IN THE PRIVY COUNCIL No. 14 of 1977

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG COURT OF APPEAL

CIVIL APPEAL No. 6 of 1976

(On appeal from Divorce Jurisdiction Action No.14 of 1970)

B E T W E E N :

ERNEST FERDINAND PEREZ DE LASALA — Appellant

- and -

HANNELORE DE LASALA — Respondent

CASE FOR THE RESPONDENT — RECORD

1. This is an appeal from a judgment of the Court of Appeal of Hong Kong (Pickering J.A. and Leonard J., McMullin J. dissenting) dated 17th December 1976 allowing with costs the Respondent's appeal from a judgment of Huggins J. in the Supreme Court of Hong Kong dated 23rd January 1976 whereby the Respondent's matrimonial financial applications to the Supreme Court were all dismissed for want of jurisdiction (although Huggins J. in his later considered judgment in writing dated 14th February 1976 as opposed to his oral extempore judgment, would have accepted jurisdiction in part had the order of dismissal not already been entered). 216 217 236-237

2. A number of fundamental questions are raised in this case:

(i) This case raises the question whether the Court has jurisdiction to dismiss an application by a former spouse for financial provision so as to bar the Court, as a matter of jurisdiction, from entertaining any fresh application for such provision. If the Court possesses such

jurisdiction, the question arises as to whether it was properly exercised in this case.

(ii) The further question arises whether the Court has jurisdiction to dismiss a claim by or on behalf of the child of the parties for financial provision so as to bar any further application by or on the child's behalf.

(iii) As to questions (i) and (ii), there being an apparent difference of view between the courts of different jurisdictions as to the answer to these questions, the issue arises as to whether the courts of Hong Kong may come to independent views of their own and/or choose to follow decisions on the points of the courts of Australia in preference to a decision (by two Lords Justices) of the English Court of Appeal (in itself in apparent conflict with other decisions in England, including a decision of the House of Lords and a decision (by three Lords Justices) of the Court of Appeal).

(iv) Independently of questions (i) to (iii) the question arises whether the Respondent was entitled as a matter of jurisdiction to seek to set aside a consent order resulting in purported dismissal of future applications by her on her own behalf and/or on behalf of the child on the ground of mistake or fraudulent misrepresentations by the Appellant resulting in the agreement leading to that consent order.

(v) Assuming that the Respondent and the child were barred under (i) and (ii) from making a further claim for financial provision (i.e. periodical payments, secured periodical payments or lump sum) the questions arise whether they are nevertheless entitled (as a matter of jurisdiction) to seek other reliefs (a transfer of property order and settlement of property order) afforded them by subsequent legislation held to be retrospective in its effect; and whether in any event a party is entitled to seek a further lump sum.

(vi) Independently of the foregoing issues, since the said agreement between the parties resulted in a Deed of Arrangement and two Trust Deeds the question arises whether they

constitute a subsisting maintenance agreement variable under the Court's undoubted statutory powers to vary such agreements.

3. The only evidence before Huggins J. and the Court of Appeal was that adduced by the Respondent to this appeal since the question of jurisdiction was raised as a preliminary issue. In consequence the Respondent's evidence was for jurisdictional purposes unchallenged.

4. The parties were married on 17th February 1966 in Hong Kong, and there is one child of the marriage, Ernest Edward De Lasala born on 28th August 1966. The Appellant had a child by a previous marriage. The Respondent looked after both children following the marriage. On 31st October 1969 the Respondent commenced Wardship proceedings in the Supreme Court of Hong Kong, and on the following day petitioned for divorce against the Appellant alleging cruelty and sodomy. 7 8 1-2 25

5. At no stage did the Appellant file an affidavit of means or otherwise disclose the extent of his resources to the Respondent, save falsely to represent to her at a crucial period in the negotiations that "he was in circumstances of acute financial difficulties and embarrassment", that a major venture in Alaska had "collapsed" and that if she did not accept his offer she ran the risk of getting nothing. The Respondent at the time believed the Appellant's said false representations and acted on them. 86

6. In her petition the Respondent alleged that the Appellant was in receipt of capital in excess of $H.K. 50 million and income in excess of $H.K. 250,000 and sought orders for maintenance, lump sum and secured provision both for herself and for the child of the family. The allegation that the Appellant had capital or income in excess of $H.K. 50 million was the only indication of the Appellant's wealth. The Respondent gives such particulars as she is able of the Appellant's financial position in her affidavit in support of her current applications, but the only material before the Court in 1969 and 1970 of the Appellant's wealth was the said assertion in the Respondent's petition. In the present proceedings the Respondent alleges that the Appellant was worth vastly more than 27

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$H.K. 50 million at the relevant time and even more now, and that he deliberately and deceitfully misled her as to his means to the effect of persuading her that he was financially in a state of collapse, as a result of which she accepted his financial offer.

