In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2016: 050

BETWEEN:

C.R.M.R.

Applicant

-and-

K.L.R.

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: Mr. Adam Richards, Marshall Diel & Myers Limited, for the Plaintiff
Ms. Jacqueline MacLellan, MacLellan & Associates, for the Respondent

Dates of Hearing: **3 – 4 December 2018**

Date of Judgment: **28 January 2019**

JUDGMENT

Ancillary relief; Object of spousal maintenance; Requirements of compensation for relationship disadvantage; Relevance of tailpiece in Section 29(1) of Matrimonial Clause Act 1974

Introduction

1. This is an appeal by the Petitioner/Wife ("Wife") against an Order for maintenance made by the Acting Registrar, R Barritt ("Registrar") in a Judgment dated 7 November 2017. There is also a cross-appeal by the Respondent/Husband ("Husband") in relation to the same Order made by the Registrar.

2. The appeal is governed by RSC Order 58, which deals with appeals from the Registrar, and which is applied by reason of Rule 3 of the Matrimonial Causes Rules 1974. The appeal is by way of rehearing (*T v T* [2014] Bda LR41 following *T v T* 2006 N0 183). Despite the fact that the appeal is by way of rehearing, the parties have agreed that they would not give oral evidence again and that the appeal would be determined on the basis of the existing record.

3. By her Judgment, the Registrar ordered that the Wife should pay to the husband the sum of $17,500 per month for child and spousal support. The maintenance was backdated to October 2016 (being the date of the initial application for ancillary relief) and was to be reviewed in October 2020 (i.e. 3 years from the judgment and 4 years from the date used for backdating). In this appeal, the Wife seeks a reduction in the maintenance and an Order that the maintenance be expressed as for a specific term. The Husband seeks an increase in the maintenance allocation.

Previous Court Orders and Agreements relevant to the issue of maintenance

4. The Registrar helpfully set out the previous Court Orders and agreements made by the parties which have a bearing on the issue of maintenance before the Court.

5. First, the Registrar noted, that on the application made by the Wife, the Supreme Court granted a freezing injunction on 18 May 2016, which ordered the Husband not to dispose of, deal with or diminish the sum of $150,000 removed from the joint bank account between 8 and 12 April 2016 and the Husband was also ordered to repay the funds to the joint account within 14 days. It is an agreed fact between the parties that the funds were not returned to the joint account. For

present purposes, the parties accept that the Husband had use of the funds in the amount of $150,000.

6. Secondly, in April 2016, the Husband left Bermuda for an agreed trip to South Carolina with the child of the family and, at the conclusion of the planned two week vacation, he advised the Wife that he did not intend to return with the child to Bermuda. The Husband initiated proceedings related to the child in the US whilst the Wife commenced an application under the Hague Convention for the return of the child to Bermuda. Eventually, after both parties incurred significant legal fees and after four months, these applications were resolved by consent with the child being returned to Bermuda in August 2016, and the husband paying towards the Wife's legal costs, the sum of $30,000. The Husband also returned to Bermuda to reside in August 2016.

7. Thirdly, the Husband initially sought maintenance in the amount of $20,000 per month by way of Ex Parte Summons dated 2 November 2016. Following a hearing before the Registrar, on 30 November 2016, the Wife agreed to pay the Husband's rent for December in the amount of $4,500 plus $8,000 per month in maintenance for December 2016, January 2017 and February 2017. The Wife continued to make voluntary payments to the Husband of $8,000 per month after the Order expired and 18 April 2017, the parties agreed that the Wife would pay the Husband $10,000 per month in maintenance commencing 1 May 2017 and continuing until matters of ancillary relief were resolved.

8. Fourthly, the parties have reached, in full and final satisfaction of all claims of a capital nature, an agreement which provides that the Husband receives a payment of $250,000; the Husband retains the benefit of the $150,000 that was the subject of the injunction application; the Husband retains the property he owns with his mother in his native South Carolina; the Husband retains one of the former matrimonial cars; the Wife retains the full benefit of her business; and the Wife retains the second former matrimonial car. As this agreement has not been reflected in a Consent Order or written agreement at the commencement of the hearing before the Registrar, both counsel confirmed that the Court should not

look behind the agreement whereby all capital claims were resolved on a full and final basis. The parties were represented by counsel and had full and frank disclosure of relevant financial information at the time the agreement was reached. On the basis of these representations, the Registrar expressly stated that she has assumed and has operated on the assumption that "*I cannot interfere with the settlement of the Husband's capital claims, and have operated on the basis that all capital claims were resolved in full and final terms by the agreement"* [13]. Counsel for the parties made the same representations to this Court at the hearing of this Appeal.

Background facts

9. In her Judgment, the Registrar set out the uncontroversial background facts relating to these parties and the underlying dispute which I gratefully adopt. The Husband is a US citizen and the Wife possesses Bermudian status. The Wife is now 42 years of age and the husband is 43 years of age. The Wife is a self-employed doctor specialising in obstetrics and gynaecology. At the time of the hearing, the Husband had not worked since 2009, and planned to return to full-time education starting in September 2017.

10. The Husband and Wife met at college in the United States. After College, the Husband and Wife worked and resided in the US from 2003 through 2009. The Husband obtained a degree in psychology and worked with consulting firms gaining experience in various business industries. The Wife continued medical studies and worked as a doctor.

11. After dating for approximately four years, the parties started living together in 2003. The parties were married on 1 May 2004. The child of the family was born on 15 June 2009 while the family was residing in the US. After the child was born, and after first relocating within the US, the parties moved to Bermuda. There is a dispute as to the parties' intention when they moved to Bermuda and how long they were going to remain in Bermuda. It is agreed that in October 2015, the Wife advised the Husband that she wanted the family to remain in

Bermuda to continue a medical practice. The Wife's medical practice in Bermuda was established during the marriage.

12. The Husband did not commence employment in Bermuda. The Husband contends that it was agreed that he would be a stay-at-home father and the primary caregiver to the child until the family returned to the US when he would return to full-time education. The Wife contends that it was always intended that the Husband would return to work once the child was in full-time education wherever the family was residing.

13. The parties separated briefly in 2014 but reconciled shortly thereafter. The party separated permanently in 2016. Decree Nisi was pronounced on 26 August 2016 and made Absolute on 20 October 2016. The length of cohabitation and marriage was 13 years.

14. The child of the family is now 9 years old, and the parties agreed a shared care arrangement in 2017. The Husband did apply for his extension of spousal rights certificate but that application was unsuccessful. The Husband is taking legal advice with a view to judicially review that decision of the Department of Immigration.

