



[2015] JMMD: FD 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012M01056

BETWEEN SUZETTE ANN MARIE HUGH SAM CLAIMANT
AND QUENTIN CHIN CHONG HUGH SAM DEFENDANT

Mr. Wentworth S. Charles and Ms. Georgia C. Buckley instructed by Wentworth S. Charles & Co. for the claimant

Mr. Gordon Steer and Mrs. Judith Cooper Batchelor instructed by Chambers, Bunny and Steer for the defendant

Heard: 7th May, 2014 and 16th January, 2015

Maintenance – spousal maintenance; application made before grant of decree nisi; whether final maintenance order can be made; lump sum and periodic payment orders; Matrimonial Causes Act SS.20 and 22; Maintenance Act SS.5 and 14(4).

IN CHAMBERS

E. BROWN, J

Introduction

[1] Suzette and Quentin Hugh Sam met in June 1995 whilst she was on a visit to this fair isle from Canada. Shortly thereafter she returned to reside here, continuing her tertiary education at the University of the West Indies and assisting in the Hugh Sam's family business. After three years of living together in a common law union they were married on the 7th November, 1998 in California, United States of America. Their

marriage began deteriorating sometime in or about 2005, and ultimately they separated in March 2010. Their union produced two (2) children: R, thirteen (13) years old and T, fifteen (15) years old, at the time of the trial.

Background

[2] I will hereafter employ the terms used by the draftsman in the ***Matrimonial Causes Act (MCA)*** to refer to the parties. That is, dependant spouse is a reference to Mrs Hugh Sam, the applicant and contributing spouse is a reference to Mr Hugh Sam, the respondent/defendant. By Notice of Application for Court Orders filed on 27th July, 2012, the dependant spouse sought, inter alia, the following two orders:

3. *That the Respondent pays the Applicant the sum of One Hundred and Sixty Five Thousand, Seven Hundred and Twenty Five Dollars (\$165,725.00) per month for the maintenance of the relevant children of the marriage.*
4. *That the Respondent pays to the Applicant the sum of Seven Hundred and Sixty Six Thousand, Four Hundred and Seventeen Dollars (\$766, 417.00) per month for the maintenance of the Applicant including rental of accommodation for the Applicant and the children and any reasonable sums needed as a deposit to secure such rental accommodation.*

[3] On the 7th November 2012 with the consent of the parties, the following interim orders were made by Beckford, J

1. *The Applicant will make arrangements for alternative accommodation on or before the 31st December 2012 and the Respondent will pay rental in the sum of One Hundred and Fifty Thousand Jamaican Dollars (\$150,000.00) plus the sum of One Hundred and Fifty Jamaican Dollars (\$150,000.00) for security deposit if required.*
2. *The sum of Two Hundred and Fifty Eight Thousand Jamaican Dollars (\$258,000.00) to be paid to the Applicant by the Respondent for the maintenance of the relevant children on or before the 1st day of each month with effect from the 1st December 2012.*
3. *The Respondent to pay the medical, dental and optical expenses reasonably incurred in respect of the relevant children.*

4. *The Respondent to pay the school fees of both relevant children.*
5. *The Respondent to pay the sum of Fifteen Hundred United States Dollars (\$1,500.00USD) for the laptop of R Hugh Sam.*
6. *The Respondent to pay all reasonable expenses for extra-curricular activities namely: scuba-diving, tennis and dancing.*
7. *The Applicant to have control and use of the Range Rover Motor Vehicle licence number 4949FM that she currently drives and the Respondent to maintain the insurance and licence of the said Motor Vehicle.*
8. *The Respondent to purchase a refrigerator and stove of similar size to the one that is presently being used in the matrimonial home.*
9. *The Applicant is permitted to remove the following:*
 - a. *The Furniture from children's bedrooms along with paintings therein;*
 - b. *The set of pots and pans now being used by the Applicant;*
 - c. *The 50 inch television set from the Respondent's bedroom and the Leather sofa;*
 - d. *The Table from entrance way.*

[4] The interim order was varied by consent before Batts, J on the 25th October, 2013. The relevant terms of the varied order are reproduced below:

