BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

No. FL 236 of 2009

BETWEEN:

AB **HUSBAND/APPLICANT**

AND

CD **WIFE/RESPONDENT**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 12 September 2019

Sir Henry Forde Q.C. in association with Ms. Margot Greene Q.C. and Ms. Nicole Roachford for the Husband.

Beverley Lady Walrond Q.C. in association with Ms. Zarina Khan for the Wife.

DECISION

INTRODUCTION

[1] The parties were married on 8 October 1994. On 12 June 1997, they executed a document overseas ("the overseas document"). It purportedly made provision for the ownership and distribution of their assets and spousal support, during the marriage and in the event of a separation.

[2] The parties did separate. On 2 November 2010, on the Wife's application, Kentish J granted a provisional decree of dissolution of their marriage. The final decree remains outstanding. On 31 October 2012, the Wife filed an amended application by which she seeks, at paragraphs (h) and (i), the following orders:

> (h) That there be an Order under Section 57 of the Family Law Act altering the interests of the ... Husband so as to vest in the Wife such a percentage of the assets as to the Court may seem just and that the said percentage be paid to the Wife by means of a lump sum;
>
> (i) That there be an Order under Section 52 of the Family Law Act granting the Wife such a lump sum as and for her future maintenance as to the Court may seem just.

[3] A dispute has arisen between the parties as to whether the Wife can seek those orders.

THE PRELIMINARY ISSUE

[4] On 20 September 2018, of her own volition, the Wife filed submissions in respect of the overseas document. Paragraph 6 of those submissions appears under the caption "PRELIMINARY LEGAL ISSUE TO BE DECIDED". It reads:

> *As it relates to the Wife's claim for her maintenance and for her claims for property settlement (sic) ... there is a preliminary legal issue to be decided. What status or validity does the Family Law Act of Barbados accord to the [overseas document] on which the Husband seeks to rely?*

[5] The Husband filed submissions on 2 October 2018 captioned "WRITTEN SUBMISSIONS ON A PRELIMINARY POINT". On page 8, he framed what he perceived to be the preliminary issue in this way:

> Whether this Court has the jurisdiction to determine the validity and/or enforceability of the [overseas document] given the fact that the [overseas document] was executed in Canada pursuant to the provisions of its Family Law Act and the law governing it is the law of Ontario.

[6] When the Wife's application came on for hearing, Beverley Lady Walrond Q.C. who appeared with Ms. Zarina Khan for the Wife submitted that the Court should consider the validity of the overseas document as a preliminary issue. Sir Henry Forde Q.C. in association with Ms. Margot Greene Q.C. and Ms. Nicole Roachford appeared for the Husband. Ms. Greene Q.C. submitted that it would have been necessary to hear evidence in order to make such a determination. She stated that there are issues of fact which are relevant to the question of validity.

[7] The Court deprecates the procedure adopted by the parties in seeking to have preliminary issues determined by it without its prior approval. Nonetheless, I am persuaded that it is necessary to consider whether the Wife can pursue her application for spousal maintenance and property orders in light of the existence of the overseas document. This equates to an inquiry into whether the Court's jurisdiction to hear those aspects of the application is stymied.

[8] In considering this issue, I had the benefit of the written submissions referred to above, additional written submissions filed by both parties, and extensive oral submissions from Counsel. In no small way, the submissions brought luminescence to the provisions of the ***Family Law Act, Cap 214*** ("***the FLA***") that the Court was required to consider. I am grateful to Counsel for them. Having considered the arguments, I have determined that the Wife may proceed with the application for orders under ***sections 52*** and ***57*** of ***the FLA***. I set out the reasons for my decision below.

THE OVERSEAS DOCUMENT

[9] I have made my determination without any excursion into whether the overseas document is valid in the sense raised by Ms. Greene Q.C., the meaning of its terms, this Court's jurisdiction to consider those matters, or the use to which the document may be put at trial. Any such issues must await future consideration.

