10/79

IN THE PRIVY COUNCIL No. 14 of 1977

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG (COURT OF APPEAL)

BETWEEN :

ERNEST FERDINAND PEREZ DE LASALA — Appellant / Defendant

- and -

HANNELORE DE LASALA — Respondent / Plaintiff

CASE FOR THE APPELLANT

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1. This is an appeal from a judgment dated 17th December 1976 of the Court of Appeal, Hong Kong, (Pickering J.A.; Leonard J.; McMullin J. dissenting) allowing an appeal from an order dated 23rd January 1976 of the Supreme Court of Hong Kong (Huggins J.) dismissing an application by the Respondent (hereinafter called "the wife") for sundry forms of relief concerning financial provision for herself and the child of the family, Ernest Edward De Lasala (hereinafter called the said child). — 247 : 1 / 216 : 1

2. This appeal raises the following principal questions:-

(i) Whether L v L 1962 P101, a decision of the English Court of Appeal, was rightly decided, or, whether a spouse may make application for further financial provision notwithstanding an agreement between the parties, sanctioned, approved by and incorporated in an order of the Court, that a spouse shall accept a certain provision "in full and final settlement" of all claims.

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(ii) Whether, if L v L was rightly decided, an agreement between the parties, sanctioned, approved by and incorporated in an order of the Court, effectively prevents an application for further financial provision on behalf of the child of the family.

(iii) Whether section 4 of the Matrimonial Proceedings & Property Ordinance 1972 on its true construction allows a fresh application for financial provision to be made after a previous application for such provision has been dismissed by the Court

(iv) (a) Whether section 6 of the Matrimonial Proceedings and Property Ordinance 1972 (which for the first time gave the Court power to make a property transfer order) enabled a spouse whose application for financial provision had been dismissed before the said section 6 came into force to make a fresh application for such provision; or

(b) whether the said section 6 is properly to be regarded as a method whereby the Court may give effect to an order for financial provision but without enlarging the quantum of an applicant's entitlement to financial provision.

(v) Whether a consent order dismissing a wife's claim for financial provision can properly be varied or set aside on the ground of misrepresentation mistake or incompetence on the part of her legal advisors by way of applications to the Court or whether such order can only be challenged either by way of appeal or by a separate action to set aside such order.

3. The statutory provisions chiefly relevant to this appeal are:-

Matrimonial Causes Ordinance 1967 section 28(1)
"On granting a decree of divorce or at any time thereafter (whether before or after the decree is made absolute), the court may, if it thinks fit and subject to subsection (3), make one or more of the following orders:-

(a) an order requiring the husband to secure to

the wife, to the satisfaction of the court, such lump or annual sum for any term not exceeding her life as the court thinks reasonable having regard to her fortune (if any), his ability and the conduct of the parties;

(b) an order requiring the husband to pay to the wife during their joint lives such monthly or weekly sum for her maintenance as the court thinks reasonable;

(c) an order requiring the husband to pay to the wife such lump sum as the court thinks reasonable."

Section 35 (1)

"If a maintenance agreement includes a provision purporting to restrict any right to apply to a court for an order containing financial arrangements, then -

(a) that provision shall be void; but

(b) any other financial arrangements contained in the agreement shall not thereby be rendered void or unenforceable and shall, unless they are void or unenforceable for any other reason (and subject to sections 36 and 37), be binding on the parties to the agreement."

Section 46 (1)

"Subject to subsection (6), the court may make such order as it thinks just for the custody, maintenance and education of any relevant child -

(a) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;

(b) where such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal;

(c) in any proceedings for restitution of conjugal rights, beforethe decree or, if the respondent fails to comply with the decree, after the decree, and in any case in which the court has power by virtue of paragraph

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(a) to make an order in respect of a child it may instead, if it thinks fit, direct that proper proceedings be taken for placing the child under the protection of the court."

Matrimonial Proceedings and Property Ordinance 1972
Section 4 (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, subject to the provisions of section 25 (1), make any one or more of the following orders, that is to say -

(a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;

(b) an order that either party to the marriage shall secure to the other to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(c) an order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified."