- (a) Rental payments referred to in paragraph 1 are to be made on the 25th day of each month beginning on October 25, 2013.
- (b) Paragraph 6 is amended to read as follows: *“Respondent to pay all reasonable expenses for extracurricular activities namely horseback riding (2 times per week at \$2000 per lesson), tennis and dancing.”*
- (c) Paragraph 7 is amended to add the following sentence: *“along with \$13,000.00 per month for maintenance of the said Range Rover payable on the 1st day of each month commencing 1st day of November 2013.”*

[5] Both parties were cross examined before me on the 7th May 2014. At the close of the case for the defendant an order was made for the filing of submissions on or before 30th May, 2014. Both sides filed their submissions on that date. In his written submissions counsel for the contributing spouse said this:

*“Mr. Hugh Sam has indicated that an order concerning the maintenance of the children should be the sum of **One Hundred and Sixty Five Thousand Dollars (\$165,000.00)** per month and a contribution of **One Hundred and Fifty Thousand Dollars (\$150,000.00)** towards accommodation and in addition one half of the reasonable educational expenses and one half of the reasonable medical, dental and optical expenses incurred on behalf of the said children.”*

That is a concession which commands some sympathy. However the circumstances of the case demand some modification. To that I shall return at the end of the discussion of spousal support.

Case for the dependant spouse

[6] The dependant spouse said in her affidavit that she is not in a financial position to adequately care for herself without receiving support in the form of maintenance from her husband. Under cross-examination she reiterated this financial inability while admitting that physically she is able to support herself, meaning she is able to work. The evidence further disclosed that the dependant spouse is a forty-three year old healthy female. She was a student at the University of the West Indies in the Faculty of the Social Sciences before her nuptials.

[7] She sought to demonstrate her dependency through a schedule of expenditures attached to her affidavit which includes the annual expenses for her and the children of the family. There is an item listed as *“Personal Expenses at J\$50,000 per month (Suzette Hugh Sam).”* Additionally, motor vehicle expenses total J\$646,000 per year or approximately J\$53,833.33 per month. The annual figures submitted for utility bills, broken down to their monthly units are: electricity - J\$70,000.00, water - J\$6,000.00, telephone - J\$18,000.00 and Flow - J\$15,000.00. Grocery amounts to J\$200,000.00 and wages for household help - J\$56,000.00. The sum listed for the expense of a yearly vacation is US\$2,500.00. Broken down, the monthly expense for an annual vacation is US\$208.33 or J\$18,541.37, at the rate of exchange used in the schedule of US\$1: J\$89. The total expenditure for a given month, including rental but omitting specific expenses for the children would therefore amount to approximately J\$637,674.70.

[8] Under cross-examination the dependant spouse was asked if she spends J\$766,000.00 on herself every month and she replied no. For groceries, her evidence under cross-examination is that on average she spends J\$280,000.00 monthly, which she has been spending since she moved out of the matrimonial home. The figure spent on fuel each month was approximated at J\$60,000.00, during cross-examination. However, in the breakdown provided in the schedule, the estimate was J\$40,000.00 per month. She explained that her fuel bill had seen an increase which includes the errands for her mother and friends.

[9] On the other side of the balance sheet, cross-examination revealed that the dependant spouse is the joint holder of an account with her mother with sums amounting to US\$161,000.00. Additionally, US\$29,000.00 stands to her credit at Mayberry Investments. Although there was an account at Alliance Investments Limited with US\$11,000.00, it became empty three months prior to date of the hearing. The emptying of that account was not due to use for day-to-day expenses. She further disclosed under cross examination her sole shareholdship in Sahai Distributors, a company concerned with the importation of chicken back for her mother's and uncle's businesses. The company ceased operating in 2011. The dependant spouse also disclosed that she received a monthly stipend from her mother which varied according to the grocery bill and the needs of the children. That sum averaged J\$250,000.00 per month.

[10] An affirmative answer was given when the dependant spouse was asked if her bills were paid from the J\$250,000.00 given to her by her mother in addition to the money received from her husband. She confirmed that her husband gives her a total of J\$421,333.00 per month. So then, her total intake from her mother and husband amounts to approximately J\$671,333.00 per month.

Case for the contributing spouse

[11] The contributing spouse disputed the circumstances which led to the cessation of the dependant spouse's attendance at the University of the West Indies. On his account she ceased attending that institution because of an inability to cope with the work. He

implied that she was a malingerer. Upon losing interest in her education she made a decision to stay home. However, in 1997 she expressed a desire to learn the business he operated at 105-107 and 107A Barry Street and 51 Orange Street. That was Xtra Wholesale which was incorporated in 1993 and became operational in that same year, some two years before the parties met, according to the contributing spouse.

