

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**Family Division
2017/FAM/div/00181**

B E T W E E N:

MAVIS LEARY (nee Wells)

Petitioner

AND

MARIO LEARY

Respondent

Before: Strachan J.

Appearances: Keith Seymour for the Applicant

Yolanda Rolle for the Respondent

Hearing Dates: 15th November 2023; 2nd April 2024; 16th April 2024

Matrimonial causes - ancillary matters - nature of consent order - absence of ownership of property under consent order – validity of consent order made under mistake - whether conveyance effectual - variation of consent order - dispensing with term in consent order – considerations for making new order – injunction.

RULING

BACKGROUND:

[1.] Pursuant to divorce proceedings brought by the Petitioner against the Respondent on the grounds of cruelty and constructive desertion, the Petitioner was granted a Decree Nisi on 12th July, 2017. At the time the Decree Nisi was granted the parties put forward an agreed position to

settle the ancillary matters between them. The agreement was crystalized into a Consent Order and was sanctioned by the presiding judge.

[2.] I have set out the salient terms of the order hereunder as follows;

“4. The Respondent shall transfer any and all right, title and/or interest held in the matrimonial home situated in Waterford Eleuthera to the Petitioner and the Petitioner shall transfer any and all right title and/or interest held in the Bar and Restaurant business situated in Waterford, Eleuthera to the Respondent.”

Both the Petitioner and the Respondent executed the Consent Order personally.

[3.] The Decree Nisi was made absolute on the 26th day of September 2017.

[4.] Approximately Five (5) years later the Respondent by way of Two Summonses filed on 6th December 2022 and again on 7th December, 2022 applied to the court for an order varying the Consent order made on 22nd July, 2017 particularizing that paragraph 4 of the said order be dispensed with.

[5.] The summonses are supported by an Affidavit filed 6th December, 2022 and a Supplemental Affidavit filed 2nd November, 2023. In response to the Application and the contents of the Respondent’s Affidavits in support of his application, the Petitioner filed an Affidavit on 4th September 2023 and a Supplemental Affidavit on 24th October, 2023.

THE FACTUAL CIRCUMSTANCES FOR THE APPLICATION:

[6.] The Respondent’s rationale for the application is outlined in his Affidavit as follows;

- a. “That as I did not have counsel during the proceedings, I misunderstood and incorrectly agreed with the terms of the order with respect to the matrimonial home.***
- b. That after further review, I am not the legal owner and have never been the legal owner of the said property and therefore I am not in the position to pass ownership as stated in the said order, as the said property cannot be passed by me to the Plaintiff, as the same wholly belongs to my mother, namely Ruby Ann Nixon and I have no right, title or interest thereto. Now produced and shown to me marked “Exhibit ML-1 is a true copy of the Affidavit of Attestation.”***

[7.] The referred to Attestation marked “Exhibit ML-1 was sworn by Two (2) gentlemen named Bruce Mackey and Jonathan Mackey, aged 80 and 82 respectively. They attest to knowing one Randolph Nixon of Waterford Eleuthera who is now deceased. They go on further to attest to knowing that the said Randolph Nixon owned a piece of property located Queens Highway in Waterford Eleuthera which he conveyed to his daughter Ruby Nixon before he died. They describe the property as;

“All that piece parcel or lot of land situate Queens Highway, Waterford just before the T-junction that takes you either to Whemyses’ Bight or Deep Creek, comprising two (dwelling homes and a restaurant and bar, measuring two (2) acres and bounded Westward by land the property of Rowena Major, Eastward by land the property of Margarita McKinney and on the south by Queens Highway.”

They go on to state that the purpose of the Affidavit is to establish the fact that Ruby Ann Nixon daughter of Randolph Nixon is the rightful owner of the said property.

[8.] The Petitioner counters the Respondent’s contentions about the property ownership. She alleges that the Respondent’s grandmother gifted the land on which they built the matrimonial home in Waterford Eleuthera to them. She admits to not knowing whether there was an actual conveyance of the property to the Respondent. Together they hired contractors to build the home. Then during the course of the marriage they purchased a bar and restaurant from the Respondent’s mother. The bar is situated on the same parcel of land as the matrimonial home.

[9.] The Petitioner admits that in pursuance of the consent order she did transfer all of her interest in the bar and restaurant to the Respondent and opines that the Bar and Restaurant is a “lucrative business” although she is not aware of the profits derived therefrom.

[10.] Since the making of the consent order the Petitioner states that she has spent in excess of Thirty Thousand (\$30,000.00) in upgrades and improvements to the matrimonial home. She resides in the matrimonial home.