[10] I outlined the general purport of the overseas document at paragraph [1]. I will refer to its contents only to highlight those provisions that were underscored by Lady Walrond Q.C. in her argument that it was intended to be in substitution for the rights of the parties under ***the FLA***.

[11] At the commencement of the overseas document, the parties acknowledge that:

> Each desires to determine by this contract his or her rights and obligations during marriage with reference to ownership of property, and upon the occurrence of a separation event, with reference to ownership and division of property and support for each other.

[12] The term "separation event" is defined in clause 3 to include "the earliest to occur" of (i) the parties "commencing to live separate and apart with either or both of them intending that the separation will be permanent"; or (ii) "the granting of a judgment, order or decree dissolving the marriage".

[13] Clause 4 is captioned "**Contract to Prevail**". It reads:

> The provisions of this contract shall prevail over the provisions of any legislation, common law and doctrines of equity in any jurisdiction whatsoever which affect:
>
> (1) ownership of property by spouses;
>
> (2) ownership of property and division of property or the value of property between spouses after the occurrence of a separation event;
>
> (3) rights and obligations between spouses with respect to support, maintenance, alimony and any other form of financial assistance after the occurrence of a separation event;
>
> including but not limited to:
>
> …
>
> (d) in Barbados, all statutes dealing with rights that a spouse has on separation or divorce … .

[14] Clauses 15 to 23 purport to make provision for property allocation and spousal support in the event of a separation. Clause 15(2) reads:

> Neither spouse shall be entitled to the equalization of the spouses' net family properties pursuant to the *Family Law Act* or to any other division of property or the value of property other than is provided in this contract, including but not limited to:
>
> (a) the assignment or transfer of property between the spouses under the laws of any jurisdiction within which they may reside during the course of their marriage;
>
> (b) any division as marital property subject to equitable distribution pursuant to … the laws of any other jurisdiction in which they may reside during the course of their marriage;
>
> (c) any division between the spouses as community property or quasi-community property under the laws of any jurisdiction embracing a community property regime; or
>
> (d) any division between the spouses under any other concept or rule of law which, but for the provisions of this contract, would award a right or property interest to either spouse by reason of their marriage.

[15] Clause 27 appears under the caption "**Releases**". It reads:

> Except as is otherwise provided in this contract, [each party] releases, disclaims and waives any and all claims and rights which he or she may have, have had or may hereafter acquire with respect to the property of the other, and without limiting the generality of the foregoing each releases:
>
> (a) rights and interests respecting ownership, division or possession of the other's property;

(b) claims to compensation or a share in property because of any contribution to the property of the other under any statute or common law doctrine;

(c) rights and interests arising out of the provisions of any legislation, common law or doctrine of equity in any jurisdiction which affects ownership of property, division of property or division of the value of property between spouses or former spouses …

[16] The final clause which I will set out is clause 31. It reads:

> The law governing the interpretation of this contract, regardless of where the parties are domiciled or reside at the applicable time, shall be the law of the Province of Ontario without regard to the principles of conflicts of laws; and the courts that shall have jurisdiction in any action, application or other judicial proceeding with respect to this contract shall be the courts of competent jurisdiction in the Province of Ontario.

THE STATUTORY PROVISIONS

[17] The conclusion that I have reached on the question I have considered is based on the examination of various provisions of ***the FLA***. These include ***section 2(1)*** which defines "maintenance agreement" and "overseas maintenance agreement", among other terms, and ***sections 66*** and ***67*** which regulate those agreements.

MAINTENANCE AGREEMENTS

[18] ***Section 2(1)*** defines a "maintenance agreement" as:

> ... an agreement in writing made, whether before or after 1st February, 1982, between the parties to a marriage, being an agreement in respect of financial matters, whether or not there are other parties to the agreement, and whether or not it provides

> for other matters, and includes any such agreement that varies an earlier maintenance agreement.

[19] With respect to the term "financial matters" ***section 2(1)*** provides:

> "financial matters" in relation to the parties to a marriage, or union other than a marriage, means matters in respect of
>
> (a) the maintenance of one of the parties;
>
> (b) the property of those parties or of either of them; or
>
> (c) the maintenance of the children of the marriage, or union other than a marriage.