Parties' position of the Registrar

15. Before the Registrar, the Wife contended that the income from the business was in the region of $35,000 per month. The Wife further contended that the income from the business had been on a downward trend due to (a) the time spent by Wife dealing with the breakdown of the marriage and the various application in 2016; (b) there are now seven OB-GYN's practising in Bermuda as compared to four when the Wife first established her practice; and (c) birth rates were on a declining trend in Bermuda. The Wife argued that as a result, past earnings cannot be used to determine the current earnings or earning potential, and that only $35,000 should be attributed to her by way of regular monthly income.

16. The Wife accepted that she should pay 100% of the child's expenses including the child's school fees, extra-curricular activities, school uniforms and supplies, health insurance, co-payments and any miscellaneous expenditure until such time as the Husband is employed. She also accepted that she should continue to pay the Husband's health insurance premium until the Husband is employed.

17. The Wife contended that the Husband should receive an award based upon his needs with a view to achieving a transition to independent living as soon as reasonable. She proposed that the Husband receive an award of $10,000 per month in the proportions of two thirds spousal maintenance and one third child maintenance based upon the following:

Rent	$4,500.00
BELCO	$378.71
Digicel	$300.00
Cablevision	$300.00
Groceries	$1,300.00
Travel	$1,175.00
Education	$1,000.00
Household/Entertainment	$800.00
Total	$9753.71

18. The Wife further proposed that the Order should have a three-year extendable turn with the obligation on the Husband for the extension. The issue of child maintenance would also be reviewed at the end of the three-year period by which time the Husband should be employed and should be able to contribute towards the indirect expenses for the child.

19. The Husband submitted a list of expenses which included those expenses which would allow him to be compensated for the economic disadvantages which he contended he suffered as a result of the role which he assumed during the marriage. The expenses were divided into two categories: (1) expenses for himself including his educational costs and the child; and (2) amounts for him to be

compensated for his economic disadvantage. These calculations listed expenses of $28,393.16 as follows:

Household

Household Rent	$4,500.00
BELCO	$1,000.00
Digicel	$300.00
Cablevision	$400.00
Cleaner	$1,000.00
Food	$1,950.00
Maintenance/Entertainments	$1,841.50
Car – Gas	$200.00
Car – License and Insurance	$333.33
Subtotal	$11,524.83

Travel Costs

Travel costs with child	$1,333.33
Travel costs without child	$1,900.00
Subtotal	$3,233.33

Educational

Business Degree	$1,460.00
Subtotal	$1,460.00

Compensation Amounts

New Car	$1,250.00
Pension	$5,000.00
House Purchase Fund	$5,925.00
Subtotal	$12,175.00

20. The Husband's position was that, based on the principles of fairness the Wife pay $30,000.00 per month over the next four years. If this amount was ordered by the

Court, the husband did not require that the Order should be back dated. In the alternative, the Husband submitted that if the Court was not prepared to award an amount for compensatory support, then his needs should be generously interpreted so that the monthly amount would be $22,093.00 to take into account an increased monthly rent and the purchase of car. The Husband contended that in this event the award should be back dated to the date of the application. In either circumstance, the Husband submitted that the amount of the Maintenance Order should continue until the Wife applied for an Order ceasing or reducing maintenance.

The Registrar's decision

21. Dealing with issues of law, the Registrar noted that the Court's jurisdiction relied upon was to be found in sections 27, 28 and 32 of the Matrimonial Causes Act 1974 ("the Act") to order periodical payments, for such period of time, as the court determines. The Registrar noted that in reaching a decision, the Court must have regard to all the circumstances of this case including the matters specified in paragraph (a) to (g) of section 29 (1) of the Act as well as the relevant case law. Section 29 (1) provides:

> "It shall be the duty of the court in deciding whether to exercise its powers under section 27(1)(a), (b) or (c) or 28 in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters—
>
> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

22. The Registrar also referred to as the House of Lords decision in *Miller v Miller* [2001] 1 AC 596 in support of the proposition that "*compensation and sharing are a requirement of fairness when determining the issue of financial relief, and that there are no statutory provisions for restricting periodical payments to the particular purpose of "maintenance"".* In this regard, the Registrar relied upon the following passages from the speech of Lord Nicholls:

> *[32] In particular, I consider a periodical payments order may be made for the purpose of affording compensation to the other party as well as meeting financial needs. It would be extraordinary if this were not so. If one party's earning capacity has been advantaged at the expense of the other party during the marriage it will be extraordinary if, where necessary, the court could not order the advantaged party to pay compensation to the other out of his enhanced earnings when he receives them…*
>
> *…*
>
> *[34] The Wife's financial needs, or her 'reasonable requirements', are now no more a determinative or limited factor on an application for a*

periodical payment order than they are on an application for a lump sum…

23. In support of the proposition that compensation is a strand of fairness, rather than a separate head of claim, the Registrar referred to decision of Potter P. in *VB v JP* [2008] 1 FLR 742 and in particular the following passages:

> *[52]…Further, I endorse the warning sounded by the judge against the introduction of an approach which seeks to separate out and quantify the element of compensation, rather than treating it as one of the stands of the overall requirement of fairness in the assessment of the parties' joint contribution to the marriage, where the wife, as a result of joint marital decision has sacrificed her own earning capacity in the interests of bringing up the family.*
>
> *[59] …in cases other than big money cases, where a continuing award of periodic payments is necessary and the wife has plainly sacrificed her own earning capacity, compensation will rarely be amenable to consideration as a separate element in the sense of a premium susceptible of calculation with any precision. Where it is necessary to provide ongoing periodic payments for a wife after the division of capital assets insufficient to cover her future maintenance needs, any element of compensation is best dealt with by a generous assessment of her continuing needs unrestricted by pure budgetary considerations, in length of the contribution of the wife to the marriage and the broad effect of the sacrifice of her own earning capacity upon her ability to provide her own needs following the ends of the matrimonial partnership."*

24. Having regard to these authorities the Registrar concluded that "*the principle of fairness requires that the Husband shall receive an award of maintenance, and that fairness requires consideration of needs, compensation and sharing…. As such, I have reached my decision in relation to quantum of maintenance on the basis of the Husband's needs as "generously interpreted"".*

25. It does not appear that the Registrar made any finding that this was a case where compensation should be awarded to the Husband on the basis that the Husband had suffered a relationship generated disadvantage. However, it should be noted that the reference to the phrase that needs should be "*generously interpreted"* does suggest that the Registrar had the concept of compensation in mind. The phrase likely comes from the decision of Potter P. *VB v JP* [2008] 1 FLR 742, [59].