[11.] The Petitioner indicates that only after she executed a transfer of the bar and restaurant to the Respondent and since the Respondent remarried did he start harassing her and damaging the property to say he wants the matrimonial home back. She was forced to lodge complaints with the Police Department in Eleuthera and had to fight off a summons taken in the Magistrate’s court by the Respondent to evict her from the property.

[12.] The Petitioner states further that she has never known the land which she said was gifted to her and the Respondent by his grandmother to be owned by his mother Ruby Nixon who has been plagued with Alzheimer’s for some time. Moreover she says that the Respondent has failed to produce any documentation to establish that he is not the legal and/or beneficial owner of the said property.

[13.] There was thereafter allegations made by the Respondent denying that the Petitioner among other things did not contribute to the construction of the matrimonial home and/ or the establishment and sustenance of the bar and restaurant.

[14.] **THE ISSUES:**

- i. What is the Nature of the consent order?
- ii. Can consent orders be varied generally?

- iii. Can this particular consent order be varied? If so;
- iv. How can fairness be achieved between the parties?

THE RELEVANT LEGISLATION

[15.] The governing statute is the **Matrimonial Causes Act, 1991 (MCA)** and the succeeding sections quoted address specifically this court's powers in connection with the application.

S. 28. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say —

- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;*
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;*

29. (1) It shall be the duty of the court in deciding whether to exercise its powers under section 25(3) or 27(1) (a), (b) or (c) or 28 in relation to a party to a marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters that is to say —

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;*
- (d) the age of each party to the marriage and the duration of the marriage;*

- (e) *any physical or mental disability of either of the parties to the marriage;*
- (f) *the contribution made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;*
- (g) *in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;*

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

[16.] S. 35 MCA provides under the rubric - Variation, discharge, etc., of certain orders for financial relief.

(1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2) This section applies to the following orders, that is to say —

- (a) *any order for maintenance pending suit and any interim order for maintenance;*
- (b) *any periodical payments order;*
- (c) *any secured periodical payments order;*
- (d) *any order made by virtue of section 27(3) (c) or 31(7) (b) (provision for payment of a lump sum by instalments);*
- (e) *any order for a settlement of property under section 28(1)(b) or for a variation of settlement under section 28(1)(c) or (d) being an order made on or after the grant of a decree of judicial separation;*
- (f) *any order made under section 25(3) for the sale of property.*

(3) The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order.

[17.] **S. 35 (7) MCA** - *In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.*

[18.] Additional legislation referred to herein are the **Stamp Act, 1925** now repealed but provisions in the **2024 Act** remain unchanged, the **Registration of Records Act, 1928**, and **The Supreme Court Act, 1996** the relevant provisions which I have taken the liberty to also set out hereunder:

[19.] **S. 29 of the Stamp Act, 1925, Chapter 370** Statute Laws of the Commonwealth of The Bahamas.

(1) Every deed of gift or other voluntary transfer of property inter vivos shall be subject to stamp duty based on the value of the property in accordance with the Second Schedule.

(2) No such deed of gift or other voluntary transfer shall be deemed to be duly stamped unless the Treasurer has expressed his opinion as to the stamp duty chargeable thereon.

[20.] **Registration of Records Act, 1928, Chapter 187** of the Statute Laws of The Commonwealth of The Bahamas states as follows:

The “signature of Notary public or Justice of the peace to be authenticated.

S. 8. (1) *The Registrar shall cause to be endorsed on every deed, document or other writing accepted for record the name of the person lodging the same and the date on which the same was lodged, and all deeds, documents or other writings so lodged shall be numbered and recorded in the order in which they are received.*

(2) *When a deed, document or other writing is recorded the Registrar shall cause to be endorsed a certificate showing the book in which the same is recorded and the pages containing such record, and that such deed, document or other writing has been authenticated in conformity with the provisions of this Act, which certificate shall be dated, signed by the Registrar and bear his seal of office.*

S 9. *All deeds, documents and other writings which have a certificate thereon in accordance with the provisions of any Act; the records thereof; and all copies of such records certified by the Registrar to be true copies, shall be admitted as evidence in any court of law or equity in The Bahamas without any further proof:*

[21.] **The Supreme Court Act, 1996**, Statute Laws of the Commonwealth of The Bahamas

S 21. (1) *The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.*

(2) *Any such order may be made either unconditionally or on such terms and conditions as the Court thinks fit.*

(3) *If, whether before, or at, or after the hearing of any cause or matter, an application is made for an injunction to prevent any threatened or apprehended waste or trespass, the injunction may be granted, if the Court thinks fit, whether the person against whom the injunction is sought is or is not in possession under claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable.*