[20] Without proper regard to ***section 2(1)*** of ***the FLA***, the term "maintenance agreement" may mislead. It is not confined to agreements for spousal or child maintenance and, indeed, a maintenance provision is not an essential component. It may also make provision in respect of the property of the parties. It must be (i) in writing; (ii) made between the parties to a marriage, though there may be other parties; and (iii) in relation to "financial matters" i.e. matters in respect of (a) spousal maintenance; (b) property; or (c) child maintenance.

CLASSIFICATION OF "MAINTENANCE AGREEMENTS"

[21] Two principal types of maintenance agreements are regulated by ***the FLA***: (i) those which provide that they shall operate, in relation to the financial matters with which they deal, in substitution for the rights of the parties under ***Part VI***

of ***the FLA*** **(**"***section 67*** agreements"); and (ii) those which leave the ***Part VI*** rights in tact but are registered under ***section 66*** ("***section 66*** agreements").

REGISTERED MAINTENANCE AGREEMENTS

[22] ***Section 66*** of ***the FLA*** reads:

> **66**. (1) Except an agreement to which section 67 applies, a maintenance agreement … may be registered in the manner prescribed under this Act.
>
> (2) Where a maintenance agreement … is so registered, the court may, in relation to the agreement, exercise any of the powers conferred on it by section 62 as if the agreement were an order of the court.
>
> (3) The court may set aside any maintenance agreement … that is registered pursuant to this section where it is satisfied that the concurrence of a party to the agreement was obtained by fraud or undue influence, or that the parties desire the agreement to be set aside.
>
> (4) Subject to section 69, this section does not apply to overseas maintenance agreements … .

[23] As seen above, ***section 62*** is referred to in ***section 66(2)***. It empowers the court to discharge, suspend, revive, or vary maintenance orders. ***Section 69*** which is referred to in ***section 66(4)*** provides that the rules may make provision in respect of the application of ***sections 66*** and ***67*** to "overseas maintenance agreements". Additionally, ***section 68*** provides that a maintenance agreement that is registered, or is deemed to be registered, may be enforced as if it were an order of the court.

SECTION 67 AGREEMENTS

[24] This brings me to agreements that are in substitution of rights under ***Part VI*** of ***the FLA***. These are regulated by ***section 67*** which reads:

> **67**. (1) Subject to this section, a maintenance agreement … may provide that the agreement shall operate, in relation to the financial matters dealt with in the agreement, in substitution for the rights (if any) of the parties to the agreement under this Part.
>
> (2) A maintenance agreement … that makes provision as mentioned in subsection (1) does not have any effect unless it is approved by the court.
>
> (3) If a maintenance agreement … makes provision as mentioned in subsection (1) and the agreement has been approved by the court and the approval has not been revoked, any order having effect under this Part … ceases to have effect in so far as it relates to financial matters dealt with in the agreement, and, subject to subsection (8), no court having jurisdiction under this Act may make an order in respect of those financial matters.
>
> (4) In proceedings for the approval of a maintenance agreement …, if the court is satisfied that the provisions of the agreement in respect of financial matters are proper, the court shall, by order, approve the agreement, but if the court is not so satisfied, it shall, by order, refuse to approve the agreement.
>
> (5) …
>
> (6) The court may by order revoke its approval of a maintenance agreement … where the agreement is registered or deemed to be registered in the court and the court is satisfied

> (a) that its approval was obtained by fraud;
>
> (b) that the concurrence of a party was obtained by fraud or undue influence; or
>
> (c) that the parties to the agreement desire the revocation of the approval,
>
> and where an approval is so revoked, the agreement ceases to be in force.
>
> (7) Where the court approves a maintenance agreement …, the agreement shall be deemed to be registered in the court.
>
> (8) …
>
> (9) Except as otherwise provided by this Act and the rules, this section does not apply to overseas maintenance agreements … .

