

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Family Appeal No. 2 of 2017

BETWEEN:

LARRY PIERRE TATEM

Appellant

AND

KATHERINE TATEM

Respondent

Before The Hon. Sir Marston C.D. Gibson, K.A., Chief Justice, The Hon. Andrew D. Burgess, Justice of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal (Acting)

2018: February 27

November 14

December 18

2019: September 25

Mr Bryan L. Weekes and Mr. Philip McWatt for the Appellant

Mrs Marguerite Woodstock-Riley QC and Mrs. Amanda Riley-Jordan for the Respondent

DECISION

REIFER JA (ACTING):

Introduction

- [1] This appeal from the Family Division of the High Court covers the entire spectrum of grounds of appeal: it challenges the trial judge's findings of fact, it alleges errors of law and it challenges the exercise of his discretion.
- [2] This (No. 2 of 2017) is an appeal by the appellant/husband filed under a Certificate of Urgency on 22 August 2017. Concurrently, an application for a stay of the Order of **Chandler J.**, the subject of the appeal was filed by the appellant/husband. Subsequent to this, the respondent/wife filed a cross-application to strike out the appeal. Both applications require an examination of the merits of the appeal.
- [3] There is another appeal (No. 3 of 2016) but this matter was given priority as it was deemed to be urgent. That appeal remains outstanding.

Factual and Procedural Background

Factual

- [4] The parties, hereinafter referred to as the appellant/husband and the respondent/wife, were married on 5 August 1995. It was the second marriage for the wife but the first for the husband. The respondent/wife is the mother of two children from that previous relationship. The family moved to Canada

in 2000 and the record shows that at the time of the move to Canada the children were approximately age 14 and 16 respectively and that the younger of the two lived with the parties when they resided there.

- [5] There is one child of the marriage, KT, who was born on 26 August 1996. KT was an adult age 21 on 26 July 2017, the date of the judge's orders. The respondent/wife has had the responsibility of the care and control of this child of the marriage during her minority and the record up to the time of the July 2017 decision, reflects that she continues to live with the respondent/wife. There are 'hot-button' issues relating to the psychological counselling of the child of the marriage, her tertiary education and the cost of the same.
- [6] The parties separated in November 2012.
- [7] The appellant/husband is a certified architect. The respondent/wife previously owned and operated her own school which she gave up when the family immigrated to Canada in 2000 when the appellant/husband secured a job there. In Canada and on the family's return to Barbados in 2005, the respondent/wife remained at home and remains unemployed to date. It is not disputed that both moves were in furtherance of the appellant/husband's career.
- [8] The record documents her health challenges, which are outlined at paragraph [37] of **Chandler J's** written judgment. It has remained her submission that

these health challenges have precluded her from obtaining meaningful and gainful employment. The respondent/wife has been unable for financial reasons to start a project to establish a school at the property where she resides. Presumably, such a project would enable the respondent/wife to maintain herself.

- [9] It is not disputed that the parties enjoyed a high standard of living during the course of the marriage of 20 years. The uncontested evidence shows the appellant/husband earned considerable sums during the marriage and that in the opinion of the trial judge, remains capable of earning considerable income through his architectural firm. The trial judge at paragraph [63] of his judgment made the following observations of the parties pre-separation standard of living:

“[63] The parties have enjoyed a comfortable standard of living for the duration of their marriage. They lived in rented accommodation at \$6,000.00 and \$4,000.00 a month at various times during the marriage. They dined out regularly as a family and travelled as a family at least once a year. The parties drove luxury vehicles during their marriage. The child of the marriage was engaged in extra-curricular activities such as archery, horseback riding and paddle boarding. This shows the standard of living which the parties enjoyed and expected that their child would enjoy. The author Findlay states in ‘Family Law in Australia’ pg. 288 paragraph 751, “*in general the wife and children should not be relegated to a significantly lower standard of living than what the husband enjoys...*” I agree with that opinion and accept it as a correct statement of the purport and intent of the provisions relating to maintenance under the **FLA**”.

[10] It was only after the marriage broke down and significantly, shortly after the appellant/husband left the matrimonial home, that he claimed that he was no longer able to support his family adequately or at all. The parties have sustained a change in their financial circumstances, the extent of which had to be determined as a finding of fact by the trial judge. At the core of this ongoing conflict is an attempt by the respondent/wife to be afforded a reasonable standard of living and the appellant/husband's position that he is unable to provide it.

Procedural

Before the High Court

[11] The proceedings before the High Court commenced with the respondent/wife's application for maintenance for herself and the then minor child of the marriage, pursuant to which an interim order was filed 4 February 2013. The terms of this Order are set out below:

- “(i) That the Respondent/Husband pay maintenance to the Applicant/Wife in the interim sum of Two thousand four hundred dollars payable equal installments on the 1st and the 15th of each month.
- (ii) That the Respondent/Husband pay the rent and expenses including; electricity, cable, bottled gas, telephone, cell phones.
- (iii) That motor vehicle registration number XK 601 remain with the Applicant/Wife for her use and the use of the minor child.

(iv) That the Respondent/Husband continue to cover the expenses in relation to the said motor vehicle registration number XK 601 including, but not limited to, insurance, road tax.

(v) That custody of the minor child of the marriage KT, remain joint between both the Applicant Wife and the Respondent/Husband and that care and control remain vested in the Applicant/Wife.

(vi) That the Respondent/Husband pay all educational, medical, dental and ophthalmic expenses for the child of the marriage KT.

(vii) That the Respondent/Husband pay all of the medical dental and ophthalmic expenses for Katherine Tatem.

(viii) That the Respondent/Husband pay for all necessary counselling sessions for KT, including any sessions that the counsellor may need to conduct with either or both parents.

(ix) Such further orders as the court sees fit.

(x) Liberty to apply”.

[12] This order of 2013 remains largely unsatisfied to date and the source of ongoing litigation both in the High Court and in this Court. This includes contempt applications in the High Court, one of which remains outstanding. Proceedings have commenced and applications have been heard by **Kentish J, Weekes J** and **Worrell J**, in addition to those dealt with by **Chandler J**.