26. The Registrar found that the Wife's income from the business ranged between $50,000 and $58,000 per month. In relation to the Husbands expenses, the Registrar found that the Wife's proposed monthly maintenance of $10,000 did not take into account the entirety of the Husband's reasonable expenses, and that the Husband's proposed amount of $22,093.00 included expenses were not reasonable in the circumstances. The Registrar concluded that the sum of $17,500 represented "*a generously interpreted monthly maintenance payment for the Husband".* The Registrar back dated the Order to October 2016 and the amounts paid by the Wife to the Husband in monthly maintenance during that period to be taken into account.

Outline of the legal issues in the appeal

27. It is argued on behalf of the Husband that the Maintenance Order made by the Registrar did not include an element of compensation for economic disadvantage as a result of the relationship such as pension, down payment for a home and a new car which should have been included in the monthly maintenance amount. Secondly, it is argued on behalf of the Husband, that the Registrar should have taken into account that the legal regime in relation to ancillary relief is different from the law in England, as the law in Bermuda has not repealed the tailpiece in section 29(1) of the Act. The result of the tailpiece, it is argued, is that the Court should order maintenance to reflect that both parties should enjoy, as far as possible, the same standard of living. As a result, it is argued, the Husband should have comparable accommodation to that enjoyed by the Wife.

28. On behalf of the Wife, it is argued that the concept of compensation resulting from the relationship disadvantage is a defined concept and only applies where it can be shown by evidence that the disadvantaged party would have been earning more than the award made by the Court by way of maintenance. Here, it is argued, that there is no such evidence and as a result the Court is unable to conclude that there should be compensation resulting from the relationship disadvantage. Further, the legal regime in Bermuda is not materially different from the law in England. The tailpiece in section 29(1) has been considered in a number of cases in Bermuda where the Court is said that it simply represents the wider notion of "fairness". Furthermore, leading English decisions relating to the approach of the Court to ancillary relief applications have been followed in Bermuda, both by the Supreme Court and the Court of Appeal, without any qualification resulting from the retention of the tailpiece in section 29(1) of the Act.

Discussion

29. *Miller v Miller* [2006] 2 AC 618 is a landmark case in the development of the appropriate approach which the Court should take in the context of the financial consequences of the breakdown of a marriage. The leading judgments of Lord Nicholls and Baroness Hale set out that the object of the exercise of the discretionary powers of the Court is to achieve "fairness" between the parties. In order to give some content to the notion of fairness the judgments in *Miller* identified three strands: needs of the parties, compensation payable to one of the parties relating to relationship disadvantage and the sharing of matrimonial assets. These three strands and in particular the concept of compensation relating to the relationship disadvantage have been further refined and developed in subsequent cases.

30. Counsel for the Husband relies heavily upon the speeches of Lord Nicholls and Baroness Hale in *Miller* in support of her submission that this is a classic case where the Husband has suffered a relationship disadvantage for which he should be awarded compensation by way of enhanced periodical payments from the

future income of the Wife. In particular, Counsel relies upon the following passages from the speech of Lord Nicholls and Baroness Hale. The passage from speech of Lord Nicholls (paragraph 32) has already been cited at [22] above. The passage from the speech of Baroness Hale is the following:

> "140. A second rationale, which is closely related to need, is *compensation for relationship-generated disadvantage*. Indeed, some consider that provision for need is compensation for relationship-generated disadvantage. But the economic disadvantage generated by the relationship may go beyond need, however generously interpreted. The best example is a wife, like Mrs McFarlane, who has given up what would very probably have been a lucrative and successful career. If the other party, who has been the beneficiary of the choices made during the marriage, is a high earner with a substantial surplus over what is required to meet both parties' needs, then a premium above needs can reflect that relationship-generated disadvantage."

31. Subsequent cases have focused upon the evidential burden assumed by a party seeking compensation related to the relationship disadvantage. The clearest discussion of what is required to be proved in order to establish a claim for compensation appears in the decisions of Mostyn J. in *SA v PA* [2014] 2 FLR 1028 and Moylan LJ in *Waggottt v Waggott* [2018] EWCA 727.

32. In *SA v PA*, Mostyn J. expressed the clear view that an award based upon compensation should be rare and exceptional. Furthermore such an award should only be made where there is clear evidence and not merely speculation:

> "36.Obviously I am bound by the decision of the House of Lords. However, in the light of the later authorities, I think that the principles concerning a compensation claim can properly be expressed as follows:-
>
> i) It will only be in a very rare and exceptional case where the principle will be capable of being successfully invoked.

ii) Such a case will be one where the Court can say without any speculation, i.e. with almost near certainty, that the claimant gave up a very high earning career which had it not been foregone would have led to earnings at least equivalent to that presently enjoyed by the respondent.

iii) Such a high earning career will have been practised by the claimant over an appreciable period during the marriage. Proof of this track-record is key.

iv) Once these findings have been made compensation will be reflected by fixing the periodical payments award (or the multiplicand if this aspect is being capitalised by Duxbury) towards the top end of the discretionary bracket applicable for a needs assessment on the facts of the case. Compensation ought not be reflected by a premium or additional element on top of the needs based award.

37. Having regard to what I said in *B v S* at paras 73-79, it will be apparent that it is my firm belief that save in highly exceptional cases an award for periodical payments should be assessed by reference to the principle of need alone."

Moylan LJ in *Waggott* reconfirmed the approach of Mostyn J. in *SA v PA* :

"140. I next deal with the compensation principle. I do not accept Mr Turner's submission that the compensation principle is to be applied not only when the applicant has sustained a financial disadvantage in his or her prospective career but also when the respondent has sustained a financial benefit. In my view it is clear from *Miller* that compensation is for the "disadvantage" sustained by the party who has given up a career. I appreciate that it is based in part on the other party's career having benefited but I regard that as an assumption rather than an evidential issue which has to be determined, in part because of the difficulty of undertaking any such exercise. In practice it is a claim which appears very rarely to have been established and I do not intend to encourage any more

extensive or expensive exploration of the issue. However, as a necessary factual foundation the court would have to determine, on a balance of probabilities that the applicant's career would have resulted in them having resources greater than those which they will be awarded by application of either the need principle or the sharing principle. Further, the court must separately determine whether, and if so how, this factor should be reflected in the award so as to ensure that it is fair to both parties.

……..

142. I am also satisfied that the judge was right to reject the wife's claim to an award by application of the compensation principle. The judge's finding that the wife would have been earning less than £100,000 gross per year (£64,000 net) is a finding which cannot be, and has not been, challenged. There was, therefore, no basis for any such award because the amount awarded to the wife exceeded what she might have been entitled to under this principle. In reaching this conclusion, I have, of course, rejected Mr Turner's submission as to the manner in which this principle is applied and have decided that it requires the applicant spouse to have sustained a financial disadvantage greater than the amount of the proposed award calculated by reference to the other principles."