Section 5

"(1) Subject to the provisions of section 10, in proceedings for divorce, nullity of marriage or judicial separation, the court may make any one or more of the orders mentioned in subsection (2) -

(a) before or on granting the decree of divorce, of nullity of marriage or of judicial separation, as the case may be, or at any time thereafter;

(b) where any such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal;

(2) The orders referred to in subsection (1) are -

(a) an order that a party to the marriage

shall make to such person as may be specified in the order for the benefit of a child of the family, or to such a child, such periodical payments and for such term as may be so specified;

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(b) an order that a party to the marriage shall secure to such person as may be so specified for the benefit of such a child, or to such a child, to the satisfaction of the court, such periodical payments and for such term as may be so specified;

(c) an order that a party to the marriage shall pay to such person as may be so specified for the benefit of such a child, or to such a child, such lump sum as may be so specified.

(3) Without prejudice to the generality of sub-section (2) (c), an order under this section for the payment of a lump sum to any person for the benefit of a child of the family, or to such a child, may be made for the purpose of enabling any liabilities or expenses reasonably incurred by or for the benefit of that child before the making of an application for an order under this section to be met.

(4) An order under this section for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the court.

(5) While the court has power to make an order in any proceedings by virtue of subsection (1) (a), it may exercise that power from time to time; and where the court makes an order by virtue of sub-section (1) (b) in relation to a child it may from time to time make a further order under this section in relation to him.

Section 6.

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

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marriage, before or after the decree is made absolute), the court may, subject to the provisions of sections 10 and 25 (1), 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;

(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;

(d) an order extinguishing or reducing the interests of either of the parties to the marriage under any such settlement;

and the court may make an order under paragraph (c) notwithstanding that there are no children of the family.

Section 7.

(1) It shall be the duty of the court in deciding whether to exercise its power under section 4 or 6 in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and 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;

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(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

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

(f) the contributions made by each of the parties to the welfare of the family, including any contributions 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.

(2) Without prejudice to subsection (3), it shall be the duty of the court in deciding whether to exercise its powers under section 5 or 6 in relation to a child of the family 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 financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the standard of living enjoyed by the family before the breakdown of the marriage;

(e) the manner in which he was being and in

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which the parties to the marriage expected him to be educated;

and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in paragraphs (a) and (b) of subsection (1), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him."

THE FACTS

7 : 8 : 4. The parties were married in Hong Kong on 17th February 1966. There are two children of the family, namely, Ernest Edward De Lasala born the 28th August 1966 (hereinafter called the said child) and the son of the Appellant's (hereinafter called the husband) previous marriage, namely, Robert Ernest De Lasala born the 5th January 1960.

1 : 1 25 : 1 On the 31st October 1969 the wife began wardship proceedings in respect of the said child and on the following day petitioned for divorce on the basis of allegations which the husband indicated that he would deny. After discussions between solicitors for the parties an agreement was reached in the following principal terms, subject to the approval of the court pursuant to the Matrimonial Causes rules:-

(a) the wife would withdraw her then current petition and would file a fresh petition on the sole ground of adultery on evidence to be provided by the husband;

(b) the wife would have custody of the said child with reasonable access to the husband;

(c) the husband would settle the sum of HK dollars 500,000 on trust for the said child, the joint trustees of the settlement being the husband and an independent trust company;

(d) the husband would provide a suitable residence for the wife and the said child and would settle the sum of HK dollars 400,000 on trust for that purpose an independent trust company being the sole trustee; the husband would pay

the further sum of 50,000 HK dollars for furniture etc.; | Page : Line of Record

(e) the husband would pay a lump sum of HK. dollars 850,000 to the wife by way of settlement of all claims for financial provision and on condition that the wife would apply to have the prayer for financial provision appended to her fresh petition for divorce dismissed.

By orders dated 16th January 1970 Briggs J. (as he then was) gave leave to the parties to implement the said agreement, subject to the discretion of the trial judge, and made consequential orders. In his judgment Briggs J. described the said sum of 850,000 HK dollars as "generous", and said "the agreement contains very proper and extensive arrangements for the support of the wife and the child of the marriage". | 63 : 10 / 63 : 10 / 46 : 3 / 47 : 43

Pursuant to the said leave and orders on the 23rd January 1970 the wife filed a further petition seeking dissolution of the said marriage on the ground of adultery and seeking maintenance, a lump sum and secured provision for herself and the said child. | 49 : 15 / 64 : 1

By order dated 25th March 1970 Briggs J. dismissed the wife's first petition. | 52 : 17