7. Following the filing of the Respondent's petition, there were negotiations between the parties both as to the disposal of the suit and as to finance, and on 16th January 1970 Briggs J. at a hearing lasting 30 minutes ordered implementation of an agreement which had been reached between the Respondent and the Appellant through their respective legal advisers. The parties went to the Court to be absolved from what was then the discretionary bar of collusion: that is what the Learned Judge considered, not whether he could or should bar further applications, nor whether proper provision was made. In her affidavit in support of her application, the Respondent said that her husband's offers were "just and proper having regard to our respective means", but did not say what those means were alleged to be. On 29th May 1970 the Respondent filed a second petition seeking the same relief as in the first petition for herself and the child, with some differences: there was an alternative prayer that such orders may be made as may be necessary to secure the observance by the Appellant of the agreement which had been reached between the parties together with arrangements concerning the maintenance and support of the Respondent and the child of the family. The fresh petition also differed from the petition originally filed by the Respondent in that the reference to the Appellant's financial circumstances was altered to allege that "the (Appellant) is in possession of capital and in receipt of income the exact details of which are unknown to your (Respondent)". In paragraph 12 of her second petition the Respondent makes it clear that she was still looking to the Appellant to maintain the child of the family.

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31 and 38; 61 (para.4)

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8. On 23rd May 1970 Briggs J. granted a decree nisi to the Respondent on the prayer of the second petition and, on the same day in chambers, made orders as to custody and access, approved the Deed of Arrangement (to which two Trust Deeds were annexed) which had been made, and ordered that upon the payment of the monies agreed to be paid under the Deed of Arrangement and upon the coming into force of the

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two Trust Deeds the prayers for financial provision for herself and the said child contained in the Respondent's second petition should be dismissed. The application in chambers lasted 10 minutes. The monies were paid, and the Trust Deeds came into force on 30th May 1970, upon which date the decree of divorce was made absolute.

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9. By summons dated 1st August 1975 issued in the Supreme Court of Hong Kong (and amended by leave of Huggins J. on 21st January 1976) the Respondent sought (inter alia) an order setting aside or varying the consent order made in the Supreme Court of Hong Kong on 23rd May 1970 whereby (inter alia) her application for maintenance, a lump sum payment and secured provision for the child of the family and for herself had been dismissed. Her affidavit in support was sworn on the 7th February 1975 and resworn on the 19th January 1976. By the said summons (as amended) the Respondent further sought an order varying or revoking the financial arrangements made between the parties contained in a Deed of Arrangement dated 22nd May 1970 together with two Trust Deeds annexed to the Deed of Arrangement marked "Trust Deed A" and "Trust Deed B", being a subsisting maintenance agreement. By the said summons the Respondent further sought orders for financial provision and property adjustment for herself and the said child of the family including periodical payments, a lump sum or sums and orders for transfer of property. The Respondent further sought such leave as might be necessary to apply for all or any of the foregoing reliefs. By a separate summons the Respondent sought an order that the Appellant should file an affidavit of means.

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10. The matter came for hearing before Huggins J. on 19th January 1976. By order dated 23rd January 1976, Huggins J. dismissed the Respondent's summons with costs, but granted her leave to appeal to the Full Court. On 14th February 1976 Huggins J. gave his considered judgment in writing in which on one part of the case he differed from his oral extempore judgment. On 17th December 1976 the Full Court (Pickering J.A. and Leonard J., McMullin J. dissenting) allowed with costs the Respondent's appeal from the order

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247-328; 329 of Huggins J. The Appellant now appeals with the leave of the Full Court to Her Majesty in Council.