33. Accordingly, these recent English authorities make clear that an award relating to the compensation strand will be rare and exceptional. It can only be based upon the disadvantage suffered by the claiming party and not based upon the advantage acquired by the respondent. Further, the Court will only consider an award relating to compensation if there is clear evidence adduced by the claimant that the claimant would have had greater resources available to him then awarded by the court based upon the needs and sharing principles.

34. The Court of Appeal in W*aggott* also considered whether the sharing principle can apply to the financial resources represented by the future income of the respondent and answered that question in the negative. Moylan LJ explained:

> "121. First: (i) is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share?
>
> 122. In my view, there are a number of reasons why the clear answer is that it is not.
>
> 123. Any extension of the sharing principle to post-separation earnings would fundamentally undermine the court's ability to effect a clean break. In principle, as accepted by Mr Turner, the entitlement to share would continue until the payer ceased working (subject to this being a reasonable decision), potentially a period of many years. If the court was to seek to effect a clean break this would, inevitably, require the court to capitalise its value which would conflict with what Wilson LJ said in *Jones v Jones*.
>
> 128. In my view *Miller* and the subsequent decisions referred to above, in particular *Jones* and *Scatliffe*, do not support the extension of the sharing principle to an earning capacity. The sharing principle applies to marital assets, being "the property of the parties generated during the marriage otherwise than by external donation" (*Charman v Charman (No 4)*, para 66). An earning capacity is not property and, in the context advanced by Mr Turner, it results in the generation of property *after* the marriage."

35. The end result is that unless a party can legitimately make a claim based upon the principles of sharing and compensation, that party's claim for ancillary relief would be determined by reference to the needs principle. In *SS v NS (Spousal Maintenance)* [2014] EWHC 4183, Mostyn J. reviewed the underlying policy rationale for spousal maintenance orders and the inherent limits of such orders. In particular Mostyn J. emphasises that a maintenance award should only be made by reference to needs, save in exceptional case where it can be said that sharing or compensation principle applies:

“46. Pulling the threads together it seems to me that the relevant principles in play on an application for spousal maintenance are as follows:

i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant. Here the duration of the marriage and the presence of children are pivotal factors.

ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv) In every case the Court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate in favour of the former.

vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.

viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary items being met from the bonus on a capped percentage basis.

ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party."

36. Counsel for the Husband appears to accept that this is not a case where the Husband can demonstrate, by reference to evidence before the Court, that had the Husband pursued his career that would have resulted in him having a higher income than awarded by way of maintenance by the Court. Accordingly, the present case does not fit neatly into the conventional claim for compensation, as that strand of fairness is explained in cases such as *SA v PA* and *Waggott v Waggott.*

37. Counsel for the Husband confirmed that the claim for compensation is not being pursued on the factual basis of what the husband could have been earning at present if he had not agreed to suspend his career conditions in order to look after the child of the family. Counsel argued that the concept of compensation, as developed by the English Courts, is not confined to cases where it can be shown, but evidence before the Court, that the applicant would have been earning more than the amount ordered by the court.

38. I am unable to accept the general submission that the strand of fairness relating to compensation is so open-ended that the Court can make such an award even where there is no evidence before the Court as to the alleged financial disadvantage suffered by the party. There are passages in *Miller* in the speech of Baroness Hale which could be read as indicating that the concept of compensation is so open-ended and flexible. However, the clear trend the English cases following *Miller* demonstrates that such claims are only likely to succeed in "exceptional" cases. Furthermore, the cases such as the Court of Appeal decision in *Waggott* make it clear that the claim for compensation based upon relationship disadvantage can only be pursued if the applicant produces evidence establishing, on a balance of probability, that but for the relationship disadvantage that party would have been earning more than the amount awarded by the Court.

39. Counsel for the Husband further argues that the Bermuda Court is not confined to the narrow strictures of the English Courts relating to maintenance and compensation as a strand of fairness because there are material differences in the statutory landscape in which the Bermuda Court is asked to exercise its discretion. In particular Counsel points out that unlike the position in England, the Bermuda legislation still retains the tailpiece to section 29(1) of the Act. The relevant provision relied upon provides that the Court should "… to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

40. The background to this argument is that prior to 1984 the statutory position in England and Bermuda was identical. In the Law Commission Paper on the Financial Consequences of Divorce (Law Com. No. 112, 1981), the Commissioners stated that they had received an overwhelming body of evidence that to direct the courts to seek to place the parties in the financial position in which there would have been if the marriage had not broken down (the wording of the tailpiece) was to impose a fundamentally mistaken objective, widely thought to be capable of producing unjust and inequitable results (paragraph 6). In *Miller* Baroness Hale explained that:

> "126. Hence the assumption of life long-obligation was repealed by the Matrimonial and Family Proceedings Act 1984, following the Report of the Law Commission (1981, Law Com No 112, *The Financial Consequences of Divorce*). The Commission's reasoning (see para 17) was essentially pragmatic. In the great majority of cases, it simply was not possible to enable two households to continue to live as if they were one. Nor in many cases was it desirable to perpetuate their mutual interdependence. The whole point of a divorce is to enable people whose lives were previously bound up with one another to disentangle those bonds and lead independent lives. But at least the discredited objective had encouraged a sort of equality: if the marriage had not broken down, the couple would still be enjoying the same standard of living. The object, therefore, was to get as close as possible to that for both of them. John Eekelaar dubbed this the 'minimal loss' principle (I used to refer to it as the principle of 'equal misery')."

41. The Law Commission Paper recommended that the statutory objective reflected in the wording of the tailpiece should be repealed. This tailpiece was indeed repealed in England by the Matrimonial and Family Proceedings Act 1984. The 1984 Act also inserted a provision to encourage and enable a clean break settlement in terms of section 25 A(1): *"Where on or after the grant of a decree of divorce or nullity of marriage the court decides to exercise its powers under section 23(1)(a) [periodical payments], (b) [secured periodical payments] or (c) [lump sum], 24 [property adjustment], 24A [property sale] or 24B [pension sharing] above in favour of a party to the marriage, it shall be the duty of the court to consider whether it would be appropriate so to exercise those powers that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable."*

42. However, the practical impact of the changes introduced by the English 1984 Act can be overemphasised. It should be noted that even before the 1984 Act, decisions of the House of Lords and the Privy Council encouraged the courts to exercise the discretionary powers in relation to ancillary relief applications so as to achieve a "clean break". Thus, in *Minton v Minton* [1979] AC 593, the Lord

Scarman explained the public policy behind the encouragement of "clean break" settlements and orders:

> "There are two principles which inform the modern legislation. One is the public interest that spouses, to the extent that their means permit, should provide for themselves and their children. But the other - of equal importance-is the principle of "the clean break". The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the model law is to encourage each to put the past behind and to begin a new life which is not overshadowed by the relationship which is broken down."