On 23rd May 1970 Briggs J. pronounced a decree nisi of divorce on the wife's further petition. On the same day Briggs J. approved a deed of arrangement and two trust deeds annexed thereto designed to give effect to the financial terms referred to in paragraph 4 (c), (d) and (e) above; Briggs J. further ordered that upon the husband paying to the wife the sum referred to in the said deed of arrangement and upon trust deeds annexed thereto coming into force and upon the husband paying the amounts payable thereunder the wife's "applications for maintenance, a lump sum payment and secured provision for the said child and for herself be dismissed". The said deed of arrangement was duly executed and the said trust deeds came into force and the said sums were duly paid by the husband. | 74 : 24 / 75 : 28 / 74 : 16 / 76 : 31

The said decree nisi was made absolute on 30th May 1970. | 77 : 10

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THE PRESENT PROCEEDINGS

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5. By a summons dated 1st August 1975, as amended on 19th January 1976, the wife applied for the following relief:-

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(i) an order setting aside or varying the said order made on 23rd May 1970 dismissing the wife's applications for maintenance, a lump sum payment and secured provision for herself and the said child;

(ii) orders for maintenance, secured provision and lump sum payments for herself and the said child;

(iii) transfer of property orders for the benefit of herself and the said child;

(iv) an order varying or revoking the financial arrangements contained in the said deed of arrangement and the said trust deed (being a subsisting maintenance agreement) for the benefit of herself and the said child.

6. At the hearing of the wife's said application counsel on behalf of the husband took the preliminary objection that the court had no jurisdiction to entertain the same. The chief grounds of objection were:

(i) that on the authority of L v. L 1962 P.101 the court had no jurisdiction to entertain fresh application for maintenance by a wife who had in pursuance of an agreement sanctioned by the court received an agreed capital sum and had her application for maintenance dismissed;

(ii) that it was no open to the wife to seek a transfer of property order under section 6 of the Matrimonial Proceedings and Property Ordinance 1972 albeit that this was a form of relief not available to her when her application for maintenance was dismissed because section 6 did not extend the quantum of a spouse's entitlement to a share of the matrimonial assets but simply provided machinery enabling a distribution of those assets in kind;

(iii) that the wife's application was not an

appropriate procedural means of challenging or setting aside the order of Briggs J. on the ground of mistake, misrepresentation or incompetence by the wife's legal advisers. The said order could, it was argued, only be challenged or set aside by means of an appeal and or a separate action.

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7. On 23rd January 1976, Huggins J. dismissed the wife's application holding that he had no jurisdiction to entertain the same and granted leave to appeal. When he came to prepare his written judgment which he delivered on 14th February 1976 Huggins J. came to the conclusion that his said order had been wrong and, without disturbing the order which he had already made, delivered a judgment favourable to the wife. In the course of his judgment Huggins J. listed the arguments advanced by counsel for the wife in support of his contention that the court had jurisdiction to entertain the application as follows :-

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"(i) he submits that the arrangement between the parties was contrary to public policy and to statute insofar as it purported to deprive the wife and child of the right to make any further application to the court.

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(ii) he attacks the order as having been made without the necessary evidential foundation.

(iii) he asks for an additional order under section 6 of the Matrimonial Proceedings and Property Ordinance.

(iv) he further attacks the order as having been made without the child's having been separately represented.

(v) he asks that the order if valid should be set aside on the ground of mistake, or varied under section 15."

8. As to (i) Huggins J. held that L.v.L. was good law in England and was authority which he should follow. The substantial ground of that decision was that only one application for financial provision was contemplated by the legislature and "once an application for maintenance has been dismissed by the court,

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jurisdiction does not exist to entertain fresh application. (per Wilmer L.J. 1962 p. at 117)." Huggins J. rejected as incorrect however a second argument which found favour with the court of

221 : 23 appeal in L. v. L., namely, that where a spouse has agreed as part of a compromise that a lump sum will be accepted in full and final satisfaction of any claim to maintenance which has been made or might be made in the future, then, provided that the agreement is sanctioned by the court, it is enforceable and the court has no jurisdiction to entertain a claim.

224 : 4 As to (ii), Huggins J. said he was satisfied that Briggs J. had had jurisdiction to make the order and that any attack upon it should have been either by way of an appeal or, possibly, by way of separate proceedings.