340 11. As to question (i), the basic question is whether and how the Court can ever be deprived of its power to entertain an application by a former spouse for financial provision or property adjustment (save as expressly provided by statute). It is respectfully submitted (since the decision in Hyman -v- Hyman (1929) A.C. 601, H.L. is applied in Hong Kong) that no agreement between the parties can prevent the court as a matter of jurisdiction from entertaining further applications for financial provision by a spouse. Lord Hailsham L.C. emphasized (at p.608) that the House of Lords was "not being invited to consider whether the provision in the deed of separation is adequate; the only question ... is whether or not the existence of the wife's covenant in the deed of separation precludes her from making any application for maintenance". He further said (at p.614):

> ".... the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction".

So, too, Lord Shaw of Dunfermline (age p.617):

> "I do not think it to be competent to us to limit or restrict that power which is thus given unambiguously and definitely. Nor is it legitimate for a Court to be swayed from such a construction by a consideration or authorities applicable to previous legislation, although that legislation was in similar terms".

> (And at p.622). Lord Buckmaster said (at p.625):

> "It is, in my opinion, associated with and inseparable from the power to grant this change of status that the courts have authority to decree maintenance for the wife. And in the exercise of this authority they are in no way bound by the contracts made between the parties

though, as pointed out by the Lord Chancellor, the consideration of all contractual rights possessed by the wife must be borne in mind".

Lord Atkin said (at p.629):

"In my view no agreement between the spouses can prevent the Court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife 'having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties'. The wife's right to future maintenance is a matter of public concern, which she cannot barter away. This is not to say that in any particular case the Court must make an order; still less that in this case it must do so. I could well understand the Court coming to the conclusion that the parties' pre-estimate of the wife's reasonable needs was judicious, and that the allowance, continuing as it does after the husband's decease, and being independent of any fluctuations in the amount of his fortune, needed no supplement. But the present objection of the husband to the Court considering the matter at all in my opinion cannot prevail".

So, too, Lord Hanworth M.R. in the Court of Appeal: (1929) P.1, 28-29.

12. The matter is now also dealt with by statute, the first such statute being the Maintenance Agreements Act 1957. There is statutory provision in Hong Kong, exactly as in England and Wales, as follows :

"(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

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... be binding on the parties to the agreement.

(2) In this section ...

"maintenance agreement" means any agreement in writing made, whether before or after the commencement of this Ordinance, between the parties to a marriage, being -

(a) an agreement containing financial arrangements whether made during the continuance or after the dissolution or annulment of the marriage; or

(b) a separation agreement which contains no financial arrangements in a case where no other agreement in writing between the same parties contains such arrangements;

"financial arrangements" means provisions governing the rights and liabilities towards one another when living separately of the parties to a marriage (including a marriage which has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the family."

(Matrimonial Proceedings and Property Ordinance, Chapter 192, s.14: Matrimonial Causes Act 1973 s.34).

13. It is respectfully submitted that the court has no jurisdiction to do by order that which is expressly forbidden by Statute, and that the consent of the parties does not confer on the court jurisdiction in such a case. This was the view taken on the self-same point by the Full Court of Victoria (Australia) in Kitchen -v- Kitchen (1952) V.L.R. 143, and by the Full Court of New South Wales in Shaw -v- Shaw (1965) 66 S.R. (N.S.W.) 30, upheld at (1965) 39 A.L.J.R. 139: see, too, Whittle -v- Whittle (1965) 66 N.S.W. 141. The law is said to be the same in New Zealand: Joske "Matrimonial Causes

of Australia and New Zealand" (5th Edn., 1969, p.570, par. 11.52).

14. As was said in another context:

> "The Court cannot give effect to a transaction which Parliament has declared to be null and void".

Thomas Cheshire & Co. -v- Vaughan Brothers & Co. (1920) 3 K.B. 240, 255, per Scrutton L.J.; A.R.Davies & Co.Ltd. -v- Campbell (1978) 2 W.L.R. 423, 433, C.A. In the instant case the legislature has decreed "void" the relevant transactions. Likewise as to a void marriage, "inasmuch as it is void it is, of its very nature, incapable of being converted into a valid marriage....": Hayward -v- Hayward (1961) P.152, 158. In Kitchin -v- Kitchin (supra), O'Bryan J. observed (p.150) that an agreement between spouses not to invoke further the jurisdiction of the court was "illegal and void", consequent on Hyman -v- Hyman, and that "it would be improper and indeed outside the jurisdiction of the court to accept any such undertaking from a spouse not to invoke the jurisdiction in future." In Kitchin -v- Kitchin Sholl J. said (at pp.160, 162):

> "I am unable to understand how the parties and the court can in combination produce a result which neither they nor it can separately produce"; and
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> "It is for the legislature, if it thinks the step socially desirable, to enable divorced wives to abandon their rights to future alimony in return for a lump sum payment".