[25] The rights referred to in ***section 67(1)*** of ***the FLA*** include the right to spousal maintenance and the right to seek an alteration of property interests. The former is regulated by ***section 50*** and the latter by ***section 57***, both of which are in ***Part VI*** under which ***section 67*** falls.

OVERSEAS MAINTENANCE AGREEMENTS

[26] "Overseas maintenance agreements" are referred to in ***sections 66*** and ***67***. The term is defined in ***section 2(1)*** as:

> … a maintenance agreement that has force and effect in a prescribed overseas country by reason of the registration of the agreement, or the taking of any other action in relation to the agreement, under the law of that country … ;

[27] ***Section 2(1)*** defines the term "prescribed overseas country" as "a country that is declared by an order made by the Attorney General to be a prescribed overseas country for the purposes of this Act". I have seen no order made by the Attorney General. However, at the end of the ***Schedule*** to the ***Family Law Rules***, ***1982***, British Columbia, Manitoba and the United Kingdom are listed under the caption "***Prescribed Overseas Countries***". There, reference is made to ***rule 122*** of the ***Family Law Rules*** which provides that "[e]ach country set out in the Appendix is declared to be a prescribed overseas country for the purposes of sections 46, 47 and 69 of the Act". I heard no arguments as to the validity of this provision.

SUBMISSIONS AND DISCUSSION

[28] The submissions were made against the background of those provisions. Both parties premised that the overseas document is a "maintenance agreement". They also agreed that it (i) is not an "overseas maintenance agreement; (ii) has not been registered under ***the FLA*** pursuant to ***section 66***; and (iii) has not been approved under ***section 67***. Neither party has applied for an approval order. It is not in dispute that the Husband has conferred benefits on the Wife pursuant to his apparent obligations under the overseas document.

[29] Lady Walrond Q.C. submitted that the overseas document purports to exclude the Court's jurisdiction in respect of all matters concerning spousal

maintenance and property. She urged that, for that reason, it is null and void as being against public policy. She cited ***Hyman v Hyman [1929] AC 601***, ***Burgoyne and Burgoyne (1978) FLC 90-467***, and ***Candlish and Pratt (1980) FLC 90-819*** in support of this submission.

[30] In ***Burgoyne***, at ***page 77,390***, the Full Court of the Family Court of Australia acknowledged that a maintenance agreement which purports to oust the jurisdiction of the court to deal with property or maintenance is "void or contrary to public policy". It opined that such an agreement requires the approval of the court as a condition of its validity or enforceability. Citing ***Hyman*** and ***Bennett v. Bennett (1952) 1 K.B. 249***, the court stated the position expressly at ***page 77,390*** in this way:

> ... maintenance agreements ... are invalid (except as provided by sec 87) to the extent that they purport to oust the jurisdiction of the Court to deal with the property of the parties to the marriage (***Hyman*** (1929) A.C. 601; ***Bennett v. Bennett*** (1952) 1 K.B. 249).

[31] Counsel submitted further that the overseas document falls under ***section 67*** of ***the FLA*** and that, since it is unapproved, it is of no effect and cannot oust the Court's jurisdiction. She contended that this document could not be approved since it was being objected to by the Wife; and that it is immaterial that the Husband made payments to the Wife in accordance with its terms.

[32] Mrs. Walrond Q.C. cited ***Gardiner and Gardiner (1978) FLC 90-440*** and ***Woodcock v Woodcock (1997) FLC 92-739***, decisions of the Full Court of the Family Court of Australia, in support of those submissions. She also referred the Court to ***In the Marriage of Wright (1977) FLC 90-221*** for a list of matters which should be taken into account when considering whether to approve a maintenance agreement.

[33] ***Gardiner*** provides some guidance as to the effect of an unapproved maintenance agreement to which ***section 67*** of ***the FLA*** applies. It related to ***section 87*** of the ***Family Law Act 1975*** ("***the Australian Act***") after which ***section 67*** is modelled. The Full Court considered whether a court could approve a maintenance agreement where one party opposed the application. The majority, Evatt CJ and Fogarty J determined that it would be a wholly inappropriate exercise of the discretionary power given by ***section 87*** to approve an agreement in such circumstances. Bell J dissented. He considered that the court's discretion under ***section 87*** could not be fettered by the unilateral act of one party in opposing the approval; or the joint action of the parties in consenting.