43. In the Privy Council decision in *De Lasala v De Lasala* [1980] AC 546, Lord Diplock reconfirmed the public policy considerations relating to the desirability of a "clean break" articulated in *Minton:*

> "… In *Minton v Minton* [1979] AC 593 the House of Lords decided that the policy of the English legislation to which the effect was given by the language that has been cited above was to permit the parties to a marriage that had irreparably broken down, to make "a clean break" also as respects to financial matters from which there could be no going back. The means provided for achieving this result were for the parties to agree upon a once for all financial settlement between them and to obtain the court's approval to it and an order of the court either for a once for all type or dismissing the parties' claims to any court order against one another for financial relief. The House of Lords' decision as to the policy and effect of the English legislation was not confined to the current Act of 1973, or to the Acts which were consolidated by it. It applied to all preceding Acts of Parliament dating back to 1958 in which similar wording had been used – as is shown by the Houses's express approval of *L v L* [1962] P. 101. In their Lordships' view the grant of the court power in 1972 to make the two new kinds of orders did no more then enlarge the ways in which the court could exercise the jurisdiction it already had to, order one spouse to make a once for all financial provision for the other….".

44. The Privy Council decision in *De Lasala* is of course binding on the Court in Bermuda. It appears that the English 1984 Act placed on a statutory basis the policy of the law which had already been articulated in the House of Lords decision in *Minton* and the Privy Council decision in *De Lasala*. This analysis is confirmed by Moylan LJ in *Waggatt* at [100]:

> "The final principle is the clean break. This was referred to by both Lord Nicholls and Lady Hale in *Miller*. It pre-dates the changes made to the 1973 Act by the Matrimonial and Family Proceedings Act 1984. As referred to by Lord Nicholls it was one of the principles identified as informing the legislation by Lord Scarman in *Minton v Minton* [1979] AC 593, p. 608F/G when he said:
>
> > "An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down".
>
> Lord Nicholls agreed that, following the 1984 Act, this was "an important principle now embodied in the statute" (para 30)."

45. The effect of the wording of the tailpiece has been considered in Bermuda and the courts have interpreted the provision as expressing the notion of fairness. The argument advanced by Counsel for the Husband in this case was advanced to Meerabux J. in *Green v Green* [1997: No.224]. Merrabux J. referred to the following passage in the judgment of Lord Nicholls in *White v White* [2000] 3 WLR 1571, where Lord Nicholls considered the implications of the deletion of the "tailpiece" in the English legislation:

> "The tailpiece was later deleted from the legislation, and nothing inserted in its place. In consequence, the legislation does not state explicitly what is to be the aim of the courts when exercising these wide powers. Implicitly, the objective must be to achieve a fair outcome. The purpose of these powers is to enable the court to make financial arrangement on or after divorce in the absence of agreement between the former spouses: see

Thorpe LJ in *Dart v Dart [*1996] 2 FLR 286, 294. The powers must always be exercised with this objective in view, giving first consideration to the welfare of the children" (emphasis added).

46. Meerabux J. then turned to the position in Bermuda and set out what in his view were the implications of the fact that under the Bermuda legislation the tailpiece continued to exist:

> "It is to be observed that the tailpiece exists in the 1974 Act. I think that in light of the tailpiece it is clear that the Act explicitly states what is to be the aim of the courts when exercising wide powers the objective in my view must be to meet the justice of the case, that is "to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his financial obligations and responsibilities towards the other". I think in meeting the justice of the case "<u>the objective must be to achieve a fair outcome</u>" (emphasis added).

47. It will be noted that according to Meerabux J. the objective to be achieved is the same objective referred to by Lord Nicholls in *White* under the English legislation where the tailpiece no longer exists. Similar reasoning was followed in *DeSilva v DeSilva* [1999 N0. 140].

48. In the circumstances it is not surprising that the House of Lords decision in *White v White* [200] 1 AC 596, has been treated by the Supreme Court and the Court of Appeal in Bermuda as a binding authority without any modification having regard to the fact that relevant time the English legislation had repealed the tailpiece. It has been followed without any modification by the Supreme Court in cases of *Duncan v Duncan* [2005] Bda LR 32; *Minks v Minks* [2016] Bda LR 136; *M v M* [2017] Bda LR 64; *Sampson v Sampson* [2015] Bda LR 65; *Green v Green* [2001] Bda LR 67 and by the Supreme Court and the Court of Appeal in cases of *Astwood v Astwood* [2012] Bda LR 70; *Darren Christopher Davy v Eva- Maria Zouppas-Davy* [2005] Bda LR 51; and *Baptiste v Baptiste* [2002] Bda LR 20.

49. Likewise the House of Lords decision in *Miller v Miller* [2006] 2 AC 618 has been followed in the Bermuda Courts without any modification on account of the fact that the Bermuda legislation continues to retain the tailpiece. *Miller* has been followed in Bermuda in the Supreme Court decisions of *D v D* [2007] Bda LR 6; *S v S* [2010] Bda LR 51; *F v F* [2007] Bda LR 56; *R v R* [2013] Bda LR 84; *Wainwright v Wainwright* [2012] Bda LR 38; *J v J* [2012] Bda LR 42; *Minks v Minks* [2016] Bda LR 136. *Miller* has also been followed in the Court of Appeal for Bermuda in *Simmons v Simmons* [2011] Bda LR 31, where Baker JA stated that: *"The criteria in section 29 of the Matrimonial Causes Act 1974 are well known and I do not repeat them. As was said by Lord Nicholls in Miller [2006] UK HL 24 para 11 when the marriage ends, fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties housing and financial needs taking into account a wide range of matters such as the parties ages, their future earning capacity, the family standard of living and the disability of either party".*

50. In the circumstances it is clear that the Bermuda Courts, including the Court of Appeal for Bermuda, have approached applications for ancillary relief on the basis that the objective must be to achieve a fair outcome. That is the same objective which the English Courts seek to achieve. It appears that the existence of the "tailpiece" in the Bermuda legislation makes no material difference. In particular the existence of the "tailpiece" in the Bermuda legislation does not warrant a different approach to the principles of compensation and sharing as explained by Lord Nicholls and Baroness Hale in *Miller.*

51. The Court reminds itself of the basic purpose and function of spousal maintenance orders. In *SS v NS* [2015] 2FLR 1124, Mostyn J. explained the objective in following terms:

> " 26. I have tried to explain that an order for spousal periodical payments can only be made in order to meet needs, save in a wholly exceptional case: see *B v S* [2012] EWHC 265 (Fam) at paras 75 - 79.