In Shaw -v- Shaw, supra, Brereton J. said (at pp.35-36):

> "I can find no basis for saying in general terms that by 'sanctioning' an agreement a void agreement is made contractually enforceable between the parties in the absence of any statutory power... I can find no real support for the view that the uttering of the word 'sanction' was for all purposes equivalent to the waving of a magic wand transforming the void into the valid".

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15. There is no provision in the laws of Hong Kong to debar (save after remarriage of the applicant) further applications for financial provision, defined in the said Matrimonial Proceedings and Property Ordinance (sections 4 and 5) as orders for periodical payments, secured periodical payments and "such lump sum or sums as may be specified" for parties, and "such lump sum as may be so specified" for children (but with the additional power to make further orders for children conferred by section 5(5)). When the legislature in England and Wales wished to provide for the court to have power not to entertain financial claims by a former spouse, it has specifically so enacted: see the Inheritance (Provision for Family and Dependants) Act 1975, s.15(1).

16. By the former Hong Kong Matrimonial Causes Ordinance (section 19(2) of the Matrimonial Causes Act 1950) the jurisdiction of the Court was to make orders for periodical payments and secured periodical payments "on any decree for divorce or nullity of marriage". The words "on any decree" have been held to indicate a limitation of time, and it was the practice, in order to comply with such limitation, when the merits justified no award at the time of the decree, for a wife to obtain a nominal order "on" the decree in order to preserve the Court's jurisdiction, there being express statutory power to vary any order at a later date if the respective means of the parties justified such variation: Mills -v- Mills (1940) P.124; Ross -v- Ross (1950) P.160: Bennett -v- Bennett (1952) 1 K.B. 249. The provision as to time in England and Wales was amended by section 1 of the Matrimonial Causes (Property and Maintenance) Act 1958 which provided that "any power of the Court... to make an order on a decree of divorce.... shall.... be exercisable either on pronouncing such a decree or at any time thereafter", and the same amendment appeared in section 28(1) of the Hong Kong Matrimonial Causes Ordinance 1967 edition (Chapter 179) which read:

> "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 to 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."

The powers of the Court to make orders for ancillary relief in favour of a party to a marriage is now contained in sections 4 and 5 of the Matrimonial Proceedings and Property Ordinance 1972 (Chapter 192) and in sections 23 and 24 of the Matrimonial Causes Act 1973 (re-enacting sections 2 and 4 of the Matrimonial Proceedings and Property Act 1970) and remains exercisable "on granting a decree of divorce... or at any time thereafter".

17. In Barnard -v- Barnard (1961) 105 Sol. Jo.441, the Court of Appeal (Ormerod, Willmer and Danckwerts L.J.J.) on a motion for leave to appeal, held that the practical effect of the amendment of the 1958 Act was that "a nominal order for maintenance no longer served any useful purpose" and was not necessary to keep alive a wife's right for maintenance. It is respectfully submitted that this decision is to the effect that a wife's claim may be dismissed without the former need to have a nominal order which could thereafter be varied because the change in the statutory wording enable the wife to apply more than once "at any time thereafter". The fact that one particular application is ineffective does not debar the right to claim later in different circumstances.

18. So in Burton -v- Burton and Gibbons (1964) 108 Sol. Jo.584 Ormrod J. refused to dismiss a wife's claim for maintenance on the ground that such order would not be effective since the statute enabledthe Court to make an order for maintenance on pronouncing a decree or at any time thereafter. In M. -v- M. (1967) P.313, Sir Jocelyn Simon P. said at page 317:

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> "When I do dismiss a wife's claim for maintenance it is intended as an indication to a Judge dealing subsequently with an application by the wife for leave to make a claim for maintenance out of time or to a Registrar dealing subsequently with a wife's claim for maintenance that I have been satisfied either that the wife's conduct has been such that it would be unjust that her husband should be ordered to provide maintenance for her or that her support has been adequately and reasonably provided for in some other way. Even so, the tribunal dealing with the matter subsequently is not concluded by my order; it is intended as no more than an indication of the view I have come to on the material before me".

