appearance: Mr. Connor Fee of Samson & McGrath for the Petitioner
Mr. Paul Murphy of Stuarts for the Respondent

*Maintenance Orders, power of Court to attach pension funds to meet such Orders, nature of Court's jurisdiction to vary Orders retrospectively, whether jurisdiction exists to remit payments already ordered and are due and owing.*

## RULING

1. On the 26th May 2014, on the application of the Petitioner and cross-application of the Respondent, I made an order in the terms attached at the end of this ruling.

2. During the course of the hearing, questions were raised on behalf of the Respondent by Mr. Murphy about the jurisdiction of the Court to make orders which would restrain pension funds for the purpose of enforcement of maintenance payments which have not yet accrued. These are pension funds presently held by the Public

Service Pensions Board ("PSPB") and potentially held by the Silver Thatch Pension Scheme, for the account of the Respondent.

3. No question of jurisdiction arises about the enforcement of the payment of arrears of maintenance now owing to the Petitioner in the amount of CI$30,755 and it is recognised that that amount can immediately be ordered to be recovered as against the funds held by the PSPB by way of a vested pension entitlement for the Respondent.

4. Mr. Murphy accepts that a garnishee order can be issued for that amount as an existing debt to be recovered from the funds held by the PSPB.

5. An affidavit by Jewel Evans Lindsay, the Managing Director of the PSPB, confirms that the value of the Respondent's accrued pension benefits is currently CI$51,723.52 and that on 8th November 2013, the Respondent elected to cash out his accrued benefit as he became entitled to do within one month after he ceased to be resident in the Islands. This statement from the PSPB reflects a policy that is established in section 43 of the National Pensions Law as applicable to accrued pension rights in other schemes (such as the Silver Thatch Pension Scheme) and which would make accrued benefits liable for attachment of payments due by order of the court upon divorce or separation.

6. Accordingly, the fund held by the PSPB for the pension account of the Respondent may be treated as a "*debt due or accruing due from the PSPB as garnishee to the credit of the Respondent as judgment debtor*" within the meaning of Grand Court Rules ("GCR") Order 45 and against which a garnishee order can properly be made

for the enforcement of the Petitioner's divorce maintenance judgment debt of $30,755.

7. Notwithstanding the foregoing, the present position with the Respondent's pension account with the Silver Thatch Scheme is different. It was confirmed, through emails from Victoria Taylor of Silver Thatch, that although the Respondent does have an account with them, at present there is no "debt due" to him. She explains that although a value of USD11,985.10 is currently ascribed to his 8,658 units with their fund, as he is not yet entitled to withdraw from the fund, having not yet elected to do so upon establishing his non-residency within the Islands (that is: his being absent from the Islands for six months or more) there is currently no accrued pension crystallized as a debt due to him.

8. It follows that an order for garnishee attaching a debt in the hands of the Silver Thatch Scheme may not yet be made: See *Webb v Stenton and others, Garnishee*[1]

**Mareva Injunction**

9. Mr. Fee on behalf of the Petitioner nonetheless applied for a Mareva injunction to freeze the Respondent's account with Silver Thatch (and the balance to be remaining in his account with the PSPB after payment of $30,755) for the purpose of securing future payments of the order for maintenance in the on-going monthly amount of CI$1,600.00.

10. He relies on the English Court of Appeal decision in *Jet West Ltd. And another v Haddican and Others*[2]

[1] *1882)11 QBD 518*
[2] *[1972] 2 All. E.R. 545*

11. That case is recent authority for the now well-settled and well-understood proposition, that the court has jurisdiction to order the restraint of assets in support of any judgment or order made by the court for the payment of money, whether or not the exact sum which will be payable has been quantified at the date of the order or at the date on which the Mareva relief is sought. It followed in that case that a Mareva injunction could be granted in support of a costs order, prior to taxation and quantification of the costs.

12. In his judgment on behalf of the Court of Appeal, Lord Donaldson MR explained the reasoning of the Court as follows (from p.547 d-f):

> *"In terms of principle the Mareva injunction was introduced in the 1970s because the courts held that they must necessarily have jurisdiction and did have jurisdiction to prevent parties to actions frustrating their orders by moving assets out of the jurisdiction or dissipating assets in one way or another, with a view to making themselves proof against a future judgment. Where you have someone who is already subject to a money judgment, including an order for costs, the same principle applies, namely that the courts will not allow people to set their orders to nought simply by removing assets from the jurisdiction. There are assets within the jurisdiction at the moment, albeit perhaps not very large assets, and therefore in principle there is no reason why the learned judge should not have made an order for a mareva-type injunction."*

13. I was satisfied that the existing order for maintenance which will accrue at CI$1600 per month, falls well within the parameters of that dictum.

