*Privy Council Appeal No. 14 of 1977*

**Ernest Ferdinand Perez De Lasala** – – – – – – *Appellant*

*v.*

**Hannelore De Lasala** – – – – – – – – *Respondent*

FROM

## THE COURT OF APPEAL OF HONG KONG

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH APRIL 1979

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*Present at the Hearing:*

LORD DIPLOCK
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD DIPLOCK]

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This is an appeal from an order of the Court of Appeal of Hong Kong dated 17 December 1976. The order was made on a summons taken out in matrimonial proceedings which had been brought by the respondent ("the Wife") against the appellant ("the Husband") in 1970 claiming dissolution of the marriage and financial relief for herself and the child of the marriage. The claim for dissolution of marriage was undefended; a decree nisi was granted on 23 May 1970. On the same day an order by consent was made by Mr. Justice Briggs approving financial arrangements that had been agreed between the parties and dismissing the Wife's application for maintenance, a lump sum payment and secured provision for herself and the child. By their order that is the subject of the instant appeal the Court of Appeal of Hong Kong allowed an appeal by the Wife from a ruling of Mr. Justice Huggins of 23 January 1976 that he had no jurisdiction to hear an application by the Wife to set aside and vary the consent order of 23 May 1970, or to make any fresh financial provision for her or the child of the marriage. The question at issue in the instant appeal is whether the judge in the exercise of the Divorce Jurisdiction of the Supreme Court had jurisdiction to re-open the question of financial provision for the Wife notwithstanding the previous consent order. It has been conceded before this Board, though it had been contested in the Court of Appeal, that there is jurisdiction in the Supreme Court to re-open the question of financial provision for the child by way of periodical and lump sum payments.

With a few minor exceptions that are not germane to the instant appeal the legislation in Hong Kong relating to financial provision for parties to a marriage and children of the family has been in the same

terms as the statutory provisions on the same subject which have been in force in England. The legislative history has also been the same in the two countries, changes in the English statutes being followed after brief intervals by corresponding changes in the Hong Kong Ordinances. At the date of the consent order made by Mr. Justice Briggs in 1970 the court's powers in relation to financial relief as between spouses were regulated by the Matrimonial Causes Ordinance which reproduced the wording of the English Matrimonial Causes Act 1965: but at the date of Mr. Justice Huggins's order in 1976, that Ordinance had been replaced by the Matrimonial Proceedings and Property Ordinance. It reproduced the wording of the English Matrimonial Proceedings and Property Act 1970, which has since been incorporated with minor rearrangement of the relevant sections in a consolidation Act, the Matrimonial Causes Act 1973.

Mr. Justice Huggins gave his ruling against the Supreme Court's jurisdiction in a short *ex tempore* judgment; and his order dismissing the Wife's application was drawn up and entered on 23 January 1976. By the time he had committed his reasons to writing, however, his examination of a considerable number of English authorities had led him to change his mind; but it was then too late to re-call his order. The judgment of the Court of Appeal on the appeal against this order was a majority judgment. Pickering J.A. and Leonard J. were for allowing the appeal; McMullen J. was for dismissing it. Their reasons for judgment incorporate an exhaustive examination of the English cases that counsel for the parties had referred to as bearing on the matter for their decision, and include a consideration of decisions of New South Welsh and Victorian courts on their local legislation which, although *in pari materia*, was not in the same terms as the Hong Kong Ordinances. Their Lordships have much sympathy with the Court of Appeal who, on this approach, found the English law on the topic to be in " a state of disarray " (as Pickering J.A. put it) at the time when their judgments were delivered in December 1976.

At that time the English authority most nearly in point was *L. v. L.* [1962] P. 101, a decision of a " two-man " Court of Appeal under s.1 of the Matrimonial Causes (Property and Maintenance) Act 1958. It was authority against the court having any jurisdiction to re-open the financial settlement as between husband and wife that had been approved by the consent order of 23 May 1970. But from the abundance of matrimonial cases which, for no very obvious reason, have found their way into law reports it is not difficult to compile a thesaurus of propositions of matrimonial law which, because they are couched in terms wider than were strictly necessary for the purpose of dealing with the actual facts of the case on which the judge's attention was concentrated, may well seem to be in conflict with one another. So it is not surprising that the majority of the Court of Appeal of Hong Kong reached the conclusion that the English law on the issue that they had to decide was unclear and that they were free to give effect to their own policy decision not to follow the English case of *L. v. L.*

The fact that this appeal has taken an unconscionable time to reach this Board from the Court of Appeal had one good effect. It has resulted in its coming on for hearing after, and not before, the judgment of the House of Lords in *Minton v. Minton* [1979] 2 W.L.R. 31. By that judgment the House of Lords approved the decision in *L. v. L.* and held that s.23(1) of the English Matrimonial Causes Act 1973 does not empower the court to make a second or subsequent maintenance order in favour of the wife after an earlier application has been dismissed.