224 : 12 As to (iii), Huggins J. rejected an argument by counsel for the wife to the effect that section 6 of the Matrimonial Property and Proceedings Ordinance which did not come into force until 1972 created a new jurisdiction and as it was not a jurisdiction which existed at the time of the consent order that order could not bar the present claim. Huggins J. held, in effect, that section 6 did not increase the quantum of a spouse's entitlement to financial provision but constituted new machinery to which the court might resort where appropriate when making an order for financial provision. He

227 : 5 continued "if the order of dismissal in the present case had been made on or after 1st July 1972 it would have barred a new claim under section 6 and in my view the fact that it was made before that does not make the order any the less of a bar."

227 : 20 As to (iv), Huggins J. rejected the contention that the consent order of 23rd May 1970 was a nullity by reason of the fact that the said

228 : 2 child was not separately represented and turned to consider whether the rule in L v. L applied equally to a claim under section 5 on behalf of the child as it did to a claim under section 4 on behalf of the wife. Huggins J. held that the wording of section 5 was materially different from that of section 4, that section 5 permitted a multiplicity of applications for financial provision on behalf of the child, so that, had the matter been res integra, he would have held that the consent order of 23rd May 1970 was no bar to a fresh

232 : 48 application on behalf of the said child. "However"

said Huggins J. "as I understand the continuing English practice to be that the court will in a proper case dismiss a claim on behalf of a child where provision has been agreed, I think the Hong Kong courts should follow that practice unless and until the Privy Council directs otherwise or the English Practice is altered."

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As to (v), Huggins J. considered that there was inherent jurisdiction in the court to set aside the consent order on the ground of mistake etc. It is to be inferred that he further considered that the application before him was an appropriate procedure in which to do so. It having been conceded that the sum of Hong Kong $ 500,000 was reasonable and there being ample powers in the trustees and the court to ensure proper maintenance of the said child, there was no evidence of mistake which could justify variation of the order in relation to him. On the other hand, so far as concerned the wife's allegation that the consequences and effects of the consent order had not been properly explained by her legal advisers and that she consented under a mistake, he thought jurisdiction did exist, however doubtful he felt about the prospect of the wife's eventually succeeding. On this one point he should, he confessed, have found in favour of the wife. 236 : 39

9. The wife appealed against the order of Huggins J. dated 23rd January 1976. The husband served a Respondent's Notice contending that the judgment of Huggins J. was wrong insofar as it conflicted with the order which he had made. The Court of Appeal gave judgment on 17th December 1976 allowing the appeal by a majority (Pickering J.A., Leonard J., McMullin J.A. dissenting). 216 : 1 243 : 1 246 : 1 247 : 1

In his judgment for allowing the appeal Pickering J.A. held that L v. L 1962 P.101 was wrongly decided. That case, he said, was a departure from Barnard v. Barnard 1961 105 Sol. J. 441 and was contrary to Australian authority, notably, Kitchin v. Kitchin 1952 V.L.R. 143.

The wife was free therefore to come back to the court upon a further financial application. He further held that the wife's undertaking to make no further financial claim or demand against the husband, contained in the deed of arrangement sanctioned by Briggs J. in 1970 was void and that 263 : 17 265 : 4

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Briggs J. had no power to sanction that undertaking having regard to section 14 of the Matrimonial Proceedings and Property Ordinance.

265 : 45 — Pickering J.A. then considered section 6 (A) of the Matrimonial Proceedings and Property Ordinance which, he said, introduced in 1972 a new form of relief (a transfer of property order) after the marriage of the parties had been dissolved; it was now open to the court to make an award of a type previously not capable of being made, a circumstance which went beyond mere provision of new machinery; this new jurisdiction
266 : 40 — was retrospective so that even if, contrary to his view, he were bound to follow the decision in L v. L, it was still open to the wife to apply for
267 : 19 — financial provision of the nature not available to her at the date of the dissolution of the marriage.

Pickering J.A. further held that the deed of arrangement and/or the two trust deeds sanctioned
268 : 19 — by Briggs J. were a "subsisting maintenance agreement" within the meaning of section 15 (1) of the Matrimonial Proceedings and Property Ordinance and that the wife was entitled to make application to vary the same.