30. In *Miller* Baroness Hale at para 138 explained that the most common rationale for imposing the obligation to maintain into the future is to meet needs which the relationship has generated. Obviously this is a very sound rationale and it is for this reason that the factors of duration of marriage and the birth of children are so important.

34. As for "how much" the Commissioners wrote at para 3.96:

> "Exactly how, and at what level, needs will be met will depend on the resources available and, usually, the marital standard of living. Replicating the marital standard of living in two homes, after divorce, will be rare: most parties will not be able, in the short to medium term, to live at the standard they enjoyed during the marriage. That said, their former standard of living will be relevant in so far as any reduction in standard of living as a consequence of the financial settlement made on divorce should not fall disproportionately on one party. In addition, the transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her own resources"

35. I would emphasise the final sentence. It is a mistake to regard the marital standard of living as the lodestar. As time passes how the parties lived in the marriage becomes increasingly irrelevant. And too much emphasis on it imperils the prospects of eventual independence.

52. In *BD v FD* [2017] 1 FLR 1420, Moylan J. expressed the objective and scope of spousal maintenance orders in similar terms:

> “114. In my view, the starting point for the assessment of needs is the standard of living during the course of the marriage. This was the view expressed by the Law Commission in its 2014 report, *Matrimonial Property, Needs and Agreements* (Law Com. No 343) (para 2.34/2.35) in

respect of "very wealthy cases": "needs are still assessed primarily by reference to the marital standard of living". This does not mean that it is either a ceiling or a floor but, as Mr Howard agreed during the course of his submissions, it provides a benchmark or starting point against which to assess needs.

120. However, in broad terms and in the context of this case, in which contributions will have been made over a 30 year period, where the resources are available, the longer the length of the period(s) referred to in paragraph 113(i) and (ii) above (being (i) the length of marriage and (ii) the length of the period of contributions to the welfare of the family which can, clearly, both pre-date the marriage and post-date the end of the marriage), the more likely the court will decide that the applicant's spouse's needs should be provided for at a level which is similar to the standard of living during the marriage."

53. The purpose of a spousal maintenance order is not to readjust the capital distribution which has taken place between the parties on a full and final basis. Here the parties have already settled their capital claims and the Husband's application for maintenance proceeds expressly on the basis that he is not seeking to reopen the distribution of capital assets available to the parties. This is an exceptional feature of this case which takes it out of the ordinary case where all the ancillary relief claims (both of capital nature and maintenance) are being dealt with at the same time. In *VB v JP* [2008] 1 FLR742, Potter P. explained that capital readjustment was an impermissible objective of a spousal maintenance application:

"18. I turn first to the last three items. Under the heading "Mortgage", the wife gives a monthly sum of £833 in respect of a flexible mortgage of up to £250,000.00 taken out with Northern Rock in March 2007. This is said to have been taken out for the purpose of subsidising the wife's maintenance by £2,000 per month up to the hearing, her legal fees, her intention to replace her car with a new car costing £45,000.00, and £150,000 for an extension to her house to add a fourth bedroom and en-

suite bathroom. The amount of the mortgage taken up was £42,000.00 at the date of the hearing but was said to be likely to rise to £52,000.00 by the end of October 2007.

19. Miss Bangay submits that this item is in fact an ill-disguised effort to increase the capital provision for the wife at the expense of the husband contrary to the terms and intention of the original order of 20 June 2001 and the dictum of Thorpe LJ in *Pearce v Pearce* [2003] 2 FLR 1115 at paragraphs [36] and [39]. I consider Miss Bangay is right…

20. The same is true of the very substantial claim of £20,000 per annum for Pensions and Savings. The first paragraph of the original consent order provided for the husband to pay to the wife a lump sum of £50,000 which she duly received. According to the husband it was the last item agreed, the wife saying that she intended to use it in the purchase of a new house (as she did). She agreed in evidence that she did not dispute that she accepted that £50,000.00 as her share of the husband's then pension fund and paragraph 5 of the order makes quite clear that she should not be entitled to make further pension claims."

54. Counsel for the Husband relies upon decision of Wade-Miler J. in *Arshad v Arshad [*2008] Bda LR 21, as demonstrating that the Court has the discretionary power to order periodical payments and at the same time require a party (in that case the husband) to make a lump sum payment of a capital nature. Such an Order is unexceptional in the ordinary case. However, in the present case the parties have settled their capital claims for a lump sum and the like on a full and final basis and in the circumstances would not be permissible to make periodical payments order designed to adjust the capital claims which have already been settled.

55. In all the circumstances the Husband's application for maintenance falls to be determined by reference to his reasonable needs and the needs of the child of the family.

Application of the legal principles

(1) Wife's income

55. The Registrar noted that roughly speaking in 2015 and 2016, the Wife would have received an income from her business in the approximate amount of $700,000 or $58,333 per month. The Registrar further noted that the gross business income was less in 2017 for the first five months but considered that fact to be insignificant on the basis that there were fluctuations in monthly income in each year. The Registrar made a finding that the income attributable to the wife from the business ranges between $50,000 and $58,000 per month. In addition the Registrar held that the Wife could rent the studio apartment attached to her new residence and in the circumstances, rental income of $1200 should be attributed to the Wife for this unit.

56. The letter from the Wife's attorneys dated 20 June 2017 sets out the average income for the preceding periods. The letter represented that the average income for the last 17 months was $51,748, for the last 12 months at that figure had been reduced to $47,559, for the last nine months it had further reduced to an average of $40,232 and for the last six months the average had been further reduced to $34,255. The attached table to that letter clearly shows a trend that the net income from the business was declining.

Business Income Summary			January 2016 – May 2017
Month	Total Credits	Average Business Cost	Net Pay
January 2016	$115,687.00	$40,000.00	$75,687.00
February 2016	$117,448.00	$40,000.00	$77,448.00
March 2016	$72,212.00	$40,000.00	$32,212.00
April 2016	$126,552.00	$40,000.00	$86,552.00
May 2016	$76,152.53	$40,000.00	$36,152.53
June 2016	$173,469.00	$40,000.00	$133,469.00
July 2016	$68,212.00	$40,000.00	$28,212.00
August 2016	$94,966.00	$40,000.00	$54,966.00
October 2016	$72,464.00	$40,000.00	$32,464.00
November 2016	$100,439.00	$40,000.00	$60,439.00
December 2016	$68,948.00	$40,000.00	$28,948.00
January 2017	$65,073.00	$40,000.00	$25,073.00
February 2017	$86,000.25	$40,000.00	$46,000.25
March 2017	$99,060.43	$40,000.00	$59,060.43
April 2017	$34,464.79	$40,000.00	-$5,535.21
May 2017	$78,179.93	$40,000.00	$38,179.93
Total	$1,449,327.93	$640,000.00	$809,327.93
Average Total Net Pay			$50,583.00
12 Month Average			$44,785.74
9 Month Average			$37,732.82
6 Month Average			$31,954.40