[13] The hearing before **Kentish J** calls for special mention. On an urgent application to that court, **Kentish J** on 29 October 2013, ordered the appellant/husband to pay forthwith to the landlord arrears of rent in the sum of \$6000. In addition to this, he was further ordered to pay rent for the months of November and December 2013 and to reimburse the wife in the sum of

\$3000. The appellant/husband appealed this order, which this Court heard and dismissed on 12 February 2014 and remitted the matter to the High Court for hearing in March 2014.

[14] The appellant/husband's position is, in summary, that his financial position has deteriorated resulting in his non-compliance with this order and that the respondent/wife is in a financial position to take care of herself. The respondent/wife alleges that in excess of \$300,000.00 is owed as a result of the appellant/husband's willful non-compliance with the consent order since 2013.

[15] An application for dissolution of marriage was filed on 24 March 2014 and the decree nisi was granted by the High Court on 14 May 2014.

[16] This appeal is against the orders of **Chandler J** made on 26 July 2017 in High Court suit No. 21 of 2013. The orders sought from this Court are the varying, setting aside and/or discharging of **Chandler J's** orders. The rescinding of the subject orders was sought as an alternative. The appellant/husband also sought an order that the respondent/wife pay the appellant/husband's costs of and incidental to this appeal.

Before this Court

[17] The notice of appeal, containing 13 grounds of appeal is set out in its entirety hereunder:

- “1. That the learned trial judge erred in law and misdirected himself when he found that monies held on a joint account with the Wife and her deceased mother was Estate funds.
2. The learned trial judge had failed to take into account relevant considerations namely the Appellant’s Application and Affidavit in support filed on the 26th day of April 2013 seeking a variation Order or a suspension of the original Order made on the 22nd day of January, 2013 and the Order made was therefore unreasonable in the circumstances and against the weight of the evidence before the Court.
3. That the learned trial judge failed to take into account the relevant consideration of the finances of the Wife, namely that she had the sum of US \$295,000.00 in an account in Canada which was undisclosed at the making of the order on the 22nd of January 2013 and which only came to the attention of the Judge during the hearing of the application for maintenance and which the Court determined belonged to the Estate of the deceased’s mother.
4. That the Order of the Learned Judge that the Appellant/Husband pay all of the educational expenses of the said adult child without having any knowledge of the relationship between them was unreasonable and irregular and ought not to stand.
5. That the Order of the Learned Trial Judge that the Appellant/Husband pay all of the educational expenses of the said adult child without having any knowledge as to whether the adult child has been in attendance at school for two years prior to the making of the order or had engaged in paid employment for the same period.
6. The learned judge erred as a matter of law in or otherwise misdirected himself in making the Order for spousal maintenance when he determined that the respondent/Wife had no financial resources of her own to maintain herself.
7. The learned trial [*sic*] erred as a matter of law in making the said Order which stated that the Wife could not maintain herself without conducting any enquiry as to the Financial Resources of the Respondent/Wife including the value of her share and interest in the estate of her deceased

mother and the Appellant/Husband respectfully submits that the entire proceedings was irregular and resulting orders were unreasonable.

8. That the learned judge failed neglected and/or refused pursuant to Rule 54(1)(2) (a)(b)(3) (a) (b) of the Family Law Rules to take any steps to ascertain in the finances of the adult child and whether the child was employed or attending school.
9. The learned trial [*sic*] erred as a matter of law in making the said Order appealed against without having regard to the fact that the Wife had failed to disclosure[*sic*] her full financial resources and the value of her inheritance at the time of hearing. That there was not sufficient evidence upon which the Orders could properly be based. Wrongly exercised his discretion in making the said Orders having regard to the law relative to spousal maintenance and to the relative financial position of the Appellant/Husband as outlined in his several Affidavits before this court.
10. The said Order was manifestly unjust and did not take into consideration all of the Wife's financial resources as well as [*sic*] Appellant's means and circumstances.
11. That the Learned Judge wrongly exercised his discretion in making the Order for the maintenance of the adult child having regard to the law relative to the maintenance of adult children and especially the fact that the Wife had not vouchsafed to the Appellant/Husband as to what proposals were intended for the adult child's tertiary education, the fees involved or any other such information.
12. That the matters outlined above speak to an abuse of process of the Court on the part of the Wife/Respondent.
13. The Respondent/Appellant/Husband reserves the right to ask, alter or vary the grounds of appeal when the learned trial Judge's notes and written decision become available."

[18] While the appellant/husband reserved the right to amend his grounds of appeal on receipt of the judge's written decision, this was never done and the application proceeded on the basis of the original grounds filed.

- [19] Filed with the said notice of appeal was an affidavit in support of notice of appeal of equal date deposed to by the appellant/husband.
- [20] Paragraph 2 of the appellant/husband's affidavit in support shows that hearing in this matter was ongoing from January 2013 when it was filed under a certificate of urgency, through to 26 July 2017, with the trial judge making several orders. It further outlined the procedural history of the matter in the High Court, the financial circumstances of the appellant/husband by way of explaining his non-compliance with the orders of the court, particularly the order of January 2013.
- [21] A notice of application of equal date sought leave to appeal and a stay of the orders made by **Chandler J** on 26 July 2017 pending the hearing and resolution of the appeal. These orders concerned the payment of monies to the respondent/wife and the now adult child of the marriage.

The Cross-Application

- [22] On 2 November 2017, counsel for the respondent/wife filed an application in this matter in the following terms:
- “1. That the Appeal filed on the 22nd August 2017 against the Order of the Honourable Justice William Chandler made on the 27th July 2017 and not served on the Appellant/Husband until the 26th October 2017 be dismissed; and or
 2. That the Appellant/Husband pay the costs outstanding from Appeal No. 6 of 20—prior to consideration of Civil Appeal No. 2 of 2017 and/or;

3. That the stay requested by the Appellant/Husband be denied and/or; as condition of any stay that the Appellant/Husband pay all outstanding maintenance and payments due pursuant to the Order of Chandler J of 22nd January 2013 and or pursuant to the Order of Kentish J of the 29th of October 2013 and or pursuant to the Order of the Court of Appeal of the 14th of February 2014.
4. That the Appellant/Husband give security for the payment of maintenance and all payments outstanding pursuant to the Court Order of 22nd January 2013 made by the Honourable Justice William Chandler prior to any Appeal being heard.
5. That the Appellant/Husband give security for the Respondent/Wife's costs of this Appeal.
6. That the Appellant/Husband do pay the Respondent/Wife's cost of this Application.
7. That the Appellant/Husband surrender all of his passports to the Registrar of the Supreme Court until compliance with the Orders made herein.
8. Such further or other Orders as the Court deems just.