270 : 37 — Pickering J.A. then turned to deal with the wife's allegation of mistake. He agreed with Huggins J. that the order dismissing the prayers
270 : 40 — for financial provision was an interlocutory order and also with Huggins J.'s belated recognition of the fact that the wife had grounds for attacking
270 : 41 — the consent order, upon her own account, on the basis of mistake. Pickering J.A. considered that Huggins J. had been wrong to hold that the consent order could not be attacked on the same basis in
271 : 4 — relation to the provision made for the said child; while there were ample powers vested in the trustees to ensure the maintenance of the child there was no obligation upon them so to act and in
271 : 45 — his view the wife's affidavit amply demonstrated that her subscription to the deed of arrangement was the product of mistake as to the true interpretation and possible effect of the trust deed which made provision for the said child; certain provisions
272 : 50 — of that trust deed were objectionable and should
274 : 16 — never have been approved by the court and the wife was now entitled to attack them. Irrespective of
274 : 20 — these considerations the wife was entitled to ask the court to review the arrangements made on behalf of the child by virtue of section 5 (5) of the

Matrimonial Proceedings and Property Ordinance. Page : Line of Record

Since, as he held, the wife was entitled to seek a transfer of property order under section 6 of the Matrimonial Proceedings and Property Ordinance it was academic to consider whether the decision in Coleman v. Coleman 1973 Fam 10 was rightly decided; he was not persuaded that that decision was wrong. 274 : 32

Pickering J.A. concluded his judgment by expressing the view that it was open to the wife to come to the court on the basis of alleged misrepresentation by the husband as to his finances; also, by implication, on the basis that she had been misled by her legal advisers as to her tax liability in England and as to the possibility of finding a house of the type stipulated for the equivalent of Hong Kong $ 400,000. He would allow the appeal, dismiss the cross appeal and remit the summons to the judge to be dealt with upon its merits. This was subject to one qualification, namely, that it was now too late for it to be appropriate to set aside the order of 23rd May 1970 or to revoke the financial arrangements contained in the deed of arrangement and the two trust deeds and that the summons should be amended accordingly. 275 : 44 276 : 1 276 : 12

Pickering J.A. did not at any stage in his judgment expressly deal with the question as to whether the hearing of the summons afforded an appropriate procedure in which to resolve the difficult factual questions which her allegations raised between herself on the one hand and the husband, her solicitors and her counsel on the other hand.

10. In his judgment for dismissing the appeal McMullin J.A. first considered whether L v. L 1962 P. 101 was rightly decided. After an exhaustive review of the authorities which preceded and followed that decision, he came to the conclusion that L v. L was correct not only for the principal reason given by Wilmer L.J., namely, that the court had no jurisdiction to entertain a fresh claim made by a wife for maintenance following upon the dismissal of her application for maintenance but also for the reason given by Wilmer L.J. in the following passage (which he cited in Extenso) (P.118) "this is enough to dispose of the appeal; but in case I am wrong, and in deference to the 282 : 15

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arguments which have been presented to us, I think it right to express my views as briefly as possible with regard to the other points that have been argued. It is, of course, well established that the jurisdiction of the court to award maintenance to a wife cannot be ousted by any private agreement between the parties: see Bennett v. Bennett (1952 1.K.B. 249) following Hyman (1929 A.C. 601). Such an agreement is unenforceable against the wife as being contrary to public policy. But it is otherwise when the agreement is brought before the court and an order of the court is made giving effect to its terms. Such an order was made in Mills v. Mills (1940 P. 124) where by consent the wife's claim for maintenance was dismissed on payment by the husband of an agreed lump sum. The principle involved was succinctly stated by Denning L.J. in Bennett v. Bennett as follows 'if the parties do not oust the jurisdiction of the divorce court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned it is valid' a little later he continued 'its sanction should, I think, be obtained in this way if the parties agree on a figure for maintenance, the court should be asked to make an order for that figure; if they agree on a secured provision, the court should be asked to approve the deed which contains the provision: if they agree on a lump sum in composition of maintenance the court should be asked to dismiss an application for maintenance or to discharge the existing order, as the case may be (Mills v. Mills); but it would, I think, be entitled to refuse to do so if it did not think it proper to permit the composition'. To the same effect the observation of Jenkins L.J. in Russell v. Russell 'the principle in Hyman v. Hyman, be it remembered, is satisfied by any bargain which is brought before the court for approval and approved by the court'.