[12] Consequently, the contributing spouse said, his wife never gave up her education to help him in the business. Indeed, at no time did she work at Xtra Trading Company Limited, the company in which his father gave him shares and to which he had been employed from 1991. On this account, the dependant spouse's interest in working at Xtra Wholesale became spent after the passage of three months. Spent interest was the reason she stopped working there and not pregnancy, he insisted. Although she may have made one or two lodgements for Xtra Wholesale, that certainly was not while she was a student. He asserted that she never worked tirelessly in the business. Neither was she an Assistant Manager.

[13] The dependant spouse's unsustainable interest in her husband's businesses characterised their relationship according to the contributing spouse. Having invited her to run Clean Chem Limited, which commenced operations in or about November, 2001, as she was home idle from 1996, her interest evaporated after four months. The contributing spouse's evidence was that, after her departure in 2002, the only uses she made of Clean Chem's office were for activities antithetical to the sanctity of the marriage vows. He went on to allege that the marriage broke down because of her infidelity. She lost interest in going to the business place every day but continued to do the payroll continuously, until either February or March 2012.

[14] Clean Chem Limited paid his wife's credit card bills, said the contributing spouse. There was a down turn in business making the payment of these bills unaffordable but that did not stop her exorbitant spending. Not being able to afford her lifestyle caused problems in their marriage. She became intolerant of him and would get very angry whenever he told her there was no money, according to the contributing spouse. The dependant spouse's spending habit was a bone of contention between them and a

source of hardship for him as the business environment became challenging, the contributing spouse swore in his affidavit. This led him, he said, to provide her with a credit card with a limit of J\$152,000.00.

[15] On the subject of assets, the contributing spouse said lots 15 and 16 Peter's Rock, St. Andrew were bought with their own resources as joint tenants. The lots remain undeveloped as discussions through their mediator came to naught. The contributing spouse owns an offshore company, Hoven Enterprises Ltd. Through that company he purchased 25 Hopefield Avenue, Kingston 6, the parties' previous residence. This home was sold for approximately US\$320,000.00 in 2010. Both Hoven Enterprises Ltd and Microage Enterprises Ltd were incorporated in 1998 in the British Virgin Islands.

[16] The contributing spouse said the accounts in the dependant spouse's name at Mayberry Investments Ltd and Alliance Investments Ltd were 'designed' for the children's further education. The former account was started with money from his father. The townhouse at 4 Dillsbury Avenue, Kingston 6 is jointly owned by him and his father. All the other real estate is owned by his family although he admits to having invested US\$250,000.00 in a housing project.

[17] The contributing spouse asserted that there was an existing J\$11,000,000.00 claim in taxes upon Clean Chem. He charged that the expenses set out by his wife are exaggerated and exorbitant and he cannot afford the sum being sought. Further, she is healthy, able to work and has money to support herself. On the other hand, his monthly salary from his companies amount to J\$550,000.00. Questioned about his income in cross-examination, he said that Sure Save, Xtra and Clean Chem pay his salary. Sure Save pays him J\$250,000.00 and Clean Chem pays him J\$150,000.00. His expenses total J\$603,000.00. The expenses presented are electricity - J\$90,000.00, water - J\$5,000.00, credit card (for wife) - J\$258,000.00, school fees (US\$28000 @ 90JA) - J\$210,000.00, food - J\$20,000.00 and petrol - J\$20,000.00. These expenses are met with help from his parents. In cross-examination he said they give him about J\$300 - J\$350,000.00 per month.

[18] Under cross-examination the contributing spouse admitted to being both a director and shareholder in several companies, some of which ceased operating at the time of the trial. He is 99% shareholder in Xtra Supercentre. He's also the holder of approximately 90% of the shares in Sure Save Wholesale. Aside from that, he invested in a Meryl Lynch, now Royal Bank of Canada. He disputed that his investments were in the region of US\$900,000.00. Rather, they were in the ball park of US\$548,000.00. He later agreed with counsel for the dependant spouse that this investment was US\$942,016.23. Asked how he used this money, he believed most of it was lost in the stock market. In re-examination he said he told Meryl Lynch what stocks to invest in.