The statutory language which in *Minton v. Minton* was construed as excluding the jurisdiction of the court to make a second or subsequent order once an application for financial relief has been dismissed appears in ss. 23(1) and 24(1) of the English consolidation Act of 1973 and is in the following terms:

> " On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say . . .".
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> (There follow in s.23(1) references to orders for periodical payments, secured or unsecured, and lump sum payments to a party to the marriage or for the benefit of a child of the family, and, in s.24(1) references to property adjustment orders.)

These words in the consolidation Act are taken from ss. 2 and 4 of the English Matrimonial Proceedings and Property Act 1970, which are reproduced in ss. 4 and 6 of the Matrimonial Proceedings and Property Ordinance which was in force in Hong Kong in 1975 when the Wife made her application which is the subject of the instant appeal. They had previously been used in s.16(1) of the English Matrimonial Causes Act 1965, which had been reproduced in the Matrimonial Causes Ordinance which was in force in Hong Kong at the date of Mr. Justice Briggs's order of 23 May 1970. So unless some relevant distinction can be found between the Wife's claim in the instant case for financial relief for herself after her original claim had been dismissed, and the claim of the wife in *Minton v. Minton* for financial relief in similar circumstances, the reasons for the judgment of the House of Lords are decisive in the Husband's favour on what is now the only contested issue in this appeal.

This will relieve their Lordships from the laborious task of examining the earlier English cases to which so much consideration was devoted by the Court of Appeal of Hong Kong. Since, for reasons to be given later, their Lordships reject the submission that this decision of the House of Lords is not binding upon the Hong Kong courts, they can confine their attention to the respects in which the respondent urges that the instant case is to be distinguished from *Minton v. Minton*.

The facts that are relevant for this purpose can be stated briefly. Towards the end of 1969 the Wife filed a petition for divorce on grounds which the Husband expressed his intention to resist. As a result of negotiations between the legal advisers to the parties agreement was reached that the Wife should withdraw her existing petition and file a fresh one based on different grounds, which the Husband would not defend. Agreement was also reached about custody, care and access as respects the child of the marriage, a boy who was then three-and-a-half years old, and as to the financial provisions to be made by the Husband for the Wife and the child. These involved the settlement of the sum of $500,000 on trust for the child under a trust deed of which the Husband and a well-known Bank's trustee company were trustees; the payment by the Husband of a lump sum of $850,000 to the Wife; and the payment by the Husband to the Bank trustee company of the sums of $400,000 and $50,000 on trust for the purchase of a residence (to be selected by the Wife) and furniture for it, for the use of the Wife during her lifetime and of the child until he reached the age of 21, the Wife to be responsible for rates, repairs and other outgoings. There was a remainder over to the child contingent upon his attaining 25 years. It

was part of the agreement that the Wife should consent to the dismissal of the claims for maintenance, a lump sum payment and a secured provision for herself and the child contained in her fresh petition.

These arrangements were approved by Mr. Justice Briggs on 16 January 1970 and leave to implement them granted. A deed, described as a Deed of Arrangement, whereby the Husband and the Wife undertook to implement the arrangements, was executed on 22 May 1970. To this was annexed the two trust deeds. The fresh petition was heard by Mr. Justice Briggs on 23 May 1970 and a decree nisi granted. On the same day he made a consent order. The first four paragraphs dealt with custody and care of the child and the Husband's right of access to him. Paragraph 5 formally approved the Deed of Arrangement. Paragraphs 6 and 8 were in the following terms:—

> " 6. Upon the Respondent paying to the Petitioner the sum referred to in the said Deed of Arrangement and upon the Trust Deeds annexed thereto coming into force and upon the Respondent paying the amounts payable thereunder, the Petitioner's applications for maintenance a lump sum payment and secured provision for the said child and for herself be dismissed.
>
> " 8. There be liberty to either party to apply in respect of custody and control of and access to the said child and any matter relating to the implementation of the said Deed of Arrangement or of the said Trust Deeds ".