57. The Wife gave evidence as to the reasons for this declining trend. The reasons were threefold. Firstly, the effect of the Husband's conduct in removing the child of the family from this jurisdiction meant that the Wife was unavailable

repeatedly for her patients for a period of months. As a result, the Wife believes that it became known that she was not available to her patients as she would have liked. The effect is that she was seeing less clients even now as she attempts to rebuild her reputation. Secondly, there are more OB-GYN's in Bermuda competing for the same business. When the Wife first started practicing there were just four practitioners but the number has now increased to seven. Thirdly, birth rates are down in Bermuda and as such there is less work to go around. All these factors explain the trend of declining income. Whilst the first factor may be transitory and temporary, the other two factors, in my judgment, provide a cogent rationale for the declining income.

58. In my judgment the appropriate figure for income from the business should be the average income for the last 12 months. The figures produced showed that the average monthly net income from the Wife's business for the last 12 months was $47,559. On the basis of this figure, the wife would have to pay payroll tax of 18% on income in excess of $35,000. This would generate an additional tax obligation of $2,260. On that basis, the Wife's average monthly income would be approximately $45,000 and this is the figure which, in my judgment, should be used for the purposes of consideration of the spousal maintenance award.

59. In my judgment it is not appropriate to contribute an income of $1200 per month to the Wife for renting out the studio apartment at the property. The fact remains that Wife is not receiving such income and does not intend to rent the property.

(2) Husband's maintenance claims of income nature

60. The Registrar accepted that the Wife's submission in part in relation to the travel expenses for the Husband and that held that the annual amount of $18,000 should be sufficient to meet all travel expenses in the circumstances. I would endorse the Registrar's decision in relation to travel expenses claimed by the Husband and consider it to be appropriate in all the circumstances.

61. In relation to the Husband's claim for educational expenses, the Registrar adjusted the educational figure to provide one figure for the four-year period thus putting

the obligation on the Husband to save for his Master's program in two years and to account for educational expenses that are presently unknown. The Registrar ordered that the Husband should be paid $1500 per month which would equate to an educational fund of $72,000 over four years which should cover the costs of the Business Degree ($27,000) and the Master's Degree ($45,000). I endorse the Registrar's decision in this regard and considered appropriate in all the circumstances.

62. In paragraph 7 of his affidavit dated 30 November 2018, the Husband sets out his current monthly expenses. I would allow those expenses in respect of Rent, Cleaning, Belco, Cablevision, Digicel, Car Licence, Car Insurance, Car Gas and Food. In paragraph 11 of the written submissions dated 16 August 2018, the Husband sets out certain additional expenses. In relation to these additional expenses I would allow Car Maintenance and Clothing/ Med Co-pays/Sundry as claimed. In addition I would allow a claim for entertainment in the amount of $1,000 per month. I would add a monthly sum of $900 per month for contingencies.

63. On this basis the monthly maintenance order would be for the sum of $14,500 per month made up as set out below:

Rent	$4,500
Cleaning	$933
BELCO	$614
Cablevision	$260
Digicel	$219
Car Licence	$133
Car Insurance	$118
Car – Gas	$200
Food	$1,950
Travel	$1,500
Tuition	$1,500
Car Maintenance	$250
Clothing/Medical Co-pays	$400
Entertainment	$1,000
Contingencies	$900
Total	$14,477

(3) Other claims made by the Husband

64. In this appeal, the Husband claims that the Wife should be ordered to pay the sum of $5,000 per month on account of savings for pension. It appeared that the Counsel was pursuing this claim as part of the wider argument that the Husband was entitled to compensation arising out of the relationship disadvantage which he had suffered. I have concluded above that it is not open to the Husband to pursue a claim for compensation in these proceedings which are aimed at the provision of spousal maintenance. Further and in any event, it is not the purpose of Spousal Maintenance Orders to increase the capital provision for one party at the expense of the other contrary to the terms and intention of the Original Order or agreement between the parties (See: *VB v JP* [2008] 1 FLR 742, "The same is true of the very substantial claim of GBP 20,000 pa for pensions and savings" per Potter P. at [20]). Here the parties have already settled their respective claims for capital sums

and the spousal maintenance application was made on the express terms that it was not intended to affect that settlement.

65. The Husband also makes a claim for deposit and mortgage payments in order to acquire a residential property for himself. In this regard he seeks $5,925 per month. For the reasons set out in the previous paragraph, I do not consider that this is an appropriate claim for spousal maintenance. In addition, the husband already rents a residential property in Bermuda in respect of which I have made allowance for rental payments in the amount of $4,500 and the acquisition of a second home would appear to be unreasonable in all the circumstances. Furthermore, if the Husband wanted to acquire such property he should have utilised the capital assets which were given to him under the full and final settlement. Accordingly, this claim by the husband is not an appropriate claim for spousal maintenance.

66. At the commencement of this appeal, the Husband sought to produce further evidence by way of his affidavit filed on 29 November 2018. In that affidavit he discloses that earlier this year when he was in the US he entered into a one-year lease of a substantial residential property in South Carolina. The rental per month for this property is $3,300 and other expenses are approximately $700 per month, making a total dollar figure of $4,000 per month or dollar figure of $48,000 per annum. The explanation given by the Husband is that he was unsure whether he would be allowed back in Bermuda and in those circumstances he considered it necessary to enter into this arrangement. I consider this was an unreasonable decision made by the Husband and the Wife should not be made responsible for this unreasonable expenditure. Firstly, the Husband already leased the property in Bermuda at a rental of $4,500 which is paid for by the Wife. The uncertainty in relation to his immigration position in Bermuda was temporary and it was unreasonable for the Husband to enter into the substantial commitment until his immigration position had been clarified. Secondly, he had available to him accommodation with his mother in South Carolina which he has used in the past. Thirdly, even if he felt it necessary to enter into a lease on a residential property, it was unreasonable for the Husband to enter into a lease for a substantial four-

bedroom house with a pool. Fourthly, this substantial property at present is being used as a second home where the Husband expects to reside for short stays on a monthly basis. In all the circumstances, this was an unreasonable decision for which the Wife should not be held financially responsible.