DISCUSSION AND ANALYSIS

[22.] This is a most curious case which requires a stretch of the imagination to accept all that has been alleged by the Respondent regarding the circumstances under which he agreed to the terms of the Consent Order. It is also mystifying that the Petitioner agreed to the terms of the order without questioning the legitimacy of the transactions agreed to. Both parties agreed to a course of action either in ignorance or reckless as to what was legally required of them to pass title to property. Whether this was feigned or genuine by one or both parties, begs the question, notwithstanding that at least one of them was represented by Legal Counsel at the time of the making of the Consent order. It seems clear that neither took advantage of the opportunity to avail themselves of pertinent information and advice required to successfully carry out the terms they agreed to. The suggestion that either or both the Petitioner and Respondent were ignorant to the requirements to transfer title can be rebutted by statements made by each of them in their respective affidavits as follows:

[23.] The Petitioner: *“That on or about the 13th day of July, A.D., 2009 the Respondent purchased the Business building which is located in the front portion of the property on which our Matrimonial Home is located from his mother, attached hereto and marked Exhibit “M.L. 2” is a copy of the unstamped and unrecorded copy of the Conveyance from Ruby Nixon to Mario Leary.”*

[24.] The Respondent: *“That on the 13th day of July A.D. 2009 and at no time afterward, did I purchase the property upon which the business and the apartment building hereinbefore referred to from my mother. The unstamped and unrecorded document exhibited in M.L. 2 in the Petitioner’s Supplemental Affidavit did not, as I am advised and verily believe effectually convey to me the fee simple interest in the said property. Therefore no documents as to my being the legal owner of the said property has been produced and I have never been in possession of any document conveying a fee simple interest in the said property to me.”*

[25.] A review of Exhibit M.L. 2 belies the contents of the Respondent's statement in his affidavit. That document clearly states in the recital that Ruby Nixon as Vendor is "seized in unencumbered fee simple" of the hereditaments listed in the schedule. The schedule describes the hereditaments as follows:

"A Two bathroom, Three (3) bedroom, living room and kitchen unfinished Stone building situated in the Settlement of Waterford in the Island of Eleuthera aforesaid and bounded on the East by a Road Reservation Twenty (20) feet wide; on the West by land the property of Ruby Nixon, on the North by a Public Road leading to and from the Settlement of Green Castle Eleuthera, Bahamas and on the south by land the property of Sandra Rolle and measuring approximately Two and One Half (2 1/2) Acres."

[26.] While there is a rebuttable presumption regarding statements made in recitals of conveyances which may render deficiencies in conveyances nugatory, there are time constraints imposed which if the threshold is not achieved the deficiency will render the conveyance ineffectual. This was enunciated by Adderley J. as he then was in *Thompson and others v. MacDonald and others* [2012] 1 BHS J. No. 39, 2007/CLE/gen/01142 when he said;

"the dictum of Lord Diplock in the Privy Council Case of Ocean Estates Ltd. v Pinder [1960] 2 A.C. where he said at 25 C is relevant here:

"...where a person has dealt in land by conveying an interest in it to another person there is a presumption, until the contrary is proved, that he was entitled to the estate or the land which he purported to convey."

Under section 3(3) of the Conveyance and Law of Property Act it is rebuttable evidence of the truth that the fee simple was conveyed to the grantees. Section 3(3) states the following:

"(3) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts or declarations, twenty years old at the date of contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions."

4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back than a grant or lease by the Crown or a certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter."

[27.] I find that the subject conveyance fails to meet the twenty year threshold whereby the recital by Ruby Nixon that she is the owner in fee simple of the property being conveyed, can be

taken as sufficient evidence of the truth of the fact, matter or description. Moreover, the conveyance is only Fifteen years old and does not meet the Thirty (30) year threshold.

[28.] There are several glaring deficiencies in the purported Conveyance which does **lead me to conclude** that there was indeed no effectual conveyance of the property.

- i. The absence of the payment of government stamp duty on the conveyance.
- ii. The absence of the payment of any recording reference notwithstanding that the purported conveyance is dated Fifteen (15) years hence.
- iii. No plan of the property purported to be conveyed is attached.
- iv. Save for describing that the land is 2 ½ acres, no measurements of the Four (4) boundaries is included in the schedule description.
- v. In any event the description is confusing as it purports to convey a house and leaves us to assume that the land upon which the house is built is also intended to be conveyed.

[29.] It is also clear that the Petitioner is of the view that the 2009 purported conveyance referred to the Restaurant and bar only, while the Respondent suggests that the document purported to convey both properties notwithstanding that the document turned out to be ineffectual.