The Husband has paid to the Wife the $850,000 referred to in the Deed of Arrangement; the Trust Deeds annexed to it have come into force and the Husband has paid to the trustees the amounts payable thereunder, except the $50,000 for furniture which has not yet become due as the Wife has not selected a residence. She has left the capital sum of $400,000 to accumulate in the hands of the Bank trustee. The financial provisions in the Deed of Arrangement, as apart from the Trust Deeds, are now spent; they have been fully executed by the Husband. The only provisions in it that are still executory are covenants by the Wife as to the education and religious upbringing of the child.

The first distinction between *Minton v. Minton* and the instant case on which counsel for the Wife relies is that this is Hong Kong legislation and decisions of English courts, even the House of Lords itself, on corresponding English legislation are not binding upon Hong Kong courts, of which this Board itself is one when it is hearing a Hong Kong appeal. In their Lordships' view different considerations apply (1) as between decisions of the English Court of Appeal and those of the House of Lords; and (2) as between decisions on questions governed by the common law as applied in Hong Kong by the Application of English Law Ordinance, and decisions on the interpretation of recent legislation that is common to Hong Kong and England.

*Trimble v. Hill* (1879) 5 App. Cas. 342 was an appeal to this Board from the Supreme Court of New South Wales which, at that time, did not exercise appellate jurisdiction. The question was one of statutory construction. This Board expressed the view that colonial courts of first instance, like the High Court in England, should treat themselves as bound by decisions of the recently created English Court of Appeal. By 1927, however, appellate courts had been established in many countries from which appeal lay to the Judicial Committee of the Privy Council. In *Robins v. National Trust Co.* [1927] A.C.515, this Board expressed the view that an appellate court in a colony was not bound to follow

decisions of the English Court of Appeal on matters as to which English law is applicable in the colony if the colonial appellate court thought the English decision to be wrong. But the Board also added:

> " It is otherwise if the authority in England is that of the House of Lords ".

So the modern rule is that judgments of the English Court of Appeal on matters of English law where it is applicable in Hong Kong are persuasive authority only; they do not bind the Hong Kong Court of Appeal. So in the instant case the Court of Appeal was right in holding that they were not bound to follow the decision in *L. v. L.* if they considered it to be wrong.

*Robins v. National Trust Co.* involved a question that was governed by the common law of England as received in Ontario in 1792. It has become generally accepted at the present day that the common law is not unchanging but develops to meet the changing circumstances and patterns of the society in which it is applied. In *Australian Consolidated Press Ltd. v. Uren* [1969] 1 A.C. 590 it was accepted by this Board that the common law as to the right to punitive damages for tort had of recent years developed in different ways in England and in New South Wales and that neither Australian courts themselves nor this Board sitting on an appeal from an Australian court were bound by the decision of the House of Lords in *Rookes v. Barnard* [1964] A.C. 1129 which limited the categories of cases in which punitive damages could be awarded in England. So too in Hong Kong, where the reception of the common law and rules of equity is expressed to be " so far as they are applicable to the circumstances of Hong Kong or its inhabitants " and " subject to such modifications as such circumstances may require ", a decision of the House of Lords on a matter which in Hong Kong is governed by the common law by virtue of the Application of English Law Ordinance is not *ipso facto* binding upon a Hong Kong court although its persuasive authority must be very great, since the Judicial Committee of the Privy Council, whose decisions on appeals from Hong Kong *are* binding on all Hong Kong courts, shares with the Appellate Committee of the House of Lords a common membership. This Board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the Colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England.

Different considerations, in their Lordships' view, apply to decisions of the House of Lords on the interpretation of recent legislation that is common to Hong Kong and England. Here there is no question of divergent development of the law. The Legislature in Hong Kong has chosen to develop that branch of the law on the same lines as it has been developed in England, and, for that purpose, to adopt the same legislation as is in force in England and falls to be interpreted according to English canons of construction. What their Lordships have already said about the common membership of the Judicial Committee of the Privy Council and the Appellate Committee of the House of Lords applies *a fortiori* to decisions of the House of Lords on the interpretation of recent English statutes that have been adopted as the law of Hong Kong. Since the House of Lords as such is not a constituent part of the judicial system of Hong Kong it may be that in juristic theory it would be more correct to say that the authority of its decisions on any question of law, even the interpretation of recent common legislation, can be persuasive only: but looked at realistically its decisions on such a question will have the same practical effect as if they were strictly

binding, and courts in Hong Kong would be well advised to treat them as being so.