[19] The contributing spouse also admitted to sitting on the board of directors of Elite Diagnostics but denied being a shareholder. He had, however, discussed investing in a diagnostic company with his wife. If he recalled correctly, he said, he was going to invest US\$50,000.00. He was also an investor in a townhouse development to the tune of US\$250,000.00. Soon after making this investment he requested the return of his money. At the time of trial he had not yet received it, notwithstanding the near completion of the apartment complex. He was ignorant of the apartments being advertised for US\$350,000.00. In 2011 the contributing spouse made an investment of J\$300,000.00 in Racers Water Company. Though not an investor, he holds ten shares in Racers Apparel Company.

[20] The contributing spouse is an avid golfer who plays golf abroad biennially. His corporate membership in the Caymanas Golf Club comes with an annual fee of about \$600,000.00. This he shares with about four or five of his friends. He drives a Porsche and has been doing so since 2009. He admitted that his nuclear family took a vacation once per year. He disagreed with the suggestion that he is in a position to keep his family in the accustomed position, saying business was down by 30%.

Submissions on behalf of the dependant spouse

[21] In respect of the considerations under the *Maintenance Act* section 5 (2), it was submitted that the parties spent a significant part of their lives together. Under the heading 'the applicant's contribution to the relationship and the economic consequences

of the marriage for her, particularly for her earning capacity', counsel made reference to the termination of the dependant spouse's education. Further, that the dependant spouse's assumption of responsibilities at Clean Chem Ltd while performing housekeeping and child care services impacted her earning capacity. This is so especially since the dependant spouse "forewent" an academic career and devoted her time assisting in the family business.

[22] Counsel next submitted on 'the applicant's needs having regard to the accustomed standard of living during the marriage'. Here counsel adverted to the fact of the parties' prior residence at 25 Hopefield Avenue then in a four bedroom townhouse at 4 Dillsbury Avenue, Kingston 6. Among the other features relied on are that the dependant spouse drives a Range Rover and the contributing spouse a Porsche Cayenne, the taking of a yearly overseas vacation and the provision of family health insurance which includes overseas care.

[23] Counsel advanced that the evidence makes it clear that 'the parties have been accustomed to a certain standard of living in keeping with their resources and lifestyle'. Learned counsel contended that it cannot be credibly argued that the dependant spouse has inflated her expenses. That is so as all the items captured by the credit card statements are reasonable expenses enjoyed by the household. Her expenses amount to J\$932,142.00 per month and she was accustomed to having a credit card with a limit of J\$1,345,500.00, the submission ended.

[24] Turning to the applicable section 14 (4) considerations, it was submitted that the dependant spouse has been completely excluded from the family businesses and currently has no means of support for herself. Although the dependant spouse is the 'joint holder' with the contributing spouse of lots 15 and 16 located at Peters Rock, St. Andrew, the contributing spouse denies her beneficial interest therein, the submission went. On the other hand, while the dependant spouse is the joint holder with her mother of an account at Charles Schwab & Company, the former has no beneficial interest in the proceeds contained in the account, counsel said. On the contrary, it was argued, the

contributing spouse is likely to have considerable assets in the future in addition to the possibility of inheriting from his mother's property located in Taiwan.

[25] Counsel next considered the *“measures available to the dependant spouse to provide for her own support and duration and cost of such measures and extent to which maintenance payments would assist her to increase her earning capacity and allow her to access education or training or otherwise obtain adequate income under sections 14 (4) (f) and (k).”* The submission was that the court may consider appropriate measures designed to assist the dependant spouse in establishing her financial independence and to make the adjustment without undue hardship. That submission was predicated on the fact of her being 43 years old and living with two teenage daughters in rented accommodations. Reliance was also placed on the assertion that she gave up university education at the request of the respondent.

[26] Two authorities were cited by counsel for the dependant spouse. The first of them is *Hughes v Hughes* (1945) 45 WIR 149, a decision of the Court of Appeal of the Eastern Caribbean States. Two orders had been made against the appellant. By the first, he was required to pay to the respondent US\$500 per month for housing accommodation for her and the two children of the family until the younger attained the age of eighteen years. Under the second order the appellant was required to pay a lump sum of \$40,000. The appeal was on the ground that the awards were excessive and against the weight of the evidence.