The Grounds of the Application are as follows:

- 1) The Appellant seeks to appeal an order of the Honourable Mr. Justice William Chandler, Judge of the High Court made on 26th July 2017 which provided *inter alia*;
*“That the Husband’s Application for a variation of the Order of the 22nd January 2013 be dismissed.
 That the Order of the 22nd January 2013 stands.”*

Service

- 2) Rule 89 (6) (a) and (b) of the Family Law Rules 1982 provided:
*“a. within 28 days after the date when the decree appealed from was pronounced; or
 b. within such further time as the judge may direct.*
- 3) The said notice of appeal was served on the 26th of October 2017 in excess of the 28 days from the date the decree appealed from was pronounced. No further time was directed by the judge. No further time should be granted in all the

circumstances of the matter, being the non compliance of the Appellant with Orders of the Court of the 22nd of January 2013 of Chandler J, 29th of October 2013 of Kentish J and the 12th of February 2014 of the Court of Appeal, the prejudice to the Respondent/Wife and the Appellant/Husband having no prospect of success”.

Outstanding Costs

- 4) In Court of Appeal No. 6 of 2013 the Appellant/Husband appealed the interlocutory order of Kentish J made on the 29th October 2013 inter alia;
 - i. *“That the Respondent/Husband shall forthwith pay to Charles Armstrong the arrears of rent in the sum of \$9,000.00 for accommodation of the Applicant/Wife and the minor child KT and rent for the months of November and December 2013 in the sum of \$6,000.00 in respect of the premises situate at ‘Kinmont’ Rockley New Road Christ Church.*
 - ii. *That the Respondent/Husband in addition thereto shall pay to the Applicant/wife the sum of \$3,000.00, the monies paid by her for rental of the aforesaid premises.*
- 5) On the 12th of February 2014 the Court of Appeal dismissed that appeal and granted the Wife costs. A request was made of the Appellant/Husband for costs and there was no response. These costs are still outstanding.
- 6) By Order of Richards J on the 29th of August 2014 the Wife was also granted costs against the Appellant/Husband arising from an injunction as a result of threats made via email to the Wife and counsel for the wife. These emails contained vulgar and threatening content including indicating knowledge of where counsel resided, an image of a dead body, and indicating “...**your life is over and so is your clients**”. The Appellant/Husbands actions indicate his lack of stability and volatile nature, disrespect and disregard

for his Wife, child, counsel, the courts and the entire judicial system”.

Change of Attorneys-at-Law

[23] By notice filed 28 November 2017, the appellant/husband changed his attorneys-at-law in this matter.

[24] His new attorneys-at-law filed written submissions 29 January 2018, supplemental written submissions 20 February 2018 and two affidavits on 26 February and 26 October 2018 respectively.

[25] All submissions in this matter on behalf of the appellant/husband were made by his new team of attorneys-at-law.

The Decision of 26 July 2017

[26] It became clear, early in the proceedings, that this matter could not be resolved by the parties and would occasion full litigation, inclusive of disclosure on both sides and extensive cross-examination.

[27] Following the conduct of the trial, on 26 July 2017 **Chandler J** issued certain orders pursuant to the application before him. The judge read a written decision, but gave an undertaking to deliver same to the parties after it had been corrected. It was these orders and that decision that the appellant/husband appealed.

[28] The written decision became available in January 2018. In that judgment, the trial judge carefully outlined the three applications before him, namely, the

respondent/wife's application, the appellant/husband's application and the contempt application, together with all applications and orders made.

[29] From the above factual and procedural history, the trial judge determined that he was faced with three issues in this matter, iterated at paragraph [30] of his judgment as follows:

- i. Whether the Applicant/Wife is entitled to be maintained by the Respondent/Husband? This will require a consideration of whether she has established that she is "*unable to support herself adequately*" from her own resources by reason of any of the statutory matters set out in Section 50(2) of the FLA;
- ii. Whether the Respondent/Husband is liable to maintain the child of the marriage?
- iii. Whether, if the maintenance order is upheld, the amount ordered is a reasonable amount or should be varied?"

[30] From paragraphs [32] and onwards the trial judge addressed each of the listed issues seriatim, first outlining the law relevant to each issue raised and then applying it to the evidence before him.

[31] On an application of the law to the facts, the trial judge found on the first issue that "the Applicant/Wife has a limited capacity for gainful employment and that the Respondent/Husband is liable to maintain her to the extent that he is reasonably able to do so".

[32] Following the same process with the second issue, the trial judge held the respondent/husband solely responsible for the maintenance of the said child in light of the applicant/wife's financial situation occasioned by her medical

condition. The trial judge found at paragraph [72] of the judgment that “the standard of living, which the Applicant/Wife and the child of the marriage were accustomed to, cannot be supported for any extended period of time on the financial resources of the Applicant/Wife. I also find that the Applicant/Wife is unable to maintain a reasonable standard of living for herself and the child or household”. The judge also ordered the appellant/husband to pay the child’s university fees, cost of books and the necessary expenses of her attendance at UWI.

[33] The third issue was whether there should be a variation of the maintenance order. Here at paragraphs [53] to [83] the judge applied the relevant law, namely **sections 53 and 54 of the Family Law Act**. At paragraph [88] the judge made the following significant findings of fact:

- “a. The Applicant/Wife is unable to support herself adequately in the present circumstances having regard to her medical condition and having regard also to the fact that she must still provide support for the child who requires counselling.
- b. The parties envisaged that the child would continue her education to the tertiary level.
- c. The Respondent/Husband is capable of providing reasonable maintenance for the Applicant/Wife and child in the terms of the consent order made by me on the 22nd day of January 2013 having regard to his statement of financial circumstances and his earning capacity as a qualified architect.”