M. -v- M. was cited with approval in Gosling -v- Gosling (1968) P.1, 16, 25, C.A. See also dicta of Karminski J. in R. -v- R. (No.2) (1967) 111 Sol. Jo. 926, in which the learned Judge dismissed a wife's claim for maintenance and added:

> "That there was nothing in the wife's conduct which should preclude her from applying for maintenance hereafter and no evidence before the Court that the husband had provided for her support in some other way".

19. It is respectfully submitted that dismissal of one particular application cannot bar the Court from entertaining a fresh application by the wife for periodical payments for herself. Such dismissal is simply equivalent to: "No order now". The Court has no statutory nor any other power to dismiss a wife's claim for periodical payments on a once and for all basis. Authority for the proposition that an order may be made dismissing once and for all rests on the decision of the Court of Appeal (Willmer and Davies L.JJ.) in L. -v- L. (1962) P.101. It was there held (reversing the decision of Marshall J.) that section 1 of the Matrimonial Causes (Property and Maintenance) Act 1958 did no more than to enlarge the time within which an existing jurisdiction in relation to maintenance awards might be exercised, by enabling a Court to award maintenance either "on" a decreee or "at any time thereafter" and that there was nothing in the provisions of the Act of 1958 to warrant the Court assuming jurisdiction to entertain

a claim for maintenance where a previous claim had been the subject of a final order dismissing it (see per Willmer L.J. at p.118).

20. It is respectfully submitted that the decision in L. -v- L. is inconsistent with the earlier decision in Barnard -v- Barnard (to which the Court of Appeal in L. -v- L. was not referred) and is inconsistent with Hyman -v- Hyman with section 34(1) of the Matrimonial Causes Act 1973 and with the authorities referred to in paragraph 18 above. It is further inconsistent with the decision of the Full Court of Victoria in Kitchin -v- Kitchin (ante) (to which the Court of Appeal in L. -v- L. was not referred) and has been criticised by the Full Court of New South Wales in Shaw -v- Shaw, ante. As was said in Kitchin -v- Kitchin (at p.147):

> "The first legislation on this matter gave to the Court a power which was incidental to its exercise of the power to dissolve the marriage, viz: a power to compel the husband to make adequate provision for the support of his wife. The tendency of legislation since 1857, both here and in England, has been to enlarge that power and to place in the discretion of the Court a large measure of control over the provision by the husband for the wife's support throughout their joint lives".

Ormrod J. put it thus in B. -v- B.(1970) 1 All E.R.913, 915:

> "This is a jurisdiction in which the maximum flexibility must be preserved, so that account can be taken of all the foreseeable and unforeseeable factors which can arise out of the relationship which must persist in many cases between persons who have once been husband and wife, and particularly where they remain parents. And the discretion, wide though it is, must be exercised judicially; but it ought not to be fettered more than is necessary to comply with established principles of law".

21. Further, as set out in para.15 of this Case, the present jurisdiction is to grant "such

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lump sum or sums" replacing the former jurisdiction "such lump sum" (para.16 of this Case), and it is respectfully submitted that the Court has by reason of the additional words jurisdiction to hear successive applications by a spouse for a lump sum even where a prior application for a lump sum has been disposed of by dismissal or otherwise. In this respect it is respectfully submitted that Coleman -v- Coleman (1973) Fam.10, Sir George Baker P., is wrongly decided. When the Court's powers were divided into financial provision and property adjustment, lump sums were put into the section containing financial provision, that is, the section containing continuing financial provisions.

22. As to question (ii), it is respectfully submitted that the Court can never debar claims by or on behalf of a child of the family. Section 5 (1)(b) of the said Ordinance provides that orders for financial provision for a child may be made:

> "before or on granting the decree ... or at any time thereafter";

and section 5(5) provides:

> "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 subsection (1)(b) in relation to a child it may from time to time make a further order under this section in relation to him".