[30.] More significantly, the statements made by the Petitioner and Respondent suggests to me that both parties knew from at least 13th day of July 2009 of the basic requirements of legally owning the property and the need for a legal conveyance to transfer that ownership. The one saving grace from concluding that the parties were not seeking to fraudulently manipulate the court, at the time of submitting the Consent Agreement is that, to laymen, the wording of the 2009 document referencing the “*fee simple*” may well have led to a genuine *mistake* regarding the efficacy of the document.

[31.] The impression that a mistake was made is bolstered by the statement made by the Respondent when he said;

“I misunderstood and incorrectly agreed with the terms of the Order with respect to the matrimonial home.”

[32.] Clearly the agreement mandated the transfer of property by the Petitioner to the Respondent and from the Respondent to the Petitioner. What is interesting is that the Petitioner speaks of the Respondent’s grandmother *giving* them the property on which they built the matrimonial home but casually states that she could not confirm whether there was an actual conveyance of the property to the Respondent. In making such a statement it discloses that there was no conveyance

of the property to herself and the Respondent. It is trite law that a *properly constructed* Deed is required to effectuate a transfer of real property:

In Bahamas Supreme Court, Common Law And Equity Division, 2012/CLE/qui/00579 In the matter of the Quieting Titles Act, 1959; And In the matter of the Petition of Eleuthera Land Company Limited, a company incorporated and existing under the laws of the Commonwealth of The Bahamas; And In the matter of a tract of land situate at Great Oyster Pond in the Island of Eleuthera comprising Thirty-three and Nine Hundred and Ninety-four thousandths (33.994) acres situated between Little Oyster Pond and Big Oyster Pond about three miles southeasterly of the Settlement of Governor's Harbour in the Island of Eleuthera. [2019] 1 BHS J. No. 36 per Justice Indra H. Charles as she then was enunciated;

"In addition, to establish a good root of title, a document must contain a recognisable description of the property to which it relates. In Bannerman Town, Millars and John Millars Eleuthera Association and others v Eleuthera Properties Limited SCCivApp Nos. 175, 164 and 151 of 2014, Allen P. explained the requirements of a good root of title as follows:

"Root of title is not defined by statute. However In Collie v. The Prime Minister [2012] 1 BHS J. No. 18, the court accepted the definition from Williams on Vendor and Purchaser at paragraph 23:

"Williams on Vendor and Purchaser 4th Edition provides a good definition of what constitutes a good root of title. The authors state at page 24: "must be an instrument of disposition dealing with or proving on the face of it without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title." [Emphasis added]

[33.] Therefore, **I am satisfied** that the purported conveyance from Ruby Nixon to the Petitioner offends the basic, fundamental rules of property conveyancing and as a result there was no effectual transfer to the Respondent of the property upon which the matrimonial home is located.

[34.] Notwithstanding the absence of a Conveyance of the property, the couple proceeded to build the matrimonial home on the property. The Petitioner speaks of having transferred her interest in Scarlet's Restaurant and Bar to the Respondent, after the Consent order was made but does not explain or show how that was done. Again this needed to be done in writing and by a properly constructed deed. However, as the Respondent has not complained of any irregularity in the transfer and in the absence of this court knowing the means by which the transfer was done, this court declines to make any pronouncement upon the efficacy of that transfer.

[35.] What is glaringly obvious is that nowhere in the Respondent's Affidavit did he speak to making any attempts to transfer the matrimonial home to the Petitioner. Rightly or wrongly and

notwithstanding the suspicions harbored by the Petitioner about the Respondent's motivations i.e. his remarriage to a third party, there is much to be said for the fact that neither he nor the Petitioner has adduced any evidence to this court conclusive of their ownership of the properties which were the subject of the Consent order. This presents a dilemma especially given the fact that the Petitioner claims to have expended some **Thirty Thousand (\$30,000.00)** Dollars on repairs and improvements to the matrimonial home and the Respondent, after the Petitioner's transfer to him, has had exclusive possession of the income from Scarlet's Restaurant and Bar. It is also curious that the Respondent made no mention at all in his application about the proceeds he derives from operating the bar and restaurant since the Petitioner transferred to him.

[36.] Notwithstanding the provisions of S. 35 empowering this court to vary the consent order there is a wealth of persuasive authority which give guidelines for the treatment of Consent orders. Consent Orders are regarded as Contracts between the relevant parties and in this case between the Petitioner and the Respondent.

In *Liva v. Harbour Island Bay Holdings Ltd.* [2001] BHS J. No. 71- Bahamas Supreme Court, Common Law Side - 1999 No. 926 -Small J.