[34] This fueled the final order which refused the variation of the interim order and ordered the respondent/husband to pay the now adult child of the marriage’s

costs of admission to the UWI. The objection to this order as a ground of appeal is curious, as it is noted at paragraph [43] of the judgment that “on 8 August 2014 an order was made by consent before **Weekes J** that the maintenance of the child of the marriage, including ancillary expenses should continue until the child completes her secondary education or until further order. **Counsel for the respondent/husband submitted that the only issue on this aspect of the case is that there is currently no information before the court relating to [K’s] future educational plans other than that [K] would be completing secondary school in 2015 and wanted to go to Canada to pursue studies.**” (my emphasis). The trial judge, in recognition of the altered financial circumstances and the fact that the parties were considering a comparable programme at the University of the West Indies (UWI) saw this as a reasonable and acceptable alternative.

Documents filed pursuant to the appeal

[35] In addition to the respective applications, the parties filed several affidavits which we shall briefly review. The observation must however be made that both parties introduced “new evidence” without first having sought this Court’s leave to admit same.

By the appellant/husband

[36] (i)The affidavit of 26 February 2018: This was filed in response to the respondent/wife’s cross-application to strike out

the appeal on the ground that it was filed and served out of time. It is in effect a legal submission on the strength of the appeal and on the issue of prejudice. It exhibits income tax returns for the years 2012 and 2016 which were not submitted to the judge during the trial and submits that this was evidence which the trial judge should have taken into account before rendering his decision in 2017. In this affidavit, the appellant/husband posits that there was a delay of over 3 years in the delivery of the decision and on the strength of a recent Privy Council decision argues that the decision has a reasonable chance of success. On the issue of prejudice he argues that if this appeal is struck out, he will lose his ability to challenge the effect of an order calling on him to pay his ex-wife hundreds of thousands of dollars.

(ii) The affidavit of 26 October 2018: This purports to be supplemental to the above affidavit and places before this Court evidence of the gross earnings of Tatem Architects Inc. for the years 2012 and 2013 as a gauge of the company's revenue stream by way of exhibiting the affidavit of the appellant/husband filed 9 May 2014. The appellant/husband alleges further that his financial information after 2013 was not put before the High Court nor was financial information requested at any time by the High Court prior to the decision given in 2017.

By the respondent/wife

[37] (i) The affidavit of 24 November 2017: This affidavit was filed in support of the cross-application and brought into account all affidavits filed for the period 2013 to 2017 inclusive of an affidavit of Amanda Riley, attorney-at-law of August 2014. It provides a chronology of this matter for the same period. It addresses the circumstances of the service of the appeal, the issue of the outstanding costs generated to date from the protracted litigation, outstanding maintenance, the appellant/husband's income as discerned from discovery and the circumstances of the child of the marriage.

(ii) The affidavit of October 2018: It updates the earlier mentioned chronology; it details the maintenance owed; it includes new information and/or allegations with respect to the

appellant/husband's income up to and including 2018 some of which was obtained as a result of a discovery order made by **Worrell J** in November 2017.

(iii) The affidavit of Amanda Riley Jordan attorney-at-law of October 2018 in support of the position that the order of January 2013 was a consensual order.

(iv) The affidavit of the respondent/wife of November 2018 in response, *inter alia*, to the appellant/husband's affidavit of October 2018: this deals with the appellant/husband's non-compliance with orders of the court and in support of the proposition that this Court should address that non-compliance before giving him a hearing on this appeal.

DISCUSSION

The Issue of the Stay and the Application to Strike Out

[38] The above application raises for our consideration two issues: namely the application to stay the order of 2013 and the application to strike out the appellant/husband's application and appeal.

The application for a stay

[39] Counsel for the appellant/husband, on the authority of **Wilson v Church (No. 2) [1879] Ch 454 (Wilson v Church)** and the jurisdiction vested in this Court by **section 53(2)(b)(ii) of the Supreme Court of Judicature Act Cap. 117A (Cap. 117A)**, argued in one of the written submissions filed 29 January 2018, that this Court should grant interim relief by way of a stay of the trial judge's order of July 2017.

- [40] For the purposes of this argument, reliance was placed on the jurisdiction of this Court under **section 53(2)(b)(ii)** on the issue of prejudice, namely, “an interim order to prevent prejudice to the claims of any parties pending appeal.” The prejudice alleged was that the financial information before the Court was the appellant/husband’s statement of financial circumstances filed 8 April 2013 and the respondent/wife’s filed 6 May 2013. Counsel’s submission was that “At no point thereafter did the court require either party to file an updated statement notwithstanding the fact that by the time of his judgment a period of approximately 4 years would have elapsed.”
- [41] In a later submission filed on 20 February 2018, counsel further expanded this submission in the context of the alleged delay and its impact on the court below making a decision on up-to-date financial information. This submission rested heavily on Lord Wilson’s dicta in **Ramnarine v Ramnarine [2013] UK PC27**.
- [42] Counsel submitted also that the matters raised in this appeal cannot be described as trivial, frivolous or unmeritorious. As such, the appellant/husband ought not to be continually exposed to liability under those orders until the appeal had been determined. Counsel contented that his argument in this regard was strengthened by the fact that the minor child had now attained the age of 18, but the order made no provision for any cessation

of the appellant/husband's obligations once this had occurred. Counsel further argued that it is uncertain whether the monthly sum payable to the respondent/wife included a portion of maintenance payable on account of the minor child.

[43] This submission ignores the factual reality of the demands for discovery from 2013 to 2015 which unfolded before the lower court. It also ignores the fact that the court's decision in 2017 was against the backdrop of the information placed before the court about the financial circumstances of both parties and on which the parties were cross-examined up to April 2015.

[44] Further it ignores the requirement of full and frank disclosure that exists in proceedings for financial provision and other ancillary relief: see **Williams JA in Wilson v Wilson C.A. Civil Appeal No. 5 of 2003 (22 March 2007)** At paragraph [48] of the judgment therein **Williams JA** (as he then was) stated:

“[48] Attorneys-at-law in family law cases have an obligation to ensure that full disclosure is made. A party that has failed to make disclosure of material evidence or whose credibility is questionable cannot expect a favourable assessment of his or her case. The judge must inevitably make an assessment based only on the credible evidence; there is no scope for speculation especially in favour of an untruthful party or a party who fails to make full and frank disclosure of all material facts and documents.”