14. There is every indication (as will be explained below) that the Respondent will continue to not satisfy that order and even after the presently accrued debt of CI$30,755 is paid from the PSPB fund, it is very likely that there will be further accrual of payments.

15. For that reason, as the attached Order reflects, I granted an injunction against the balance held by the PSPB for a period of one year. If within that time the Respondent resumes payment of the monthly maintenance and satisfies the Court that he will continue to do so, he may apply for the injunction to be discharged.

16. Failing that, the Petitioner will be at liberty to enforce any further accrued non-payments of maintenance against the amounts restrained.

17. I declined however, to make a similar order of restraint against the Silver Thatch account in the name of the Respondent. For one thing, the value of that account has not yet crystallized as a benefit due to him and so there could be uncertainty of application of the Mareva order as it purports to bite upon his aliquot share of the Silver Thatch Fund. I do not understand the Mareva jurisdiction as extending to assets such as "may yet become available" to a judgment debtor. It can bite only upon existing assets.

18. While the Respondent's interest in the Silver Thatch Fund may already be identifiable for the purpose of being restrained by reference simply to the number of units said to be allocated to his account (8,658) – this was not sufficiently explained to satisfy me that a Mareva injunction could be ordered as attaching to those units which, as I am

informed, simply represent an uncrystallized debt which will be owed to the Respondent only when it is crystallized upon the conditions described being satisfied.

19. For another thing, there is no current judgment debt due and unpaid. The accrued arrears are now recoverable and are to be recovered as against the PSPB account in the name of the Respondent. That account is restrained and will be good to cover any further arrears for at least one more year.

**Jurisdiction to remit maintenance arrears**

20. Mr. Murphy, in seeking to advance the Respondent's cross-summons for an order to remit (in the sense of pardoning or cancelling) the payments already due to the Petitioner, urged me to accept jurisdiction to do so in respect of the entire amount of CI$30,755 now claimed by the Petitioner.

21. I immediately refused that application for want of jurisdiction. Moreover, in light of the Respondent's on-going failure to pay maintenance resulting in the very large debt, such an order would have been a deeply unattractive proposition, even if the jurisdiction were available.

22. From his own affidavits filed in these proceedings, it appears that the Respondent stopped paying maintenance even before he resigned from his job and left the Islands to live in the UK. That was a job at the Turtle Farm from which he earned the significant salary of CI$4,400 per month.

23. From this, he was required to meet the maintenance payment of CI$1600 per month for his three children – leaving him with some CI$2,800.00 per month for himself.

24. Despite that state of affairs, the Respondent had claimed to be unable to meet the order and twice applied for its variation which was twice refused, first by Williams J. on 20th June 2012 and later by Henderson J. on 17th February 2013. Henderson J. instead made an order for

attachment of the Respondent's earnings in the amount of $1,600, addressed to the Cayman Turtle Farm.

25. Henderson J. did, however, grant the Respondent liberty to further apply to vary the order in light of genuine change of circumstances. But it appears that this was not the course preferred by the Respondent who, having remarried, perceived it instead to be in his own best interest to resign from his job at the Turtle Farm and take up residence in the UK.

26. His affidavit states that he was prodded towards that course because he had felt "crippled" by the Attachment of Earnings Order and left with no alternative but to leave the jurisdiction in an attempt to make a "clean start".

27. It is in these circumstances that the Respondent has applied to have "*the whole of the arrears remitted*" and to have the obligation to pay on-going maintenance "*reduced to zero until he obtains employment and can resume payments*".

28. I refused to make either order.

29. As to the lack of jurisdiction for the former, I referred Mr. Murphy in this regard to my recent ruling in the matter of A.T. v T.T., Cause D13 of 2002, 31st March 2014.

30. There it was argued that the applicant mother was barred from seeking to recover maintenance payments which had accrued owing and remained unpaid over a number of years. In support a reported "*practice or convention*" of this court, was cited as purportedly following the UK practice, which is itself based upon a statutory provision in the UK.