'In England there is a line of authority in support of the proposition that a consent order should not be set aside unless grounds which would entitle the court to set aside-or vary a contract are shown: Purcell v F C Trigell Ltd [1971] 1 QB 358; National Benzole Co Ltd v Gooch [1961] 1 WLR 1489; [1961] 3 All ER 1097; Siebe Gorman & Co Ltd v Pneupac Ltd [1982] 1 WLR 185; [1982] 1 All ER 377. There are Australian authorities to the same effect. Harvey v Phillips (1956) 95 CLR 240 at 243-244 and General Credits Ltd v Ebsworth [1986] 2 Qd R 162 at 165.

[37.] **I find that** the threshold which requires the existence of grounds entitling the court to set aside or vary a contract are present and apparent from the evidence of the parties in the surrounding circumstances of the consent agreement. The evidence points to the party's *mistaken belief* that they had ownership of the subject property sufficient to transfer ownership. As the line of authorities above demonstrate, Consent Orders like contracts are adversely affected by "**mistake**". This proposition is demonstrated by the Halsbury references quoted below:

[38.] The court is entitled in certain circumstances to set aside or vary a contract. Contracts made under a mistake is one such circumstance.

"At common law mistake will render the contract void where the parties contracted under the common mistaken assumption that the subject matter of the contract existed when, in fact, that was not the case. Mistake as to the quality of the thing contracted for will, however, have no effect unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. In 2002 it was decided that a line of authorities which held that a contract is liable to be set aside in equity if the parties were under a common misapprehension either as to facts, or as to their

relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault cannot stand with a previous House of Lords decision. There is no jurisdiction in equity to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law; a mere unilateral mistake on the part of the claimant, unknown to the defendant, does not entitle the claimant to rescission, with or without the option of rectification.” Halsbury Laws of England Volume 47 (2021)

[39.] Further, Halsbury's Laws of England Volume 32 (2023) provides:

“In order to render a contract void for common mistake (see Triple Seven Msn 27251 Ltd v Azman Air Services Ltd [2018] EWHC 1348 (Comm), [2018] 4 WLR 97): (1) there must be an assumption as to the existence of a state of affairs substantially shared between the parties; (2) the assumption itself must have been fundamental to the contract; (3) the assumption must have been wrong at the time of the conclusion of the contract; (4) by reason of the assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract; (5) alternatively, the contract must be impossible to perform having regard to or in accordance with the common assumption; (6) the parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common assumption was wrong; and (7) the contract must not have made provision in the event that the common assumption was mistaken.”

[40.] Deed executed under common mistake- Halsbury's Laws of England Volume 32 (2023)

“Where a deed gives effect to or embodies an agreement entered into under a mistake common to both parties as to some essential and integral part of the subject matter of the agreement and not merely to its quality, for example a contract made in the belief that some person is living, who is in fact dead, or that some property is in existence, which is not, the agreement is altogether void and not merely voidable. It follows that the deed is void and not voidable; and it appears upon principle that, if either party should be sued in a claim founded on some obligation undertaken by the deed, he might plead non est factum.”

[41.] Small J. went on in “Liva” supra to say:

“I considered that the following principles were relevant to this case:

- (a) a consent order should not be set aside unless grounds which would entitle the court to set aside or vary a contract are shown;*

- (b) *if the order has not been entered in the Registry of the Court, the Court may set aside the compromise or may refuse to enforce the agreement by declining to make an order giving effect to it;*
- (c) *in such a case, the Court has a general discretion to ensure that its procedures are not a source of injustice;*
- (d) *if the consent order has been entered, the Court has discretion to set the order aside. This discretion will only be exercised in exceptional cases and normally only where there is a ground on which a compromise between the parties could lead to it being set aside;*
- (e) *delay in applying to set aside the consent order is a relevant matter to be considered when the court exercises its discretion."*

[42.] **I am satisfied** that clause 4 of the consent agreement is void. My conclusion also comports with (a), (c) and (d) of Small J's exposition in "*Liva*" that this consent order (i) contains grounds for its setting aside or variation by the court; (ii) the setting aside or variation is an exercise of this court's discretion to ensure that it's procedures are not a source of injustice and (iii) it is an exceptional case where there is a ground which a compromise between the parties could lead to it being set aside.

[43.] I turn now to another issue pertinent to the subject application. The question must be answered as to whether a Consent Order is capable of review by a court of first instance. *In EW v. PW [2017] 2 BHS J. No. 74 Bahamas Supreme Court, Family Division 2016/FAM/div/00102*, per Justice Ian Winder also concluded that a Consent order is capable of review by the court of first instance;

An order "*made by consent can be reviewed by the court has been surveyed by Bracewell J in Benson v Benson (Deceased) [1996] 1 FLR 692 and, more recently, in S v S (Ancillary Relief: Consent Order) [2002] EWHC 223 (Fam), [2003] Fam 1, [2002] 1 FLR 992. I need not repeat the exercise. It is enough for present purposes to identify those circumstances. In the list that follows the labels are descriptive rather than definitive and should be treated as such. The situations which may trigger such a review are:*