- [45] Accordingly, in the face of the parties' failure to make full disclosure, they are in no position to complain if the trial judge deals with the matter as best he could. It is to be noted, however, that pursuant to disclosure orders made by the trial judge, there was financial information before the court on which it based its evaluation for the purpose of its findings of fact. A by-product of this disclosure fueled the trial judge's assessment of the credibility of the parties, specifically the appellant/husband.
- [46] Counsel for the respondent/wife's response to the application for the stay is posited primarily on the appellant/husband's alleged willful refusal to comply with the orders of the court, his non-compliance with the **Family Law Rules, 1982** in the filing and service of his appeal and application for a stay, and his non-payment of the costs outstanding from appeal No 6 of 2013 among other cost orders. The particulars of these submissions are addressed below under the rubric "the striking out application".
- [47] This Court in **IDM Direct Marketing Corporation v The Attorney General et al Civil Appeal No. 4 of 1998 (IDM Marketing)** applied the law in **Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887 (Linotype)** and **Wilson and Church** both of which are often cited by counsel in this jurisdiction and in the Commonwealth Caribbean. **Linotype** establishes that an application for a stay of execution must establish severe prejudice if a stay

is not granted and also that the appeal has a genuine prospect of success. This case is seen as a change from the former rigid requirements and the ushering in of a more practical and liberal approach. In **IDM Marketing**, this Court said this of **Linotype-Hell Finance Ltd v Baker**:

“The basis for the grant of a stay in the Linotype case was three-fold: that there was an arguable appeal, that the applicant would otherwise be exposed to ruin, and that the judgment creditor was adequately protected by a charging order. I certainly think that the applicant for a stay should show that the appeal is a *bona fide* appeal with some prospect of success. But it cannot be said that Linotype sets out the only circumstances in which a stay should be granted; and it certainly did not abrogate the principle in *Wilson v Church* (Supra).

[48] The applicable law is also outlined by Awich CJ (Ag.) in **BCB Holdings Limited, Belize Bank Limited v The Attorney General of Belize Claim No. 743 of 2009** which adopted and applied in that jurisdiction the leading English authorities on the point. These are **BMW AG v Commissioner of HM Revenue and Customs [2008] EWCA Civ 1028**, **Gator Assets Ltd v NAK Naftogaz Ukrainiy [2008] EWCA Civ 1051** and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 1915 (Hammond Suddard)**. These cases establish that the litigant is entitled to immediately enjoy the fruit of his successes in litigation, unless the court orders otherwise. The proviso is that the court has an unfettered discretion to impose a stay of execution if the justice of the case so demands.

[49] The applicable law is also comprehensively outlined at **Halsbury's Laws of England 4th Edition, Volume 17** at **paragraph 455** in the following terms:

“The Court has an absolute and unfettered discretion as to granting or refusing of a stay, and as to the terms upon which it will grant it and will as a rule, only grant a stay if there are special circumstances which must be deposed to an affidavit unless the application is made at the hearing.”

[50] In **Hammond Suddard** the court posited that it should ask itself the following relevant questions:

- “(a) If a stay is refused, what are the risks of the appeal being stifled?
- (b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?
- (c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover what has been paid to the respondent?”

In short, a balancing of the risks and the making of a determination in the interest of justice.

[51] This was the approach taken by **Phillips LJ** in **Combi (Singapore) Pte v Sriram and Another [1997] 1 EWCA Civ 2164 (Combi)** where he stated the proper approach to be as follows:

“In my judgment the proper approach must be to make that order which best accords with the interest of justice. It there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not

ordered but no similar detriment to the plaintiff is a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice”.

- [52] This was the approach followed by **Morrison JA** in **Urban Development Corporation v Jacitar (JA) Limited JM 2011 CA 67**. This was also the approach advocated by counsel for the respondent/wife who cited the authority contained in **The Practice of Family Law: Evidence and Procedure** by David Burrows and the Australian case of **Aldridge v Keaton (Stay Appeal) [2009] Fam CAFC 106**.

The application to strike out

- [53] The submission of counsel for the respondent/wife, in respect of this application, was grounded in several factors, ranging from the fact that the notice of appeal was filed and served out of time contrary to **Rule 89(6)(a) and (b)** of the **Family Law Rules 1982**, the failure of the appellant/husband to apply for leave to file that appeal and to apply for leave to extend the time for filing and/or service. This was set out at para [22] above.
- [54] Counsel examined the approach of various jurisdictions on these issues.
- [55] She noted that the courts of the United Kingdom consider, *inter alia*, the interest of the administration of justice, whether an application was made

promptly, a good explanation for the failure and the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocols.

[56] Citing the Australian authority of **Cowper v Jenkins [2017] FAMCAFC 39 (Cowper v Jenkins)**, counsel submitted that similar considerations were applied in that jurisdiction. Counsel referenced an extract, cited by the court in **Cowper v Jenkins**, from which the following principles can be extracted in considering whether to grant an extension of time. There are:

(i) The discretion to extend time is given for the sole purpose of enabling the court or justice to do justice between the parties: see **Hughes v National Trustees Executors & Agency Co. Australasia Ltd [1978] VR 257 at 262**. This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant.

(ii) In order to determine whether the rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time: see **Avery v No 2 Public Service Appeal Board [1973]2 NZLR 86 at 92; Jess v Scott (1986) 12 FCR 187 at 194-5**.

(iii) When the application is for an extension of time in which to file an appeal, it is always necessary to consider the prospects of the applicant succeeding in the appeal: see **Burns v Grigg [1967] VR 871 at 872; Hughes, at 263-4; Mitchelson v Mitchelson (1979) 24 ALR 522 at 524**.

(iv) It is also necessary to bear in mind in such an application that upon the expiry of the time for appealing, the respondent has “a vested right to retain the judgment” unless the application is granted: **Vilenius v Heinegar (1962) 36 ALJR 200 at 201**. It follows that, before the applicant can succeed in this application,

there must be material upon which the court can be satisfied that to refuse the application would constitute an injustice.