The next distinction sought to be drawn between *Minton v. Minton* and the instant case is that in *Minton v. Minton* the various kinds of orders by way of financial relief which the court had power to grant at the date of the dismissal of the wife's original application were the same as those which it had power to grant at the date of her fresh application; whereas in the instant case the powers of the court in this respect had been enlarged between the date of the consent order made by Mr. Justice Briggs in 1970 dismissing the Wife's application for financial relief, and the date of her fresh application in 1975.

Under the Matrimonial Causes Ordinance which was in force in 1970, the court had power to make two different types of orders making financial provisions for a wife:

(*a*) periodical payments, both secured and unsecured; and

(*b*) a lump sum payment.

Orders of the former type could be varied or discharged by the court upon subsequent application by either spouse. Lump sum orders were once-for-all; they could not subsequently be varied. There was, however, at that time no power in the court to make an order for the transfer of property between spouses or for the settlement of property for the benefit of a spouse. The power to make transfer of property orders and settlement orders was conferred upon the court in 1972 by s.6 of the Matrimonial Proceedings and Property Ordinance. Like lump sum payments they are once-for-all orders; there is no power to vary them upon subsequent application. This enlargement of the power of the court, it is contended, conferred upon it a brand new jurisdiction additional to and distinct from the previous jurisdiction which it had exercised when it dismissed the Wife's application for financial provision to be made for her in 1970, with the consequence that her application to the court to exercise this new jurisdiction was not barred by the court's having exhausted its previous jurisdiction.

Their Lordships find themselves unable to accept this argument. In *Minton v. Minton* the House of Lords decided that the policy of the English legislation to which effect was given by the language that has been cited above was to permit parties to a marriage that had irreparably broken down, to make " a clean break " also as respects financial matters from which there could be no going back. The means provided for achieving this result were for the parties to agree upon a once-for-all financial settlement between them and to obtain the court's approval to it and an order of the court either of a once-for-all type or dismissing the parties' claims to any court order against one another for financial relief. The House of Lords' decision as to the policy and effect of the English legislation was not confined to the current Act of 1973, or to the Acts which were consolidated by it. It applied to all preceding Acts of Parliament dating back to 1958 in which similar wording had been used—as is shown by the House's express approval of *L. v. L.* In their Lordships' view the grant to the court of power in 1972 to make the two new kinds of orders did no more than enlarge the ways in which the court could exercise the jurisdiction it already had to order one spouse to make a once-for-all financial provision for the other. The difference between a lump sum order which the court already had power to make and a property transfer order that it acquired power to make in 1972 is the difference between providing money and money's worth. The finality of the break effected by the consent order dismissing the

Wife's application for financial relief cannot in their Lordships' view be prejudiced by the court's having acquired at some later date a power to make once-for-all orders for financial provision of kinds which were not available at the time that the " final break " which the court then approved was made.

Lest it be thought that they had overlooked it, their Lordships should also mention that some reliance was also placed by the respondent on the fact that by the provision in s.4(1)(*c*) of the 1972 Ordinance conferring power to make lump sum orders the expression

" such lump sum or sums "

was substituted for the expression

" such lump sum "

in the previous Ordinance. The suggestion was that it was a necessary implication from this reference to more than one lump sum that the court, having made an order for the payment of one lump sum, could make a subsequent order for the payment of another lump sum. In their Lordships' view the substituted provision permits and permits only a single order which may, where appropriate, include provision for the payment of more than one lump sum as, for instance, where one sum is to be paid immediately and a further sum contingently upon the happening of a future event such as the falling in of a reversionary interest in an estate to which one of the parties to the marriage is entitled.

Their Lordships next turn to the contention that even if the court lacked jurisdiction under s.4 and s.6 of the Matrimonial Proceedings and Property Ordinance to re-open the once-for-all financial settlement approved by the consent order, it nevertheless has jurisdiction under s.15 to entertain an application by the Wife for the variation or revocation of the financial arrangements contained in the Deed of Arrangement and Trust Deeds A and B, on the ground that collectively or individually they constitute a subsisting " maintenance agreement " within the wide meaning ascribed to that expression by s.14(2). S.15, which corresponds to s.35 of the English Act of 1973, empowers the court to vary or revoke financial arrangements contained in a maintenance agreement if it is satisfied of a change in circumstances in the light of which those financial agreements were made.