Here agreement between the parties was brought before the court, was sanctioned by the court, and became the subject of an order of the court whereby the wife's claim for maintenance was dismissed. The principle of Hyman v. Hyman does not, therefore, apply, and in these circumstances I confess I find it difficult to see why the wife should not be held to her agreement. If the agreement is binding on her, it seems to me that her present attempt to claim maintenance for a second time constitutes a clear breach of it. I am not impressed with the argument of Mr. Comyn that the sanction of the court

for such an agreement is not properly obtained unless there is a full investigation by the court of all the circumstance, with affidavits of means filed on both sides. We are dealing here with a case in which both parties were competently advised by solicitiors, one of whom was present on the hearing of the summons. The summons was heard by an experienced registrar and it is to be presumed that he did not make the order giving effect to the terms of the agreement without satisfying himself that it was proper in all the circumstances to do so. I do not think it is right therefore to dismiss the making of the consent order as a mere formality equivalent (to use Mr. Comyn's phrase) to no more than putting a rubber stamp on the agreement of the parties. It seems to me that everything necessary to be done to give binding effect to the agreement was done in this case. The wife, therefore, is in my judgment, precluded by the agreement from making this second attempt to obtain an order for maintenance against her husband."

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McMullin J.A. referred to Coleman v. Coleman 1973 L.R. Fam 10 in which Sir George Baker P. had relied on L v. L in his judgment and to certain words of Sir Jocelyn Simon P. in M v. M. 1967 P.313 at 324 "moreover, it seemed to me to be one of those exceptional cases where it would be wrong to demur to the wife, in consideration of the other ample provision made for her, covenanting to abandon any further claim to maintenance." 287 : 24

McMullin J.A. also referred to Rayden on Divorce 12th Edition page 789 "where the agreement is embodied in an order dismissing the application for financial provision and property adjustment, the wife's right to any further financial provision or property adjustment wholly ceases." 295 : 45

He concluded his review by saying "I do not find it possible to say either that L v. L was decided per incuriam or that it does not represent the true state of the law in England at the present time." 296 : 27

McMullin J.A. then considered whether or not L v. L should be followed in Hong Kong. He reviewed the Australian authorities and the arguments advanced on behalf of the wife and expressed his conclusion in the following words "on balance it appears to me to be the preferable view that L v. L was rightly decided and that, so far at least as the wife's interests are concerned, 305 : 36

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it ought to be followed here; alternatively the powers conferred by rule 6 of the Matrimonial Causes Rules give warrant for the approval of Briggs J. of the parties arrangement."

As to whether the approval of Briggs J. of the parties arrangement prevented the wife from making a fresh application on behalf of the child,

306 : 4 McMullin J.A. made reference to the second principle enunciated by Wilmer L.J. in L v. L (quoted above). He also made reference to the indication given by

306 : 24 Sir Jocelyn Simon in M v. M 1967 P. 313 approving an agreement entered into by a wife and implying that the terms of that approved agreement would be effective to bar also any further claims on behalf

306 : 32 of her children. He continued "not without some hesitation, I have come to the conclusion that even in the case of provision for a child it is within the court's power to sanction an agreement which absolves the husband (or the wife as the case may be) from all future financial responsibility. I think the entire slant of the authorities to which I have referred already is in favour of the view that the courts possess the power to serve the interests of finality in appropriate cases and in doing so to relinquish its own right to intervene further in the parties' affairs."

In dealing with the new power to award a transfer of property order McMullin L.J. accepted the arguments put forward by counsel for the husband to the effect that the new provision did not create new substantive rights but was merely an additional form of machinery whereby the matrimonial "pool of

308 : 17 assets" could be distributed. In Doherty v. Doherty 1975 3 W.L.R. 1 Ormrod L.J. had said that the equivalent English sections were part and parcel of the single code providing for the making of lump sum orders as alternatives to property adjustment orders, thus making a more convenient method available to the courts for a just distribution of property following upon dissolution of marriage.

308 : 33 He could see no reason to suppose that if these new powers had been available the wife would have been awarded something more by way of money's worth, or would have demanded something more by way of money's worth, simply by virtue of the existence of such powers.