[34] Counsel relied on the majority decision in ***Gardiner*** to support her contention that the Wife's objection to the overseas document constitutes a legal barrier to its approval. However, it is not necessary for me to determine whether that

decision or the minority opinion of Bell J represents the law in Barbados. The fact is that the overseas document is unapproved and neither party has applied for its approval. I prefer to leave any determination of that issue to a case in which it properly arises and is fully argued. For the same reason, I will not reproduce or comment on the factors set out in ***Wright***.

[35] However, in ***Gardiner***, the court also commented on the legal effect of an unapproved maintenance agreement which meets the criteria set out in ***section 87(1)***. At ***page 77,244***, the majority stated:

> Section 87(2) provides "A maintenance agreement that makes provision as mentioned in subsec. (1) does not have any effect unless it has been approved by the Court."
>
> That the agreement, unless approved, has no legal effect or consequence in the sense of establishing or defining legal rights and duties is we think clear and indeed could not really be the subject of argument to the contrary in light of the wording of subsec. (2).
>
> On the hearing of an application under sec. 72 [spousal maintenance] or 79 [property settlement] the essential task is to make the order having regard to the provisions of those sections. A prior agreement of the parties (in whatever form) does not oust this statutory responsibility.

[36] That passage is equally applicable in this jurisdiction. ***Section 67(2)*** of the ***FLA*** provides that a maintenance agreement to which ***section 67(1)*** applies "does not have any effect" unless approved. Without cogitating on all that those words may encompass, one thing is clear when account is taken of

section 67 in its entirety. A maintenance agreement which provides that, in relation to the maintenance or property matters it deals with, it shall operate in substitution for the statutory rights in respect of maintenance and property contained in ***Part VI*** of ***the FLA***, has no such effect unless approved by the court.

[37] In ***Woodcock***, the court determined that estoppel is no bar to the exercise of a court's jurisdiction to grant orders in respect of financial matters under ***the Australian Act***. Having reviewed a number of authorities, it concluded in this way at ***page 83,968***:

> In our view the cases referred to above clearly indicate that the Court's jurisdiction to grant relief under s 74 (spousal maintenance) or 79 (property settlement) can only be ousted by court order or by an agreement approved pursuant to the provisions of s 87. … [I]t is the dominant and unwavering thread of all the cases that the parties cannot by their conduct or agreement oust the jurisdiction of the Court.

[38] I accept this principle to be equally applicable in Barbados. ***The FLA*** gives parties to a marriage certain rights of application in respect of maintenance and property. These rights are contained in ***Part VI***. An unapproved agreement cannot oust the Court's jurisdiction to grant relief in respect of them. It is therefore illogical to think that acts done pursuant to such an agreement can have such an effect.

[39] In my view, the applicable principle was stated by the Full Court of the Family Court of Australia in ***Naughton and Naughton (1983) FLC 91-327*** at ***page 78,226***. In a passage that was cited in ***Woodcock*** at ***page 83,963 – 83,964***, the court stated:

> However, it appears to us that in any event this submission of estoppel has no validity ... Whatever the scope of the doctrine of estoppel, it has no application in the circumstances here. The submission on behalf of the appellant proceeds upon a concession that there is no property order, and consequently the submission relies on the terms of the settlement as constituting the agreement between the parties which may have been subsequently acted upon by them. However it appears to us that an agreement between the parties to a marriage or former marriage (which agreement is not approved under s 87 or subsequently embodied in property orders under ss 78 or 79) does not prevent one of those parties from subsequently issuing a valid property application in respect of that property or other property of the parties.
>
> The statutes, namely the Matrimonial Causes Act to 1975 (sic) and the Family Law Act since that time, give to parties of a marriage or former marriage certain rights of application in respect of property and maintenance. The parties cannot by agreement outside the confines of that legislation contract themselves out of the right to institute proceedings… In appropriate circumstances, the agreement of the parties and the circumstance that one of them may have acted upon its terms to his detriment may be adduced in evidence in such a proceeding, and may be a factor which the Court may take into account in determining whether to make any and if so what orders. That however is different from asserting that such circumstances inhibit a party from exercising that person's statutory right to institute such a proceeding.