[57] Counsel submitted further that the Barbadian authorities followed the principles adumbrated above and while the **Family Law Act** is not subject to **CPR**, the authorities on extending time do nonetheless provide guidance. In this regard, counsel referenced the High Court case of **Credit Agricole Indosuez v The Owners of the Vessel European Vision et al BB 2004 HC 19**.

[58] Mrs Woodstock-Riley QC relied on the delay of 90 days before service; no explanation and/or no adequate explanation for the delay; the appellant/husband's non-compliance with the orders of **Chandler J, Kentish J** and this Court; and the prejudice to the respondent/wife and the child of the marriage by this non-compliance. Counsel contended that "it is well recognised that perpetrators may use litigation as a form of ongoing control and harassment". This was a prelude to counsel's submission that the appellant/husband is using this process to continue his harassment and abuse of the respondent/wife and those around her including her attorney-at-law. Several examples of the said abuse were enumerated in counsel's written submissions.

[59] Finally, counsel explored in detail the submission that the appeal has no merit and in consequence little or no prospect of success. She relied on the authority

of **CGI Consumers Guarantee Insurance Co. Ltd v Trident Insurance Co. Ltd**, CA No 9 of 2014 (February 16 2016), **Locke v Bellingdon Limited et al**, CA No. 19 of 2001 (**Locke v Bellingdon**) and **Toojays Ltd v Westhaven Ltd**, [2012] 2 LRC 65 (**Toojays**). All of these cases underline the principle explicated by de la Bastide CJ in **Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 562** at 568 “that the trial judge’s exercise of his discretion was not based on a misunderstanding or misapplication of either the law or the evidence”:

[60] It was part of counsel’s case and the orders sought in the cross-application, that the appellant/husband pay the costs outstanding from appeal No. 6 of 2013, among other costs orders of **Kentish J** and **Chandler J** currently payable, before consideration of this appeal. Counsel also argued that the fact of the non-payment of these costs be considered relevant to the determination of whether to extend time or as a condition of the stay of the order of **Chandler J**. It was also counsel’s contention that the appellant/husband should be ordered to pay all outstanding maintenance before consideration by this Court of the application for a stay. In addition, the appellant/husband should be required to provide security for the payment of maintenance, all payments outstanding from the court order of January 2013, the

respondent/wife's costs of this application and that he be required to surrender all of his passports until compliance with the orders made herein.

[61] Counsel also contended on the authority of **Radmacher v Granatino [2008] EWCA Civ. 1304** that where a party has been habitually non-compliant, the Court of Appeal can consider making conditions that govern any proposed stay.

[62] In the second written submission dated 29 January 2018, counsel for the appellant /husband addressed the application of the respondent/wife to strike out the appeal on the basis that it was served outside the 28 day period specified by **Rule 89 (6) (a) of the Family Law Rules 1982**.

[63] His answering submission is that **Rule 137(1) of the Family Law Rules 1982** provides that non-compliance with these rules does not render the proceedings in that court void unless the court so directs. Counsel further submitted that **Rule 137(2)** sets out the matters that need to be considered by the court when deciding what course of action ought to be taken under **Rule 137 (1)** and these include the merits of the case and the degree to which any party has been prejudiced by the breach of the **Rules** complained of. He submitted that the respondent/wife had not in any way shown prejudice by the service of the notice of appeal in this matter outside of the 28 day period stipulated by the **Family Law Rules**.

- [64] However, the Court notes that there was no explanation of the delay in filing and service.
- [65] It was counsel's strongly worded submission that this Court was in no position to consider the merits of the appeal without the transcript of the cross-examination of the parties in the court below especially in view of the fact that at the time of filing the appeal, the trial judge's written decision was unavailable.
- [66] Consequently, this matter was adjourned to facilitate the production of this transcript and permit evaluation of its contents and allow the further submissions thereon by the parties.

Discussion

- [67] Absent from the submissions of both counsel in this matter is the strong authority provided by the CCJ in the case of **Barbados Rediffusion Services Limited v Asha Mirchandani, Ram Mirchandani and McDonald Farms Ltd. CCJ Appeal No, CV1 of 2005 (Barbados Rediffusion)** on the law as it relates to striking out.
- [68] This Court in **American Life Insurance Company v Ainesley Corbin Civil Appeal No. 35 of 2014 (American Life)**, asserted at para [56] that:

“The judgment of the CCJ in **Barbados Rediffusion**, delivered on 16 March 2006 by President de la Bastide J., provides binding authoritative guidance on the factors which must be considered in the exercise of the striking out discretion.”

See **Goodridge JA** also in **Erskine Kellman et al v Granville Bovell Civil Appeal No. 13 of 2015**. In other words, it is good pre-CPR and post-CPR authority in this jurisdiction.

[69] It is to be noted in general, as observed in both cases mentioned above, that the jurisdiction to “strike out” is entirely discretionary. It is a wide and flexible discretion which is to be exercised “as justice requires”. It is also thought important that a court or judge must always bear in mind at the outset that to strike out a party’s case and so deny a hearing on the merits is an extreme step not to be taken lightly. In **American Life** in a judgment written by **Burgess JA**, this Court observed, as per **Barbados Rediffusion**, that it “must conduct a balancing exercise in which account is taken of all relevant circumstances of the case”: para [73] and further, in carrying out this exercise, a court must seek to give effect to the overriding objective.

[70] The factors or principles, stated by the **CCJ** to be non-exhaustive, which a judge should consider when asked to make a strike out order can be found a para [57] of the judgment of **Burgess JA**. Of special note in the context before us is factor (iii) which provides as follows:

“(iii) Broadly speaking striking out should be made in two circumstances. The first is when it is necessary in order to achieve fairness. The second is when it is necessary in order to maintain respect for the authority of the court’s order.”