McMullin L.J. concluded his judgment by considering whether the consent order of 16th January 1970 could properly be attacked in the

instant summons or whether such attack should have been either by way of appeal or by way of separate proceedings. He referred to the decision of Baker J. (as he then was) in Wilkins v. Wilkins 1969 2 A.E.R. 463 where he held that once a judge has approved a consent order it would be wrong in principle for the court to upset the order, in the absence of fraud, other than upon appeal. In Coleman v. Coleman 1973 Fam 10 Sir George Baker had said "nondisclosure of assets or fraud could always be dealt with by giving leave to appeal the original order out of time and setting it aside." As to the wife's argument that all orders made on applications for ancillary relief in matrimonial proceedings are to be regarded as interlocutory orders McMullin J.A. quoted the judgment of Ormrod J. (as he then was) in Brister v. Brister 1970 1.W.L.R. 664 at page 668 "in certain cases arising out of maintenance proceedings, a consent order will be a final order in others it will found an estoppal, but in all such cases underlying the consent order there will be found a true contract". McMullin J.A. said "the question whether the order in the present case was of a final nature or not brings us back once more to the question with which we started: the validity of the agreement to oust the jurisdiction of the court. Once it is granted that that was a valid arrangement then, echoing the words of Ormrod J., under the consent order in this case there is to be found a true contract and the order is one of a final nature. For these reasons even in regard to the question of mistake, misrepresentation or inadequate judicial consideration I agree with (counsel for the husband) that the proceedings before Huggins J. were not competent."

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11. Leonard J. concurred with Pickering J.A. in allowing the appeal. He considered that, in the state of the authorities, the question as to whether a party whose application for financial provision has been "dismissed" can re-apply should be treated as res integra. He saw the fundamental difference between the parties as a conflict between the desirability of finality on the one hand and the desirability in family matters the courts should retain flexibility on the other.

317 : 6

Having reviewed the relevant provisions of the English and Hong Kong legislation, Leonard J. said "it is I consider against this background of

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constantly widening powers and the desire to give flexibility to courts in family matters that one must approach the question of jurisdiction. One must, I consider, strain to accept jurisdiction

325 : 33 rather than to reject it." The Matrimonial Proceedings and Property Ordinance did not visualise anything so final as a dismissal of an application once and for all; insofar then as the agreement entered into in the present case provided that the application for maintenance should be dismissed it was inaccurate in its terminology; so too was the order questioned in the instant proceedings.

Neither of the rationes in L v. L should be

327 : 43 followed having regard to the tenor of the legislation which was to preserve to the court flexibility and jurisdiction to make such orders as the circumstances prevailing at the time of the application demanded.

328 : 9 In conclusion, Leonard J. said he did not consider that jurisdiction to set aside the consent order made on 23rd May 1970 existed in proceedings constituted as the instant proceedings were constituted nor that those proceedings were suited to or proper for that purpose. It was unnecessary for him to go into his reasons for so holding since the same result could be obtained without the consent order being set aside, He would allow the appeal and hold that Huggins J. had jurisdiction to entertain applications for various reliefs set out in paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the amended inter-partes summons.

12. The husband respectfully submits that the judgment of the Court of Appeal was wrong. It is submitted that L v. L 1962 P 101 was correctly decided and was authority which the Court of Appeal Hong Kong ought to have followed. Section 4 of the Matrimonial Proceedings and Property Ordinance and the statutory provision which it replaced correspond closely with the equivalent English legislation. On their true construction the statutory provisions allow only one application to be made to the court for financial provision and it is not open to a spouse to make a fresh application for such relief once his or her application has been dismissed.

Where the circumstances require that the rights of the party to make future application to the court should be preserved the proper course

is for the court to make a nominal order or no order at all on the original application.

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It is desirable in the public interest that in a proper case the courts should have the power to achieve finality in litigation between spouses relating to financial provision. It is in the interests of a spouse that he or she should be enabled to secure generous financial provision by agreement, provided the court sanctions such agreement, in exchange for barring him or herself from making further application.

For many years orders have been made dismissing applications for financial provision and sanctioning such agreements as that in the present case on the footing that such orders would achieve finality between the parties. It is submitted that it would be wrong and would result in an injustice if L v. L and the practice based upon that decision were not upheld.