67. In the same affidavit, the Husband disclosed that he had borrowed $50,000 from HSBC Bermuda which has to be repaid within 10 months. This means a monthly payment of $5,250 and that the Husband claims that the Wife should reimburse him for this amount on a monthly basis. I decline to include this amount in the spousal maintenance. Under the full and final settlement of capital assets the Husband received $250,000. This included at the sum of $150,000 which the Husband had transferred out from the joint account of the parties secretly and without authorization. The Husband has expended this money unwisely. Nearly $100,000 of this capital sum has been expended upon legal fees relating to the Husband's extraordinary and unreasonable decision to take the child of the family out of the jurisdiction and his refusal to return him to Bermuda. At least a further $125,000 has been spent by the Husband in relation to these spousal maintenance proceedings. This figure excludes the legal expenses incurred in this appeal. The expenditure relating to the legal fees relating to the refusal to return the child to this jurisdiction, was entirely unreasonable and should have been avoided. If that expenditure had been avoided it would have been unnecessary for the Husband to borrow money from HSBC Bermuda or from his friends. The need to borrow money from HSBC Bermuda and his friends arises directly as a result of the husband's unreasonable actions. In those circumstances it is inappropriate and unreasonable that the Wife required to reimburse the Husband in relation to those loans.

68. The Husband also makes a claim that legal costs incurred by him should be included in the maintenance award. I consider that the issue of legal costs should be determined in the ordinary way at the conclusion of these proceedings. In taking this view I remind myself that this is not a case where the Husband had no other means to fund the legal costs of these proceedings. Secondly, maintenance

orders requiring the Wife pay $8,000 per month and then $10,000 per month were made with the consent of the Husband.

69. The Husband also seeks an Order that the maintenance award should make a provision for any taxes which he may be obliged to pay to the US Government as a result of receiving the spousal maintenance. In principle, the Wife agrees that this is an appropriate item for the maintenance award. However, the Wife has produced the expert evidence of Mr Allen Essner of Ferber Chan Essner & Coller, LLP and his expert evidence is that, as a result of US tax legislation enacted in December 2017, effective as of January 1, 2019, amounts received as alimony or spousal maintenance by a US citizen or resident will no longer be subject US income taxation. In the circumstances, I do not include any sum on account of US taxes in the maintenance award. However, in the event that the view taken by Mr Essner is erroneous and in fact US taxes are payable, I give leave to the Husband to make a renewed application in relation to his liability to pay US taxes.

(4) Back dating of the order

70. The Wife justifiably complains that the Registrar back dated the Order which included items in respect of which the husband had incurred no liability. The proposed maintenance Order contains a total sum of $700 in respect of car expenses notwithstanding that these costs were largely being met by the Wife following separation. In addition, the Husband did not start to have shared care and control until shortly prior to the hearing and therefore his costs would have been significantly reduced. Furthermore, he did not travel frequently and this would have reduced his travel costs. Finally, the proposed Order contains a provision in the amount of $900 per month for contingencies. I accept that having regard to these items it would be inappropriate and unfair to include these items in any order which was backdated to the time when this application was made. In all the circumstances I consider that a reasonable result would be if the backdating of the Order was limited to the sum of $12,500 per month. In other words the proposed Maintenance Order should be reduced by the sum of $2,000 per month for back dating purposes. The wife should pay the sum of $14,500 per month from the date of the decision of the Registrar being 7 November, 2017.

(5) Review Period

71. The Court does not order at this stage that the maintenance award is for a fixed period. However, consistent with the English authorities such as *SS v NS (Spousal Maintenance)* [2015] 2 FLR 1124 and *BD v FD (Financial Remedies: Needs)* [2017] 1 FLR 1420, it is the expectation of the Court that, assuming the Husband has completed his intended education, the maintenance Order is expected to come to an end at the end of the four years period unless there are unforeseen circumstances. In other words, it is the expectation of the Court that, as long as the Husband has completed his intended education, the maintenance award made by this Court will come to an end in October 2020 with the expectation that after that date, the parties will lead independent financial lives. However, the Court recognises that in all the circumstances such a decision should be made at that time.

72. In order to ensure that the review by the Court does take place in October 2020, both parties are at liberty to file an application for such a review at any time after April 2020. I confirm that the amount of the maintenance shall not cease or be reduced until such time as there is a court order either by consent or by way of review.

(6) Lump sum for periodical payments from April 2016 to September 2016

73. The Husband seeks an award for a lump sum representing the amount of periodical payments from April 2016 to September 2016 (6 months in total). During this period the Husband was in Bermuda for 2 months and paid total rent in an amount of $9,000. The remainder of this period he was in South Carolina living with his mother. I award the Husband additional living expenses of $5,000 per month whilst he was in Bermuda (total of $10,000) and $4,000 per month whilst he was in the South Carolina (total $16,000). The lump sum on account of periodical payments for April 2016 to September 2016 is, therefore, $35,000.

(7) Costs of these proceedings

74. Having heard the parties in relation to the costs of the hearing before the Registrar and this appeal, the Court Orders that there be no order as to costs incurred in these spousal maintenance proceedings either before this Court or before the Registrar below. Such an order reflects the success achieved by each party and the resources available to the Husband to meet any costs order. The no order of costs includes the issue of costs relating to the freezing injunction proceedings before Hellman J.

75. Having regard to the matters above, I make the following orders:

> (1). That the Wife shall pay $14,500 in monthly maintenance to the Husband until further Order of this Court. The sum of $9,700 shall be attributed to spousal maintenance and the sum of $4,800 shall be attributed to child maintenance.
>
> (2). By consent, the Wife will continue to pay for the Husband's health insurance and the child's health insurance until further Order of this Court.
>
> (3). By consent, the Wife will continue to pay 100% of the child's expenses including the child's school fees, extracurricular activities, school uniforms and supplies, health insurance, co-payments and any miscellaneous expenditure until further Order of this Court.
>
> (4). The Wife shall pay a lump sum of $35,000 to the Husband representing periodical payments for the period of April 2016 to September 2016.
>
> (5). This Order, to the extent of maintenance in the amount of $12,500 per month, shall be back dated to October 2016 and the amounts paid by the Wife ($12,500 in December 2016, $8000 in January 2017 and February 2017 and March 2017 and $10,000 from April to October 2017) to the Husband in monthly maintenance during that period should be taken into

account. The Wife shall pay the sum of $14,500 per month from the date of the decision of the Registrar being 7 November, 2017.

(6). The above Orders shall be reviewed in October 2020 for the purposes of considering, inter alia, whether the Maintenance Orders should be continued or terminated. Either party may apply to the Court for such a review, at any time after April 2020, so as to allow an effective hearing before the Court in October 2020. For the avoidance of doubt, the amount of maintenance shall not cease or be reduced until such time as there is an Order from the Court either by consent or by way of review.

76. I invite Counsel to prepare an order for the Court's approval.

Dated this 28 day of January 2019

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NARINDER K HARGUN
Hon. Chief Justice