- [71] It is interesting that ‘fairness’ is defined at (iv) of para [57] to refer not only to the non-offending party but also to other litigants who are competing for the finite resources of the court. This is a clear reference to the Overriding Objective of the **CPR**, which though not applicable in family matters, contains concepts applicable in an exercise of the inherent jurisdiction of the Supreme Court.
- [72] The more relevant consideration in the context of the matter at bar, is the consideration of whether a striking out order is necessary to maintain respect for the authority of the court’s orders. At (vii) of para [57] this Court observes striking out orders to be “a necessary and to some extent symbolic response to a challenge of the court’s authority, in circumstances in which failure to make such an order might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of behaviour that may properly be categorised as comtumelious or contumacious ...”.
- [73] In examining the reasons advanced by the appellant/husband for the non-compliance, we must observe on a consideration of the trial judge’s findings of fact in his decision and the copious record placed before this Court, that there is a doubt raised with respect to the sincerity of the appellant/husband’s stated reasons for non-compliance. The record, in our opinion, discloses a pattern of non-compliance to the consent order of January 2013, to the orders

of **Kentish J**, this Court in 2014, **Richards J** and **Weekes J**. It must be observed, that the appeal of the judgment of **Chandler J** of July 2017 and the application to stay that order had nothing to do with the non-compliance with the orders of **Kentish J**, this Court, **Richards J** and **Weekes J**, the latter one of which have not been appealed.

[74] We decline to go further in making a finding as to whether this non-compliance is “contumelious or contumacious” bearing in mind that there is presently being heard an application(s) for contempt proceedings before **Worrell J** in the lower court.

[75] We shall however in the final analysis consider the argument of striking out against the back drop of the parties’ submissions in the application and cross-application.

The Appellate Function

[76] A brief look at the appellate function and this Court’s jurisdiction is necessary before proceeding further. The basic principle is that, despite the wide powers vested in this Court by **section 61 (1) (e) of Cap 117 A**, the decision of a lower court is always accorded a large measure of respect. It is only where the lower court is found to have committed an obvious mistake of fact, or an error of principle or followed a seriously defective procedure, will an appeal court disturb its decision.

[77] In the recent case of **JJ v SW, Civil Appeal No.4 of 2018 (JJ v SW)** this Court in a reference to **Trimart Inc v Glenda Knight Civil Appeal No. 9 of 2014** and **Ward v Walsh et al Civil Appeal No. 20 of 2005 [unreported]** outlined the appellate approach to an appeal on the facts. And at **paras [44]** to **[46]** of **JJ v SW**, using the dictum of Lord Diplock in **Hadmor Productions v Hamilton [1983] 1 AC 191**, this Court once again summarised the appellate approach to the trial judge's exercise of discretion. See also, *inter alia*, **Locke v Bellingdon** and **Toojays**, which all accepted as the law and approach in this jurisdiction, Lord Woolf MR's exposition in **Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 WLR 1523-D**.

[78] In **E. Pihl and Sons A/S (Denmark) v Brondun A/S (Denmark) Appeal No.24 of 2012**, this Court in exploring further the appellate court's function on questions of law and fact, emphasised the distinction to be drawn between perception of facts and evaluation of facts or stated differently, between primary facts and inferences from primary facts. In view of the fact that the process of finding primary facts involves assessing the credibility of witnesses, the stated principle is, that an appellate court will only interfere where there was no evidence at all or only a scintilla of evidence to support the finding. On the other hand, where the issue concerns an evaluation of facts or the inferences to be drawn from primary facts, an appellate court will

generally regard itself as being in as good a position to draw inferences from or evaluate the facts as the trial judge.

[79] Of particular interest, is the Court's outline of the test where there arise questions of mixed fact and law? **Burgess JA** (as he then was) stated the principle thus:

“Questions of mixed fact and law involve applying a legal standard to a set of facts. This is to be contrasted with factual findings or inferences which require making a conclusion of fact based on a set of facts. But, both mixed fact and law and fact findings also involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. It follows therefore that on an appeal on a question of mixed law and fact, an appellate court in our jurisdiction is free to draw legal or factual inferences and to interfere with the findings of the trial judge.”

[80] Accordingly, the trial judge made findings of primary fact grounded in his assessment of the credibility of the parties, he evaluated facts or drew inferences from primary facts and he addressed questions of mixed fact and law, that is, he applied a legal standard to a set of facts.

Prospect of Success

[81] In the consideration of the respondent/wife's application to strike out the appellant/husband appeal, featuring prominently is the prospect of success of the same. We turn now to a consideration of this issue.

[82] In this intended appeal, the appellant/husband has indeed cast his net wide. A review of the 13 proposed grounds of appeal reveal allegations that the trial

judge erred in law, made erroneous findings of fact, and wrongly exercised his discretion. At the heart of it is a challenge to the payment of maintenance, spousal and parental. It challenges the trial judge's findings of the needs and resources (inclusive of earning capacity in employment) of the respondent/wife and the resources of the appellant/husband. Specifically, counsel for the appellant/husband focuses on the judge's finding that the respondent/wife did not have the ability to maintain herself and the ability of the appellant/husband to pay maintenance. These findings are based both on an evaluation of facts and the perception of facts.

The Consent Order

[83] We are satisfied on a review of the extensive record in this matter that the order of January 2013 was a consensual one and that the recently raised issue as to whether it was a Consent Order, in the absence of the actual words on the perfected order, is purely strategic. As recently as November 2017, the transcript of proceedings indicate that it was put to the appellant/husband that the order reflected what was discussed and agreed, to which the appellant/husband responded:

“Yes it did.”

The Grounds of Appeal Disaggregated

[84] A review of the 13 grounds of appeal (many of which are repetitious) indicates, as mentioned above, that the judge's findings of fact and exercise of his discretion have all been called into question. The errors of law alleged are not an argument that the wrong law was applied. The errors of law seemingly relate to findings of fact and whether there was evidence to support those findings of fact (against the weight of the evidence before the Court), as well as allegations of the failure of the trial judge to further investigate the financial circumstances of the parties.

[85] We are not persuaded from a reading of the judge's decision and a perusal of his notes of proceedings that there is any merit in these arguments. We respect the trial judge's findings of fact based on his assessment of the parties and most importantly, their credibility; in the words of **Burgess JA** in **E. Pihl**, and the House of Lords in **Benmax v Austin Motor Co. Ltd. [1955]1 All E.R. 326.**, in the distinction to be "drawn between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts."