13. The husband further submits that Section 6 of the Matrimonial Proceedings and Property Ordinance which again corresponds to the equivalent English legislation, though it was enacted after the wife's application for financial provision was dismissed, and even though it may be retrospective in effect, does not of itself permit a fresh application. At the time of the orders made on 16th January and 23rd May 1970 the court had power to order periodic payments or secured periodic payments on the one hand and lump sum provision on the other. The new power given by section 6 to order a transfer of property is simply an alternative and, in some cases, more convenient means of providing a spouse with a capital asset so as to ensure a just distribution of the matrimonial property. The power of the court to make financial provision for a party to a marriage is properly to be regarded as part of a single indivisible jurisdiction that is capable of being exercised in a number of ways and the change brought about by section 6 is limited to the introduction of an additional means of exercising that jurisdiction; it does not increase the extent of a spouse's entitlement to a share in the matrimonial property. A claim for a transfer of property order is a claim of the same kind as that which was dismissed and section 6 creates no new substantive rights capable of being exercised by the wife.

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14. In any event, the husband respectfully submits that a maintenance agreement entered into by the parties to a marriage in contemplation of the termination of the marriage by a decree of divorce and containing a covenant by a wife to make no further financial claim or demand against a husband, either on her own account or on behalf of a child, is valid in law, provided that the terms of the agreement have been sanctioned by the court. Admittedly, such an agreement would not be valid in the absence of approval by the court as being contrary to public policy (Hyman v. Hyman 1929 A.C. 601). Nonetheless, an agreement such as the present, including as it does a condition that the court should approve it, is valid, as the sanction of the court is sufficient to cure any illegality or objection on the ground of public policy. The true doctrine of Hyman v. Hyman is that an agreement by a party not to invoke the jurisdiction of the court to make an order for financial provision is contrary to public policy and therefore illegal and void. In that case it was emphasised that such an agreement is a contract like any other and is only not binding on the parties because of the illegality with which it is tainted. If, therefore, the basis of the illegality is removed, the maintenance agreement becomes binding upon the parties like any other contract. It is submitted that this is achieved in relation to maintenance agreements by bringing them before the court and obtaining the sanction of the court. An agreement to obtain the consent of the court to financial arrangements agreed between the parties is the very reverse of an agreement not to invoke the jurisdiction of the court. It is accordingly submitted that the consent order in the present case is binding upon the wife and that it is not open to the wife to make a fresh application either on her own behalf or on behalf of the said child notwithstanding the fact that, apart from this limitation, section 5 of the Matrimonial Proceedings and Property Ordinance might allow repeated applications on behalf of the said child.

15. It is further submitted that the order dismissing the wife's application for financial provision on behalf of herself and the said child was a final order and as such could only be set aside by way of an appeal or by means of separate proceedings to that end. The wife and the husband were represented throughout by highly experienced solicitors and counsel and the wife's solicitors

consulted a taxation expert as to the fiscal implications of the proposed settlement. The wife's allegations to the effect that she was incompetently advised and was misled by the husband and his solicitor involved serious allegations against persons who were not and would not be parties to her summons for further financial provision. It is submitted that the wife's summons was a wrong and wholly appropriate means of judging the truth or otherwise of her allegations if, as was assumed in her favour, they had any prima facie substance.

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16. The Appellant respectfully submits that this appeal should be allowed and the judgment of the Court of Appeal Hong Kong should be set aside, with costs, for the following among other reasons:-

(1) BECAUSE section 4 of the Matrimonial Proceedings and Property Ordinance does not allow a fresh application to be made after a previous application has been dismissed.

(2) BECAUSE section 6 of the Matrimonial Proceedings and Property Ordinance does not extend the jurisdiction of the court in relation to financial provision but merely provides an additional means of exercising existing jurisdiction.

(3) BECAUSE the wife is precluded by a binding agreement embodied in a consent order of the court from making any further claims on behalf of herself or the said child.

(4) BECAUSE the decision of the English Court of Appeal in L v. L 1962 P 101 should be followed.

(5) BECAUSE the order of Briggs J. could not, as a matter of law, be challenged or set aside by way of a summons inter-partes for further financial provision.

(6) BECAUSE the judgment of McMullin J.A. (dissenting) was correct.

Christopher French

George Newman

No. 14 of 1977

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(COURT OF APPEAL)

BETWEEN:

ERNEST FERDINAND PEREZ
DE LASALA — Appellant

- and -

HANNELORE DE LASALA — Respondent

CASE FOR THE APPELLANT

THEODORE GODDARD & CO.,
16 St. Martin's-le-Grand,
London, EC1A 4EJ.