- i. *if there has been fraud or mistake: de Lasala v de Lasala;*
- (ii) *if there has been material non-disclosure: Livesey (formerly Jenkins) v Jenkins;*
- (iii) *if there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made: Barder v Caluori [1988] AC 20, [1987] 2 FLR 480;*
- (iv) *if and insofar as the order contains undertakings: Mid Suffolk District Council v Clarke [2006] EWCA Civ 71, [2006] All ER (D) 190 (Feb);*
- (v) *if the terms of the order remain executory: Thwaite v Thwaite [1982] Fam 1, (1981) 2 FLR 280 and Potter v Potter [1990] 2 FLR 27.*

Justice Winder then concluded in *EW v PW* supra;

*In all the circumstances therefore I am satisfied that there exists a jurisdiction in the Court of first instance to review the consent order on the basis as alleged by the Respondent that: (1) there has been a new event since the making of the order which invalidates the basis, or fundamental assumption, upon which the order was made; (2) that matters which are sought to be varied relate to undertakings; and (3) the terms of the order remain executory. Whether the Court will ultimately accept that these factors are present, so as to warrant a variation, is an entirely different matter as was found in the case of *L v L*.”*

[44.] **I accept and adopt** here, Winder J’s finding that not only is a Consent Order capable of review by a court of first instance, but also that, it is no longer necessary, that the application to vary a consent order, needed to be made by commencing a new action or by appeal to a superior court. In the circumstances of this case I find that this court has jurisdiction to review the application brought by the Respondent by Summons and is empowered to vary the consent order for the following reasons.

- i. The Consent Order was executed by the Petitioner and the Respondent under a fundamental *mistake* regarding their legal ownership of the fee simple in the properties in question and in particular that upon which the matrimonial home is situated. They were also mistaken about the Respondent’s ability to transfer the matrimonial home to the Petitioner.
- ii. The terms of the order as it relates to the Respondent’s undertaking to transfer the property to the Petitioner *remains executory*.

[45.] I note that a variation of Clause 4 changes the entire nature of the Consent order. To accede solely to the Respondent’s application, which presents as completely self-serving, without looking at the entire order, to see how it affects both parties, is offensive to the objectives and principles inherent in determining a matter such as this. It is the duty of the court in these matters always to strive to achieve fairness between the parties.

*“Fairness is an equal sharing of property: In *A v B* 2010 2 BHS No. 18 – Barnette CJ (as he then was) – “In my judgment the modern day approach to a division of property in a marriage is that fairness is an equal sharing of property unless there is a compelling reason to depart from that equality. The Law is perhaps best summarized in the judgment of the English Court of Appeal in *Charman v Charman* [2007] 1 FLR 1246.”*

[46.] The circumstances of this case dictate a reconsideration of the terms of the entire order and dictates that this court apply the same considerations provided in **S. 29 MCA** to achieve a variation order that does no violence to or discriminates against the

responding party. In **Jupp v Jupp SCCrAPP No. 37 of 2011** it was expressed that a judge must take into consideration section 29 when exercising his discretion:

“Section 29 is very clear, as to what a judge must take into consideration when considering whether to exercise her powers under section 27 or 28 or even section 25 of the Act. Any sharing principle enunciated by case law must be construed in this light. The statute required that you look at all circumstances and you make the order which puts the parties in the financial position so far as it is practicable that they would have been in if the marriage had not broken down. The division of assets must be fair in its entirety. It is not the role of the judge to list the assets of the family and to divide them one by one. The trial judge must look at the circumstances on the whole; examine the entire context of the case and make an award accordingly, stating sufficient reason for the same.”

[47.] In ensuring also that the Petitioner is not discriminated against; Per Lord Nicholls of Birkenhead in **White:**

“Sometimes, having carried out the statutory exercise, the judge's conclusion involves a more or less equal division of the available assets. More often, this is not so. More often, having looked at all the circumstances, the judge's decision means that one party will receive a bigger share than the other. Before reaching a firm conclusion and making an order along these lines, a judge would always be well advised to check his tentative views against the yardstick of equality of division. As a general guide, equality should be departed from only if, and to the extent that, there is good reason for doing so. The need to consider and articulate reasons for departing from equality would help the parties and the court to focus on the need to ensure the absence of discrimination.”