31. I remarked as follows:

> *"The statutory provisions in Article 32(1) of the Matrimonial Causes Act 1973 (UK) which require a party to first get the leave of the Court*

*before bringing enforcement proceedings in respect of arrears which are due for more than 12 months, have not been adopted as part of the laws of the Islands.*

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

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

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

32. The Respondent here does not invite me to remit the arrears of maintenance because of their age. He simply invites the Court to extinguish them because, as he asserts, he cannot afford to pay them. His application nonetheless assumes the existence of the jurisdiction in the Court to remit an existing debt and obligation owed to his children no less than that owed in A.T. v T.T. to the children of that applicant and which was found not to be remittable simply as a matter of the Court's "practice or convention".

33. To meet that obstacle, Mr. Murphy invoked the Court's jurisdiction to vary an order made in the context of matrimonial proceedings, such as the present order.

34. He cited sections 21 and 23 of the Matrimonial Causes Law (2005 Revision) (the "MCL") which together provide (as relevant):

> *"21. At the time of pronouncing a decree under the Law, the Court shall, as appropriate, make orders for –*
>
> ...
>
> *(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse;*
>
> *(f) providing for periodic payments from the property of either spouse for the children of the marriage and for the other spouse...."*

35. And section 23 –

> *"23. Either spouse or the personal representative of either spouse may make application for the variation of any order made under section 21, and the Court, after hearing the parties, may make such variation."*

36. This is clearly a wide general power to vary orders made under section 21 (here specifically maintenance orders) but the question now posed is whether such variations may be made with retrospective effect so as, effectively, to extinguish the obligation to make maintenance payments which have already accrued.

37. For this proposition, Mr. Murphy relies again upon English case authority decided under the equivalent English statutory provisions.

38. In *Worden v Worden [ 1981] 3 WLR 10,* the English Court of Appeal construed the provisions of the Matrimonial Causes Act 1973 ("the MCA"), Section 35 which

enabled the English courts, in the following terms, to make orders varying earlier orders:

> *"(1) Where a maintenance agreement is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident in England and Wales, then subject to subsection (3) below, either party may apply to the court or to a magistrate's court for an order under this section.*
>
> *(2) If the court to which the application is made is satisfied either (a) that by reason of a change in the circumstances in light of which any financial arrangements contained in the agreement were made or, as the case may be, so as to contain financial arrangements; or (b) that the agreement does not contain proper financial arrangements with respect to any child of the family, then subject to subsection (3), (4) and (5) below, that court may by order make such alterations in the agreement – (i) by varying or revoking any financial arrangements contained in it, or (ii) by inserting in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family, as may appear to that court just, having regard to all the circumstances, including if relevant, the matters mentioned in section 25 (3) above; and the agreement shall have effect thereafter as if any alteration made by the*

*order had been made by agreement between the parties and for valuable consideration (emphasis added).*

39. "*The matters mentioned in section 25(3) above*" include matters like those which fall to be considered by this Court when making provisions under the local MCL, including the financial needs of children and the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.

40. However, for the purposes of the present contention of Mr. Murphy – that a variation order may have retrospective effect including so as to enable the court to remit maintenance payments already accrued and owing – he relies on the following dictum from Lord Justice Ormrod on behalf of the Court of Appeal by reference to the words last in emphasis above in section 35(2) of the MCA:

> *"...Mr. Ralls submits that in general the Court has power in the exercise of its various jurisdictions under the Matrimonial Causes Act 1773 to vary its own orders retrospectively. He relies on two cases in this court, MacDonald v McDonald [1964] P.1 and Style v Style and Keiller [1954] P. 209, and there is no doubt that both of those cases establish beyond any possibility of doubt that the court, in so far as its own orders are concerned, has an almost unrestricted power to vary them retrospectively and, moreover, retrospectively beyond the date of the application for variation, that the power to vary extends backwards in the case of an order for periodical payments after*

*divorce, to the date of decree nisi; or in the case of an alimony pending suit, to the date of the petition....*

*I am impressed by that argument...I therefore think that Mr. Ralls is right and that those words*

> *"...and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration."*

*can properly be read ...as if the words "then" appeared instead of "thereafter"...it would then read "...and the agreement shall have effect then as if any alteration..." meaning clearly that the agreement is to continue in force with the variation inserted by the court. I see no difficulty in reading the section in that way and I see grave disadvantages in treating those words as imposing so severe a limitation on the jurisdiction and powers of the court as to cause inevitably severe injustice."*

41. Mr. Murphy submits that section 23 of the MCL should be construed in the same way as vesting this Court with the jurisdiction to vary orders retrospectively; in effect invoking the same inherent power the English Court was deemed to have by the earlier cases cited by Ormrod LJ (above) and confirmed to exist by his dictum.