[86] We have reviewed his evaluation of the evidence placed before him and find that there was evidence before him to support the findings made. On an evaluation of the facts before the trial court we find no basis to interfere with

the findings of the trial judge. The trial judge's decision, as well as his notes of proceedings, ably assist in the consideration of these issues as the trial judge carefully reasoned his decision against the backdrop of the evidence before him. It can be seen that he evaluates the evidence as it relates to the account in Canada. At paragraph 76 the trial judge states:

“The Applicant/ Wife had recourse to an account in Canada in her mother's name to assist with her general upkeep and that of the child. She gave evidence that the balance outstanding to that account belongs to her mother's estate. There is evidence that she is entitled to monies under her mother's estate. There is no evidence as to the exact amount or when that estate will be settled. Counsel referred the Respondent/Husband to the wife's inheritances, and the fact that she did banking for her mother. He responded “I know that the money in that account was not from monies earned by Mrs. Tatem.”

[87] In analysing the evidence before him, it is clear that the trial judge explored the law, specifically the **section 53(2)** factors of the **Family Law Act** and also **sections 50** through **54**, and the application of these principles to spousal and child maintenance, particularly as it related to children over the age of 18. It is also noted in this regard that in August 2014, before another judge of the High Court, the appellant consented to an order for the payment of maintenance of the child of the marriage inclusive of ancillary expenses specifically until the child completes her secondary education or until further order. There has been no submission that this was not a consensual order.

[88] The trial judge in accordance with the statutory criteria gave careful consideration to whether the appellant/husband was reasonably able to provide maintenance for the respondent/wife. From paragraphs [73] to [86] the trial judge considered in detail whether the appellant/husband was reasonably able to provide maintenance for the respondent/wife concluding at paragraph [83]:

“It is clear from this evidence that the Husband/Respondent has made no effort to honour the order of Court or to pay any part of the said order even when funds were available.”

[89] The judge concluded further at paragraph [88] that:

“The Respondent/Husband is capable of providing reasonable maintenance for the Applicant/Wife and child in the terms of the consent order made by me on the 22nd day of January 2013 having regard to his statement of financial circumstances and his earning capacity as a qualified architect.”

CONCLUSIONS

[90] Having reviewed the submissions of the parties, the several affidavits and the judge’s notes of proceedings, we can find no basis to fault the judge’s perception of the facts and evaluation of the facts.

The application for a stay

[91] On a consideration and application of the principles discussed above at paras [47] to [52] to the case at bar, the balance in favour of a stay does not lie with the appellant/husband. There are no special circumstances here justifying a stay. The appellant/husband has refused to make payments pursuant to a

consent order made since 2013. It is clear from the financial records that there was an income stream from which maintenance could be paid, but the appellant/husband while challenging the quantum of maintenance, rather disingenuously maintains that he has been advised that a part-payment constitutes an infringement of the said order. On a balance, the prejudice to the respondent/wife is greater than that to the appellant/husband.

The application for extension of time

[92] Having given consideration to the length of the delay, the reason for the delay (or more appropriately the lack thereof), but more critically the issue of injustice or prejudice and the merits of the appeal, we are of the view that the application for extension of time within which to file the appeal should be denied.

The cross-application to strike out

[93] Taking into account all the relevant circumstances, in particular a consideration of ‘fairness’ and the necessity to maintain respect for the authority of the court’s orders, it follows that this Court accedes to the respondent/wife’s cross-application to strike out the appellant’s applications in this matter. In summary, it is our view that on a consideration of the two circumstances enumerated in **Barbados Rediffusion** it is this Court’s opinion that the extreme step of striking out is fully warranted.

OBSERVATIONS

- [94] It is critical that due regard is paid to the fact that the matter before the trial judge was interlocutory in nature. It was an application to vary the provisions of an order made or agreed to since 2013. Between 2013 and 2019 that order and its sequelae have been the subject of litigation both in the High Court and Court of Appeal. It has become an epic battle from which neither side can give quarter.
- [95] It appears to this Court that the order made by the trial judge in July 2017 was an order pursuant to the court's powers under **section 59 (1)** of the **Family Law Act**, that is, "an order pending the disposal of proceedings" or "until further order". It was clearly not an order made pursuant to **sections 56** and/or **57** of the **Act**. This application for maintenance was independent of any consideration of final orders and the relevance of a consideration of maintenance in the crafting of such an order.
- [96] In fact, there appears never to have been a time given to the consideration of final orders in this matter. Stated differently, at all times the court has dealt with the applications (often urgent) before it and never given the opportunity to step back and make a finding as to whether this marriage was well and truly over with no possibility of reconciliation; and to look at the matter broadly, invite relevant applications and submissions and to craft an order reflecting

three parties moving on and forward with their lives in the best way possible, in new and changed circumstances. That, in the opinion of this Court is the overarching intent of family justice. It does not have the same philosophical underpinnings as civil litigation *simpliciter*.

[97] In the interest of family justice this matter cries out for final resolution on all fronts. **Section 60** of the **Family Law Act** imposes a duty upon the court(s) to bring finality to parties' financial relations. It provides as follows:

“In proceedings under this Part, other than proceedings under **section 56** or proceedings in respect of maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.”

[98] It is the view of this Court that the applications before this Court for the reasons articulated should be dealt with as indicated but, in the interest of family justice and the duty of the court under **section 60** of the **Family Law Act**, it is the judgment of this Court that this matter should return to the High Court for urgent determination of the following:

1. The current status of the child of the marriage and the future (if any) of her tertiary education;
2. The plans of the respondent/wife as it relates to future employment or income with consideration being given to a final settlement or a finite time period for the payment of spousal maintenance;
3. The final settlement and/or disposition of the matrimonial property/assets in accordance with the provisions of **sections 56** and **57** of the **Family Law Act** bearing in mind

that the main asset of the parties now appears to be the appellant/husband's earning capacity.

DISPOSAL

[99] For the foregoing reasons, the application for a stay and extension of time is denied. This appeal is struck out and the matter remitted to the High Court.

[100] We shall hear submissions on the issue of costs.

Chief Justice

Justice of Appeal

Justice of Appeal (Acting)