Their Lordships have listened to an interesting argument as to whether the Deed of Arrangement and the Trust Deeds (to which the Bank trustee is also a party) either separately or in combination could have constituted a subsisting maintenance agreement for the purposes of s.15 if they had not been made the subject of a consent order of the court. In their Lordships' view, however, it is not necessary to decide that question. The claim that there is jurisdiction in the instant case under s.15 can be disposed of on a much broader ground.

The Ordinance and the corresponding English legislation recognise two separate ways in which financial provision may lawfully be made for parties to a marriage which has been dissolved. One is by a maintenance agreement entered into between the parties without the intervention of the court; the other is by one party obtaining a court order against the other for periodical payments or for once-for-all financial provision. In the event of default, a maintenance agreement is enforceable by action; a court order is enforceable by judgment summons. A maintenance agreement cannot bar the right of either party to it to apply for a court order under s.4 or s.6, or to apply to the court for variation or revocation of the agreement under s.15. A court order on the other hand which

makes a once-for-all financial provision for a party to the marriage or dismisses that party's claim to financial relief operates as a bar to any fresh application for a court order.

Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order; and the method of enforcing such of their provisions as continue to be executory (in the instant case the provisions of Trust Deeds A and B) is not by action but by summons under the court order pursuant to the liberty to apply, reserved in the instant case by paragraph 8 of the consent order of 23 May 1970. In their Lordships' view there is no relevant maintenance agreement now subsisting which is capable of attracting the jurisdiction of the court under s.15 of the Ordinance.

Finally it was suggested that there was evidence before the Hong Kong court that the Wife had been induced to agree to the consent order of 23 May 1970 (*a*) by misrepresentations by the Husband as to his financial position at that time and (*b*) by the bad advice she had received from her then legal advisers as to what her tax position would be. On either or both of these grounds, it was submitted, the Wife was entitled by an application made in the present proceedings to have the consent order set aside.

The Court of Appeal had decided against the Wife on this submission, so that strictly speaking it should have been the subject of a cross-appeal. However, their Lordships heard argument upon it and can dispose of it shortly.

Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, the only ways of doing it that are open to him are by appeal from the judgment or order to a higher court or by bringing a fresh action to set it aside. The test whether a judgment or order finally disposes of the issues raised between the parties is not determined by inquiring whether for the purposes of rules of court relating to time or leave to appeal it attracts the label " final " or " interlocutory ". The test is: Has the court that made the order a continuing power to vary its terms, as distinct from making orders in aid of enforcing those terms under a liberty to apply? Since their Lordships have already held that Mr. Justice Huggins, in the exercise of the Divorce Jurisdiction of the Supreme Court of Hong Kong (not its Appellate Jurisdiction), had no power to vary the consent order made by Mr. Justice Briggs on 23 May 1970, the only means now open to the Wife to set it aside on grounds of fraud or mistake would be by bringing a fresh action for this purpose.

It is, however, only fair to the Husband to say that her allegations of fraud are couched in terms that suggest that she is willing to wound and yet afraid to strike. " I now dispute ", she says in her affidavit, " the veracity of the representations made to me by the Respondent in 1969 and 1970, and to my then legal advisers through his solicitors, concerning his financial position at that time ". Reports of enquiry agents made in 1973 and 1974, to which she refers as supporting this half-hearted charge, go nowhere near doing so and would be insufficient to justify English counsel in putting his name to a statement of claim in an action claiming to set aside the consent order of 23 May 1970, on the ground that it was obtained by fraud.

The appeal must be allowed in so far as it relates to the Wife's application for further financial provision for herself but dismissed in so far as it relates to her applications for further financial provision for the benefit of the child. These applications must be remitted to the judge for further hearing at which their Lordships think that it would be appropriate for the child to be separately represented.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed in part and the order of the Court of Appeal varied by ordering that instead of remitting the amended summons, dated 1 August 1975 and re-dated 21 January 1976, to the judge to be dealt with upon its merits as therein stated, it be so remitted for the judge to deal on the merits with the claims for relief in Prayers 5 and 7 and Prayer 6 (with the deletion of the words "(4) and ") only. The appellant and the respondent must bear their own costs here and below.

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**In the Privy Council**

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**ERNEST FERDINAND PEREZ DE LASALA**

*v.*

**HANNELORE DE LASALA**

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DELIVERED BY
LORD DIPLOCK

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