[48.] I adhere to the basic principle that unduly enriching the Respondent at the Petitioner's expense in the decision to vary this order must be avoided. Considering the fact that the Petitioner seems content with having transferred her interest in the business to the Respondent. It is not clear what form that transfer took given her Affidavit evidence; *“That the Respondent and I during the course of the marriage purchased a bar and restaurant from the Respondent's mother which said business is situated on the same parcel of land as the matrimonial home.”* Whatever that interest was or what form that transfer took, it seems clear that the good will of the business was transferred to the Respondent. The business apparently remains a going concern, from which the Respondent solely benefits to the exclusion of the Petitioner.

[49.] This court has taken into account all of the S. 29 MCA considerations, against the backdrop of the circumstances that existed during the marriage. There are no compelling factors dictating that particular focus should be applied to any one of those singular considerations, except that the emphasis placed by the respective parties on their contributions to the building of the matrimonial home and acquiring the Restaurant and Bar (the S. 29 (1) (f) consideration) bears allusion. To that

end, and in light of the conflicting accounts, I prefer the Petitioner's account of the contributions made by the parties in acquiring and building their assets during the marriage and towards the family in general. She alludes to the fact that as a stay at home mom she not only had the greater apportionment of raising the children but that she was the project manager while the matrimonial home was being constructed. It was upon the opening of their business Scarlet's Restaurant and Bar that she took on full time work at that establishment. She also speaks of being a part time property manager and of doing all the administrative work for the Respondent when he was gainfully employed as a full time Captain. This was until the Respondent lost his job in 2016. At that time Scarlet's Restaurant and Bar was doing so well financially that both of them quit their jobs as part time property managers and worked in Scarlet's. She later, when their first daughter went to college, took a temporary job at the Island School, ostensibly to assist financially at a time when she says they began to struggle with saving money. The petitioner also speaks of both she and the Respondent taking part time "gigs" with guests at private vacation homes at which time she worked three jobs, as a full time chef at the Island School, part time as a chef and housekeeper at the private vacation home and full time at Scarlet's.

[50] The Petitioner's account of the circumstances which existed in the marriage, strikes me as more plausible when compared to the Respondent's assertions that, aside from the responsibility of raising and educating the children of the marriage up to college stage, the only one thing that the Petitioner contributed to the marriage was payment of the phone bill. Moreover the Respondent describes the Petitioner's presence in the matrimonial home and on the property which he emphasizes was owned by his mother, as a "*guest of my mother and me.*" The Respondent's attempts to minimize the Petitioner's role in the marriage and her position in the home, even if he refuses to acknowledge her contributions in managing the construction stage of the matrimonial home, strikes me as particularly condescending of her contributions in raising the children and the role she played in the success of the restaurant and bar business,. This is so notwithstanding that her specific assertions were uncontroverted by him. He now solely enjoys the benefits of sole ownership of a thriving business which the Petitioner helped to grow.

[51] **In Wachtel v Wachtel, 1973 1 ALL ER 829 to 839** Denning M.R. discussed the development of the law surrounding the Matrimonial Proceedings and Property Act, 1970 in the United Kingdom, in particular S. 5 (1)(f). This is the counterpart to The Bahamas', S. 29 (1) (f) MCA provisions and the discussion is instructive in demonstrating the progress made over the years towards achieving fairness, for wives whose contributions to the family are indirect, in the sense that they stayed at home to look after the family and/or did not venture outside the home for employment:

Per Denning MR; "*The injustice to her has often been pointed out. Seven members of the Royal Commission on Marriage and Divorce presided over by Lord Morton of Henryton ((1956), Cmd 9678, para 652, at p 178) said:*

'If, on marriage, she gives up her paid work in order to devote herself to caring for her husband and children, it is an unwarrantable hardship when in consequence she finds herself in the end with nothing she can call her own.'

He went on :

In 1965 Sir Jocelyn Simon PC used a telling metaphor: 'The cock can feather the nest because he does not have to spend most of his time sitting on it.' He went on to give reasons in an address which he gave to the Law Society:

In the light thus thrown on the reason for s 5(1) (f), we may take it that Parliament recognised that the wife who looks after the home and family contributes as much to the family assets as the wife who goes out to work. The one contributes in kind. The other in money or money's worth. If the court comes to the conclusion that the home has been acquired and maintained by the joint efforts of both, then, when the marriage breaks down, it should be regarded as the joint property of both of them, no matter in whose name it stands. Just as the wife who makes substantial money contributions usually gets a share, so should the wife who looks after the home and cares for the family for 20 years or more.