It is respectfully submitted that the Court has no jurisdiction whether with the consent of the spouses or otherwise to deprive itself of the jurisdiction to make "from time to time" such "further order" as may be just. (The English parallel jurisdiction is Matrimonial Causes Act 1973, section 23(4)).

23. On the first and second questions, the issue arises as to whether if, contrary to the Respondent's submissions, the Court possesses jurisdiction to dismiss applications so as to debar further applications by a spouse or by a child, it properly did so in the instant case. The matter was a complex one involving Trust Deeds of 32 typed pages in all,

apart from other documents, but the total time for their "approval" and for other matters before the Court is shown on the Court record as 10 minutes (para.8 of this Case). An examination of the documents shows that they do not fulfil that which they supposedly set out to achieve. Apart from trivial payments years ago, no payment has been made to or for the child and recent "offers" to pay (after criticism in the Courts below) have been accompanied by conditions (without any actual payments). The agreement reached was fundamentally defective as far as the wife was concerned in that :

(i) It failed to provide her with a home in Europe for herself and the child;

(ii) It failed to provide her with a reasonably adequate income once regard was had to European tax considerations.

7 The agreement was fundamentally defective as far as the child was concerned in that :

(a) It placed no obligation on the trustees or the child's father (the Appellant) to pay anything for the child despite an assurance that the child would be maintained "down to the last aspirin"; and the trustees have not maintained the child or offered to (save for an offer described by Huggins J. as "derisory").

(b) The trustees (of which the Appellant is one, a bank the other) have absolute power to remove the fund from Hong Kong, to treat income as capital, to pay or lend trust funds to the Appellant (as they have done, free of interest), and the Courts have no power to interfere with the exercise of that discretion: Howard -v- Howard (1945) P.1, C.A.; Dundee General Hospitals Board -v- Walker (1952) 1 All E.R. 896, H.L.

(c) Requests for information requested by the Respondent as to the state of the Trust and its administration have been consistently rejected.

It is very respectfully submitted that the

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Court had no jurisdiction to approve such deeds and could not have examined them prior to its purported approval. As was recently said in Dean -v- Dean (1978) 3 W.L.R. 288, 292:

> "If the Court does express an opinion (prior to the hearing as in the instant case) that does not relieve it of its duty to reconsider the matter under section 25 (section 7 of the said Ordinance) at the appropriate time".

In Shaw -v- Shaw, ante, the Full Court of New South Wales was considering a statutory provision giving the Court specific power to "sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order...or any right to seek such an order" (set out at (1965) 66 S.R. (N.S.W.) 30, 41). Asprey J. said at p.4:

> "The present case should not be parted with without stressing that agreements presented to the court under section 87(1)(k) should not be sanctioned as of course and the court's approval should be withheld unless the court is, upon the appropriate evidence, affirmatively satisfied that the provisions of the agreement are, in the particular circumstances and having regard to the principles applied by the court in matters of maintenance, equitable. If section 87(1)(k) is to have the operation of ousting the principles contained in Hyman -v- Hyman it should be recalled that "the Court cannot forgo its duties, and it cannot be bound by an estoppel between the parties; for the jurisdiction in matters of divorce is not affected by consent" (see per Lord Hanworth in Hyman -v- Hyman (64)). A heavy responsibility is placed upon the court under this statutory provision and the court should not be asked to exercise its jurisdiction thereunder without the fullest disclosure of it of all the relevant facts to enable it to decide whether or not to make the order asked of it. In particular, the court should be wary of exercising its powers under section 87(1)(k) when the interests of children are involved".

24. It is respectfully submitted in the instant case that if the Court had jurisdiction to permit the

agreement to be valid, the matter was not properly considered at the first hearing on 16th January 1970 and was not "reconsidered" at all on 23rd May 1970, despite the drastic consequences, if such they be, to the wife and to the child. There was "no appropriate evidence", no "fullest disclosureto it of all the relevant facts", and the interests of a child was involved. So great were the defects that the jurisdiction was not properly exercised at all and the court orders were of no effect, or did not bar further applications.

The proper approach is also dealt with in Gosling -v- Gosling (1968) P. at 24, C.A.: "(that fullness and candour which is essential)" and in Nash -v- Nash (1965) P.266, the Notice of Petition states that the Appellant "must" file his affidavit "giving full particulars of your property and income", meaning "full, frank and clear" disclosure: J. -v- J. (1955) P.215, 228-229.