[40] Lady Walrond Q.C. also cited ***Candlish*** and ***Burgoyne*** in support of a submission that an unapproved maintenance agreement, whether registered under ***section 66*** or not, does not preclude the Court from hearing a subsequent application for spousal maintenance or property orders. The court stated at ***page 75,168*** of ***Candlish*** that "[a]s the Deed is not an agreement coming within sec. 87, it does not preclude either party from making an application for maintenance or for an alteration of interests in property". I endorse that statement.

[41] In ***Abed v Abed, High Court Suit No. 346 of 1987*** (***date of decision, 14 June 1991***), the court was concerned with an unregistered maintenance agreement which did not fall within ***section 67***. It contained a covenant by the Wife that she would be responsible for her own maintenance. That notwithstanding, Williams CJ determined that she was entitled to pursue an application for spousal maintenance. Poignantly, he stated at ***page 3***:

> I do not think that the doors of the court can be closed to a woman because she signed an agreement purporting to exclude the husband's obligation to maintain her during the marriage. It would, I think, be against the public interest so to decide. Circumstances change and what is fair and reasonable now may not be so at some other time. [Hyman v Hyman] [1929] AC 601 seems to support that view.

[42] Unless approved under ***section 67*** of ***the FLA***, a maintenance agreement cannot oust the Court's jurisdiction to hear maintenance and property applications.

[43] Ms. Greene Q.C. submitted that the overseas document does not fall within ***section 67.*** She acknowledged that ***the FLA*** gives the Court powers in respect of maintenance agreements registered pursuant to ***section 66*** and overseas maintenance agreements to which ***sections 66*** and ***67*** apply. Counsel urged that since the overseas document is not an overseas maintenance agreement and has not been registered under ***section 66***, the Court has no jurisdiction to determine its validity or efficacy.

[44] Ms. Greene Q.C. submitted further that a general rule, which has not been displaced in this case, is that the validity of a contract is governed by the proper law of the contract. She cited ***Antec International v Biosafety [2006] EWHC 47*** and ***English v Donnelly 1959 SLT 2*** in support of this submission. With respect to those authorities, Lady Walrond Q.C. submitted that the former is unhelpful and that the latter "is in aid of the Wife's contention".

[45] The ultimate issue in ***Antec International*** was whether the proceedings ought to have been stayed on the grounds that Florida was a more convenient forum. The court held that the fact that parties to a contract have freely negotiated for the non-exclusive jurisdiction of the English Courts and the application of

English law creates a strong *prima facie* case that the English jurisdiction is the correct one. No forum issue has been raised in these proceedings and I derive no assistance from this case.

[46] ***English v Donnelly*** is a decision of the Scottish Court of Session. The court had to determine whether the validity of a hire-purchase contract was affected by ***section 2*** of the ***Hire Purchase and Small Debt (Scotland) Act, 1932***. The legislation laid down some conditions for the validity of hire-purchase contracts. The contract contained a clause that English law would apply. The court held that the statutory provisions were not displaced by the contractual clause. Lord President (Clyde) stated, at page 6:

> It is quite true that in general under private international law it can be said that the validity of a contract is governed by the proper law of the contract, namely, by the law which the parties intend or fairly intend or may fairly be presumed to have intended to invoke-see Dicey, Rules 153 and 148. But that general rule is displaced where An Act of Parliament has expressly provided otherwise, and has applied certain conditions as necessary for the validity of the contract. The situation might have been different if the statutory provisions had not been mandatory … .