[52.] I appreciate the mischief behind The Parliament of the United Kingdom and of The Bahamas in this empowering legislation. In light of the intention behind the legislation. Exercising the yardstick of equality, **I find no reason** to depart from the principle of equal sharing as expounded in *White* supra. An equal sharing in the matrimonial property includes real and personal property; Per Lord Nicholls of Birkenhead in *White*:

"For the same reason the courts should be exceedingly slow to introduce, or re-introduce, a distinction between "family" assets and "business or investment" assets. In all cases the nature and source of the parties' property are matters to be taken into account when determining the requirements of fairness. The decision of Munby J in P v P (Inherited Property) [2004] EWHC 1364 (Fam), [2005] 1 FLR 576, [2005] Fam Law 101 regarding a family farm is an instance. But "business and investment" assets can be the financial fruits of a marriage partnership as much as "family" assets. The equal sharing principle applies to the former as well as the latter. The rationale underlying the sharing principle is as much applicable to "business and investment" assets as to "family" assets."

[53.] Therefore, **I find** that the Petitioner is entitled to a Fifty 50% share and the Respondent to a 50% share in the matrimonial assets being both the home they built and Scarlet's Bar and Restaurant, both referenced in the Consent Order which they both executed.

[54.] I have taken particular note of the Respondent's behaviour towards the Petitioner which is tantamount to harassment for which she has had to take out court proceedings against him in the Magistrate's court. I find this behaviour unacceptable in the circumstances. Notwithstanding that

the Petitioner has not applied for relief from the Respondent's actions in this court, I feel it incumbent to address this issue. Such behaviour is possible of remedy by way of injunctive relief.

[55.] The Supreme Court's jurisdiction to grant injunctive relief is codified in section 21 of the Supreme Court Act, which provides for the Court to grant an interlocutory or final injunction "in all cases in which it appears just and convenient to do so." **Order 29 of the Rules of the Supreme Court (R.S.C.) 1978** sets out the procedural provisions governing the grant of the relief. Final (or perpetual) injunctions are of course, granted following a final determination of the dispute between the parties, either at a summary judgment application or at trial. Unlike interim injunctions they are designed to dispose finally of the dispute between the parties and are therefore permanent in nature. I have determined that this case is an appropriate one for the issue of a final injunction; justice and convenience demands it.

[56.] **CONCLUSION:**

The Application for variation of Clause 4 of the Order dated 6th and 7th December, 2022 is granted and the said order is varied in the following manner;


1. The Matrimonial property/assets include the Matrimonial home which is comprised of the building built on the property situate Waterford Eleuthera, The Bahamas and the business called Scarlet's Restaurant and Bar, situate Waterford, Eleuthera.
2. A perpetual injunction is granted wherein the Respondent, be restrained whether by himself, his servants or agents from in any way disturbing or otherwise interfering with the Petitioner and the Petitioner's quiet possession of the building and premises comprising the matrimonial home situate Waterford Eleuthera, The Bahamas, for her lifetime, unless and until the Respondent's ownership of the said property or ownership of the said property by a third party, is determined by authentic documentation or court order.
3. The Petitioner is deemed entitled to remain in undisturbed possession of the building comprising the matrimonial home, situate Waterford Eleuthera for her lifetime to the exclusion of the Respondent unless and until ownership of the property upon which the building comprising the matrimonial home is situated is proven to belong to the Respondent, the parties jointly, or by a third party, by authentic documentation or court order.
4. If at any time during the lifetime of the Petitioner it is proven by authentic documentation or court order that the Respondent is the beneficial owner of the property upon which the building comprising the matrimonial home is situate, the Respondent

shall convey all his right, title and interest to the Petitioner within Three (3) months of the date of such determination.

As an alternative to clauses 1-3

5. The Petitioner and the Respondent shall within sixty (60) days of the date hereof, cause the value of both the business, namely Scarlet's Restaurant and Bar previously owned jointly by the parties, and the building comprising the matrimonial home, to be determined by a qualified, licensed realtor/valuer, agreed to by both parties,. The cost of the valuation shall be shared equally between the Petitioner and the Respondent.
6. Once the valuation by the agreed valuer has been completed then, within Ninety (90) days of the date thereof, the Respondent shall pay to the Petitioner Fifty Per centum 50% of the value of the two matrimonial assets, being Scarlet's Restaurant and Bar and the building comprising the matrimonial home, whereupon the Petitioner shall execute a document transferring all her personal interest in the building comprising the said matrimonial home, and the transfer of the restaurant and bar she previously executed in favour of the Respondent shall stand as a transfer of that interest to the Respondent if it is proven effectual. Otherwise the Petitioner shall execute an effectual Conveyance of Scarlet's Restaurant and Bar to the Respondent.
7. The Respondent shall bear the cost of the transfer deed of the matrimonial home (the building) to the Petitioner. In the event that the transfer of Scarlet's Restaurant and Bar becomes necessary the Petitioner shall bear the cost of the transfer to the Respondent.
8. Each party shall bear their own costs of this application.

Dated the 1st day of October, A.D. 2024



C. V. Hope Strachan
Justice