42. For good measure Mr. Murphy also pertinently points to the fact that provisions now appearing in section 10 of the First Schedule to the Children Law 2012 dealing with

the alteration of Maintenance Agreements by order of the court, is in terms practically identical to section 35 of the MCA 1973 considered by Ormrod LJ (above).

43. He naturally argues therefore that section 10(4) of the First Schedule should also read as if the word "then" is substituted for the word "thereafter" as follows:

> *"Where the maintenance agreement is altered by an order under this paragraph, the agreement shall have effect then as if the alteration had been made by agreement between the parties and for valuable consideration."*

44. Given that the approach of the English Court of Appeal to the construction of the words in the statute proceeded on the basis of a pre-existing inherent jurisdiction in the court to vary maintenance agreements and its own orders for maintenance retrospectively, I can see no basis for saying that the local provisions should be construed differently.

45. But I am not satisfied that Ormond LJ intended the sort of complete and far-reaching retrospectivity contended for by Mr. Murphy.

46. A finding that the Court might cast its order to operate retrospectively is not the same as the finding of a power to remit the payment of maintenance which is already accrued and owing.

47. I am not persuaded that Ormrod LJ had any such far-reaching consequence in mind in his interpolation of the word "then" for "thereafter" in section 35(2) of the MCA 1973.

48. Indeed, on the facts of the case then before the Court of Appeal, no such construction would have been necessary.

49. The facts were briefly (as taken from the headnote) that in 1975, the husband and wife had agreed to live apart and that the husband should pay a monthly sum for the maintenance of the wife and two children of the family.

50. In February 1981, the wife obtained a summary judgment against the husband under R.S.C. Order 14, for £3,796 in respect of arrears of the agreed payments. The Master stayed execution of the judgment pending the determination of the husband's application to vary the 1975 agreement because of an adverse change in his financial circumstances. At first instance, the Court (per Balcombe J.) held (as a preliminary point), that the court had no power under section 35(2) of the MCA 1973 to back date a variation of the maintenance agreement, by reason of the final phrase of the subsection "*and the agreement shall have effect thereafter as if any alteration made to the order had been made by agreement between the parties and for valuable consideration*". This is the decision which the Court of Appeal overturned by construing the word "thereafter" as if it read "then".

51. There are further words from Ormrod LJ which sought to explain the meaning he intended to convey (from paragraphs F-H):

> *"If Balcombe and Hollings JJ;s [at first instance] construction is right it leads, as has been pointed out, to this extraordinary anomaly that the moment when the variation takes effect, no matter what the justice of the case, must be the date on which the court makes its order which in some ways, is a wholly irrelevant date. It means that a husband would be deprived of the benefit of a variation to which he is entitled insofar as justice is concerned, by a freak of being unable to get this*

*case heard owing to court arrangements for a month or two months, or as the case may be, and I find it difficult to accept, unless the section is explicit, that the power of the court in such circumstances is restricted to the moment when the order itself is made. It is highly anomalous that the relief should not be capable of being granted at least from the date of the application for that relief". (Emphasis added)*

52. What this would mean was further sought to be explained by Waterhouse J in his brief judgment on behalf also of the Court of Appeal:

*I respectfully agree with Ormrod LJ that the wide powers conferred upon the court by the earlier provisions of section 35(2) point against a restrictive interpretation of the last clause of the subsection.*

*In my judgment the word "thereafter" means no more than "then" in this context and the effect of the last clause is simply to make clear that the agreement survives and continues, once the order has been made, in its varied form: thus the variation by order may be retrospective, just as an agreed variation might have been retrospective."*

53. It was therefore on the basis of that construction that the wife's application for the enforcement of her judgment for arrears for £3,796 was to be considered in light of any variation of the agreement for maintenance then to be imposed by the order of the court made on the husband's application. It seems that such an order retrospectively reduced the amount to that which she should have been entitled and so reduced the amount of the arrears. But even that construction is not entirely clear from the

judgment which on one view of the language used, the word "then" carried the distinctly prospective connotation of "from then onward". But be that as it may, even a retrospective application that would vary the amount to that which the wife would have been properly entitled, is not the same thing as an order that would purport to remit the amount of accrued arrears which were properly ordered in the first place and which remain due and owing.

54. Yet that is precisely what is proposed now by Mr. Murphy on behalf of the Respondent and in effect, it is the same as was proposed on behalf of the respondent in *A.T. v T.T.* as a bar to that mother's application for an order to enforce the payment of arrears which were due in that case and was refused for want of jurisdiction to make such an order.