[47] He continued:

> In the present case … the statutory provision contained in the Scottish Act of 1932 (as amended in 1954) is mandatory. The object of section 2 of the Scottish Act is to lay down certain conditions precedent for valid hire purchase contracts, designed to ensure that persons who hire goods under them are properly certiorated of the conditions contained in the agreements into which they are entering. The Act is a piece of social legislation

> designed for the protection of certain persons, i.e., members of the public who hire articles … The way the protection operates is the avoidance of the contract of hire if certain statutory safeguards in the hirer's interest are not satisfied. … [T]he general rules of private international law applicable to contracts are superseded by this express statutory provision. Such a situation is envisaged by Dicey in Rule 149.

[48] Lady Walrond Q.C. submitted that ***section 67(2)*** is a protective provision and that a party could not be deprived of the rights contained in ***Part VI*** of ***the FLA*** by an unapproved agreement. I agree with that submission. Counsel sought to demonstrate the protective nature of ***section 67(2)*** by reference to passages from ***Gardiner*** and ***Wright***. The common law as espoused in ***Hyman*** and ***section 67*** of ***the FLA*** is underpinned by a common rationale. It is that the courts are guaranteed a protective role where parties to a marriage purport to settle affairs of maintenance and property by agreement and forego their right to go to court. This is reflected by the requirement for court approval in s***ection 67(2)***.

[49] Ms. Greene Q.C. submitted further that to fall within ***section 67(2)***, a "maintenance agreement" has to be made after divorce or marital breakdown. Counsel argued that a number of passages from ***Gardiner*** and ***Wright*** support this contention. She noted that the agreement in ***Gardiner*** was executed after the parties were divorced. In response, Lady Walrond Q.C. submitted that

section 67 does not "ring fence" such agreements in that way; and that this issue did not arise in the cases cited by Ms. Greene Q.C.

[50] I agree with Lady Walrond Q.C. I have reviewed the several passages to which Ms. Greene Q.C. referred. They speak in general terms about the effect of ***section 87*** of ***the Australian Act***; and the duty of the court when considering an application for approval. I found nothing in them which expressly or by necessary implication suggests that ***section 67*** of the ***FLA*** is to be interpreted in the restrictive way that Ms. Greene Q.C. suggested. If anything, there is some authority that goes the other way.

[51] In ***Liveris v Commissioner of Taxes (1989) FLC 92-041***, Asche CJ had to determine, among other things, whether a deed was a maintenance agreement for purposes of ***the Australian Act***. Referring to statutory definitions of the terms "maintenance agreement" and "financial matters" identical to those in ***section 2(1)*** of ***the FLA***, he concluded that he could see nothing to substantiate the notion that some degree of estrangement must be shown to be present at the time of the agreement. Generally, he considered it was undesirable to limit the broad scope of the term "maintenance agreement".

[52] I have searched fastidiously for the slightest hint in ***the FLA*** that to fall within the scope of ***section 67(1)***, an agreement must have been made after divorce, separation or some degree of marital discord, but I have found nothing.

Section 67(1) and ***(2)*** merely stipulate the type of "maintenance agreement" that would be ineffective unless approved by a court. I reproduced the definition of that term at paragraph [18]. It focuses largely on content criteria. Nothing in it expressly or implicitly requires that there must be marital discord between the parties when the agreement is made.

[53] Whatever be the true status or meaning of the overseas document, it cannot fetter this Court's jurisdiction to hear the Wife's application. Let us examine the possibilities. If the overseas document is a valid "maintenance agreement" and does not provide that any of its terms are in substitution of rights as permitted by ***section 67(1)*** of the ***FLA***, it does not impact this Court's jurisdiction to hear the Wife's application. Secondly, if the overseas document is valid and provides as allowed for by ***section 67(1)***, it cannot oust the Court's jurisdiction since it has not been approved under ***section 67(4)***. Thirdly, if it is invalid then it can have no effect.

DISPOSAL

[54] The Wife is not precluded by the overseas document from making an application for spousal maintenance and property orders. She may therefore proceed with her application.

OLSON DeC ALLEYNE
JUDGE OF THE HIGH COURT