Further, Briggs J. did not have regard to contemporary approach in Hong Kong to lump sum awards: Cheung Yuk-lin (No.4) -v- Hui Shiu-Wing (1970) H.K.L.R. 119.

25. As to the third question, if contrary to the Respondent's submissions, L. -v- L. (1962) P.101 C.A. is correctly decided, it is respectfully submitted that the Courts of the Crown Colony may come to an independent view of their own as to the construction of a statute in accordance with their knowledge of the Colony, providing that the construction is a tenable one; and the Courts of the Crown Colony may in this regard prefer to follow the decisions of another jurisdiction rather than the jurisdiction of the English Court of Appeal: see Robins -v- National Trust Company Limited (1927) A.C. 515, 519 P.C.:

> "...when an appellate Court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally of course,

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the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board".

(See also Chan Wai-Keung -v- Regina (1965) H.K.L.R. 815). In Roberts-Wray Commonwealth and Colonial Law, 1966, page 567, the learned author comments on the passage cited from Robins -v- National Trust Company Limited:

> "Strictly, the courts of a colony do not administer the laws of England and the House of Lords is no more part of the colonial judicial hierarchy than the Court of Appeal. Whatever may have been the position in the past, the attitude of the Judicial Committee had apparently changed with the times between 1879 and 1927 ... and constitutional relationships have undergone far greater changes between 1927 and the present time than during that period".

26. "In matters which may considerably be of domestic or internal significance the need for uniformity is not compelling": Australian Consolidated Press Limited -v- Uren (1969) 1 A.C. 590, 641, P.C.

There are significant statutory differences between the Matrimonial Causes Act 1973 and the Hong Kong Matrimonial Proceedings and Property Ordinance (Chapter 192), and in this context direction is drawn only to the fundamental difference in tenour between section 25 of the Act and section 7 of the Ordinance:

> (1) In the Ordinance "conduct of the parties" is placed at the forefront of the matters to be regarded by the Court.
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> (2) In the Ordinance there is omitted the direction given at the conclusion of section 25 of the Act, namely that the court should -
>
> > "exercise these 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".

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27. Further in this sphere of law attitudes may differ when considering the consequences of an effective once and for all dismissal of matrimonial financial claims. In England and Wales there is at any rate a sophisticated social welfare scheme sufficient to support in whole or part to a subsistence standard a former spouse who falls on hard times and has no recourse to her (or his) former partner. In Hong Kong the social welfare system is such that an agreement by the parties or a court order that they should not avail themselves of the remedies granted by law leaves the wife without recourse to the public purse.

In this sphere local conditions may make inappropriate that which is appropriate elsewhere.

28. As to the fourth question, it is respectfully submitted that a consent order in an interlocutory application may be set aside if induced by mistake or misrepresentation: Mullins -v- Howell (1879) 11 Ch.D.763, 766, C.A.; Guerrera v. Guerrera [1974] 3 All E.R. 460, C.A.; B. -v- B. [1970] 1 All E.R. 913, 916. In the instant case, the consent order resulted in the purported dismissal of future applications by the Respondent. Her evidence as to mistake and misrepresentation is (on the issue of jurisdiction) uncontested and amounted to fundamental and fraudulent misrepresentation by the Appellant as to his financial position. Huggins J. in his written judgment found that there was jurisdiction in respect of the wife's allegation in this regard as to her claims, but not apparently in respect of claims on behalf of the child. It is submitted that there was equally mistake and/or misrepresentation in regard to the child, and a like jurisdiction exists. 235-236

Huggins J. himself accepted that the trustees' offer of maintenance for the child was "derisory", whereas the Respondent had relied on the representation to her that the child would be properly and fully maintained "down to the last aspirin". 228

It is submitted that where there is a mistake or fraudulent misrepresentation resulting in a consent order the Court that made the order may set it aside: see Wilkins -v-

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Wilkins (1969) 2 All E.R. 463, 468 per Baker J.