55. I see no basis for departing from that decision here.

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

would, in my view, be inappropriate for the Court to invoke its inherent powers to bridge the jurisdictional gap.

57. I note, in passing, that the need for legislative change was perceived in England and Wales to vest the similar jurisdiction in the courts there, as also explained in A.T. v T.T. and that this was so, despite the currency of the provisions discussed in *Warden v Warden (above).*

58. I should go on to emphasise though that in any event, given the circumstances of this case, and his own behaviour, I would not have made an order in favour of the Respondent remitting the payments which are due and owing.

59. By resigning from his job and relocating to England, (where he has been and remains unemployed) he deliberately put himself in the position of not being able to make the payments which were ordered and which have accrued. It is apparent from his own affidavit evidence, that he need not have done so and was therefore reckless as to the consequences for his children who depended upon him for support. The result was that the entire burden for the children's support has fallen upon the shoulders of their mother and it is her entitlement to recover the sums owing that is proposed to be denied.

60. The position of the Respondent here is in my view, indistinguishable from that of the respondent doctor in the case of *V v V*[3] who sought a prospective change to an order. In that case, Foster J. found as follows (as taken from the CILR Note):

> *"Although the Court would exercise its discretion to vary an order which a party was no longer able to meet, that was not the case here.*

[3] 2010 (2) CILR Note 1

*The husband needed to establish a genuine, unavoidable and bona fide change in his circumstances, meaning he could no longer afford the payment originally ordered, and he had not done so. He had provided no reason or justification for leaving his practice in the Islands – instead, he had of his own free choice put himself in a position to which his earnings were considerably reduced, jeopardizing his ability to fulfil his responsibilities and legal obligations under the interim order in favour of his children.*

*Nor had he given any reason why he could or should not return to the Islands to resume his practice and meet those obligations. Rather, it appeared that he had deliberately left open his possibilities of his returning to his practice in the Islands, and there was no legal reason why he could not do so. The Court would therefore refuse the application."*

61. For similar reasons arising from the circumstances brought about by the conduct of the Respondent in this case, his applications for the suspension of payment of maintenance going forward (however temporary) and for the remission of the payment of sums accrued and owing, were refused.

Hon. Anthony Smellie
Chief Justice

Oral Ruling delivered on 2nd June 2014
Written Ruling handed down on 13th June 2014

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BEFORE THE HON. CHIEF JUSTICE
THE 26TH MAY 2014

Appearances: Mr. Connor Fee of Samson & McGrath for the Petitioner
Mr. Paul Murphy of Stuarts for the Respondent
Ms. Melanie Ebanks Jackson of the Public Service Pension Board (PSPB)

**MINUTE OF ORDER**

On the Petitioner's Summons:

(i) Enforcement of garnishee order granted by direction to the PSPB to pay the arrears now standing in the amount of $30,755 to the Petitioner from the pension fund held by the PSPB for the account of the Respondent.

(ii) An injunction is also granted restraining the payment out to the Respondent by the PSPB of the balance (approx. $20,800) remaining in his pension account for one year from today or earlier by order of the Court.

The Respondent will be at liberty to apply to lift the restraint upon suitable arrangements being made for payment of the maintenance for his children and the Petitioner will be at liberty to apply for a further order of garnishee against the balance before the expiry of the period of the restraint to enforce any further unpaid arrears.

(iii) Order of restraint against any liquid interest that the Respondent might have in the Silver Thatch Pension Fund is refused because no debt owed to him by the Pension Fund has as yet crystallized.

(iv) In keeping with paragraph 3 of the summons (and on this score with the agreement of the Respondent through Mr. Murphy), the Petitioner shall be entitled to apply for any passports for the children (including any passport renewals) to complete any travel documentation or authorisation required in respect to the children, to complete any documentation or make any decisions to do with schooling or authorisation for school activities for the children, and to complete any documentation or make any decisions to do with the children's medical care, without the need for her to obtain the signature or consent of the Respondent and his consent to such matters is dispensed with; provided that the Respondent will have liberty to apply to vary this provision of the order.

On the Respondent's cross-summons:

(i) The application that the amount of the child maintenance payable to the Petitioner in the amount of CI$1600 be temporarily suspended and reviewed three months from the date of the Order is refused.

(ii) The application that any arrears of maintenance now assessed as owing to the petition be remitted is refused. Likewise, the application for remission of any debt owed in respect of the educational, medical, optical and dental needs of the children.

(iii) Written reasons to follow in respect of the financial provisions of this order.

Hon. Anthony Smellie
Chief Justice

GRAND COURT CAYMAN ISLANDS