29. As to the fifth question, it is respectfully submitted that the order of dismissal did not in any event bar the Respondent and the child from being entitled as a matter of jurisdiction to seek a transfer of property order and a settlement of property order. As Huggins J. put it:

> "I do not see how the Court in say 1970 could, by dismissing a claim then before the Court, in effect dismiss a future claim which had not yet been made".

The power to grant transfer of property and settlement of property orders was enacted by the said Ordinance (Chapter 192), section 6. That section is retrospective in its operation: Chaterjee -v- Chaterjee (1976) Fam. 199, C.A.; Powis -v- Powis (1971) Fam. 340; Williams -v- Williams (1971) Fam. 271; so that as Pickering J.A. put it:

> "It is still open to the wife to apply for financial provision of a nature not available to her at the date of the dissolution".

In any event, as already submitted, there is a right to claim "lump sum or sums", and it is contended that such jurisdiction is equivalent to a right to apply from time to time.

30. As to the sixth question, the definition of a maintenance agreement in the said Ordinance (section 14(2); Matrimonial Causes Act 1973, section 34(2)), is as stated in para.12 of this Case.

It is respectfully submitted that the phrase "any agreement in writing" is as wide as may be, and covers the Deed of Arrangement and Trust Deeds in the instant case.

31. Further, the said agreement in writing is subsisting as both the Trust Deeds continue to subsist and in such circumstances the Hong Kong court has jurisdiction to entertain application to alter the agreement under section 15 of the Ordinance (section 35 of the Matrimonial Causes Act 1973) which provides:

> "(1) Where a maintenance agreement is for the time being subsisting and each of the parties

to the agreement is for the time being either domiciled or resident in Hong Kong then subject to subsection (3), either party may apply to the Court for an order under this section.

(2) If the Court to which the application is made is satisfied either -

(a) That by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made or, as the case may be, financial arrangements were omitted from it (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different, or, as the case may be, so as to contain, financial arrangements, or

(b) That the agreement does not contain proper financial arrangements with respect to any child of the family,

then, subject to subsections (3), (4) and (5), that court may by order make such alterations in the agreement -

(i) by varying or revoking any financial arrangements contained in it, or

(ii) by inserting in it financial arrangements for the benefit of one of the parties to the agreement or of a child of the family,

as may appear to that court to be just having regard to all the circumstances, including, if relevant, the matters mentioned in section 7(3); and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration".

The Supreme Court had jurisd ction to entertain the claim under section 15 by reason of the fact that both parties were resident in Hong Kong at the time of the presentation of the application, and

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since there were concurrent applications before that court, it was the convenient court to hear the application, and in any event should it be that technically the matter should have commenced in the District Court and be transferred to the Supreme Court, the matter was curable under the Supreme Court Practice (R.S.C. Order 2, Rule 1). As Pickering J. said:

> "Any application commenced in the District Court would almost certainly be the subject of eventual transfer to the High Court". 10

337,340

32. On 18th January 1977 and 29th April 1977 the Hong Kong Court of Appeal made orders giving leave to appeal to Her Majesty in Council.

33. The Respondent submits that this appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. BECAUSE there is no jurisdiction to debar further claims by a spouse who has not remarried. 20

2. BECAUSE there is no jurisdiction to debar further claims by or on behalf of a child.

3. BECAUSE in any event if there is jurisdiction to debar, such jurisdiction was not properly exercised and was nugatory.

4. BECAUSE in any event the Hong Kong court may take an independent approach to the matter of precluding or not precluding future claims for matrimonial financial relief. 30

5. BECAUSE in any event there is jurisdiction to apply to set aside a consent order by reason of mistake or misrepresentation.

6. BECAUSE if there was a dismissal of claims such dismissal could not effect claims not then made, these latter claims being afforded by a later Ordinance retrospective in its application.

7. BECAUSE in any event the Deed of Arrangement and two Trust Deeds constituted a subsisting

maintenance agreement the terms of which can be altered by the Court.

RECORD

JOSEPH JACKSON

NICHOLAS WALL

No. 14 of 1977

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF HONG KONG
COURT OF APPEAL

CIVIL APPEAL No. 6 of 1976

(On appeal from Divorce Jurisdiction
Action No.14 of 1970)

B E T W E E N :

ERNEST FERDINAND PEREZ
DE LASALA — Appellant

- and -

HANNELORE DE LASALA — Respondent

CASE FOR THE RESPONDENT

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