[27] The court held, among other things, first, the short duration of a marriage does not necessarily debar the other party from entitlement to a lump-sum order. Secondly, in applying the one third rule for financial provision, where one party has failed to make a full and frank disclosure of income and assets the court is entitled to draw inferences adverse to that party, although such inference must bear a genuine relationship to the available assets.

[28] Counsel submitted that the contributing spouse in the case at bar has systematically and calculatedly pursued a course of action to deliberately conceal his assets and to convey to the court that he is impecunious and unable to maintain the

standard of living to which the parties had become accustomed. The complaint was that the dependant spouse failed to attach any value to declared assets, particularly those of several companies he operates and the income derived therefrom. In the face of the contributing spouse's failure to give full particulars for these companies, the court was invited to do make two adverse findings. First, I am to infer that the contributing spouse is the principal behind these companies. Secondly, I am to say that the reasons for the non-disclosure are either to defeat the claim or precipitate an order which is not in keeping with the justice of the case.

[29] Counsel for the applicant next cited *McEwan v McEwan* [1972] 2 All ER 708, a case also cited by the dependant spouse's counsel. This was an appeal from the decision of justices to dismiss the husband's application to vary an order for maintenance of his wife. The husband was an unemployed, retired detective constable in receipt of a pension. The main contention on appeal was that the justices reached their conclusion by unjustified speculation about the husband's potential earning capacity, without having any or sufficient regard to the fact that he was unemployed. It was held that the justices were entitled to take into account not only the husband's actual earnings, but also his potential earning capacity.

[30] In the instant case, it was submitted on behalf of the dependant spouse that her husband had a high propensity to engage in various investment activities during the marriage. That propensity is an inference capable of being drawn from his investment in the Hopefield Avenue townhouse development, Merrill Lynch, Racers Apparel and Racers Water and his advice to his spouse concerning how to arrange the family business, the submission ran. It is therefore appropriate, counsel concluded, for the court to take into consideration the contributing spouse's potential earning capacity, based on his demonstrated investment portfolio over the years.

[31] Following on that, it was submitted that in the case of a rich man who may well live largely on capital and capital profits, his capital assets will be of particular importance and a person's standard of living may be the best guide to the level of his income. *Brett v Brett* [1969] 1 All ER 1007 was relied for that submission. Counsel said

in the instant case the evidence is that the contributing spouse would remove cash from his companies, deposit it to his personal account then use it to discharge his household expenses. Counsel contended that the contributing spouse has not seen it fit to disclose his capital assets of the various companies. However, it is clear that his standard of living could be described as that of a rich man having regard to his lifestyle, the argument went. In the circumstances, counsel concluded, it would be appropriate for the court to consider his lifestyle as primary evidence in exercising its discretion to make a lump sum payment.

Submissions on behalf of the contributing spouse

[32] In the introductory section of his submissions Mr Steer provided a summary of the contributing spouse’s present financial obligations under the interim order as varied. It reads:

(a) Towards rental	J\$150,000.00
(b) Maintenance	J\$258,000.00
(c) Horseback riding, \$2,000.00 per week x 2x 4	J\$16,000.00
(d) Motor vehicle expenses	<u>J\$13,000.00</u>
Total =	J\$437,000.00

The school fees of US\$28,000.00 calculated at an exchange rate of J\$110 to US\$1 amounts to J\$3,080,000.00 per annum and therefore J\$256,666.66 per month. When the school fees are added to the J\$437,000.00, the monthly figure is J\$693,666.66. Immediately following this breakdown, the court was reminded of the contributing spouse’s contention that his income cannot meet these demands.

[33] Mr Steer highlighted passages from the contributing spouse’s evidence which show that the management of money was an issue between the parties. Reference was made to the undisputed evidence, according to the submission, to the payment of credit card bills by Clean Chem and the deleterious impact this had on the business. This was attributed to the dependant spouse’s refusal to listen when she was told that Clean

Chem could not afford to pay the bills and the continuation of her exorbitant spending. The further contention was that the dependant spouse's lifestyle was unaffordable and resulted in problems between the spouses. It was further contended that the dependant spouse's belief that there was a mountain of cash made her unprepared to work hard or to work to acquire whatever she wanted.

[34] Turning his attention to exhibit "SHS1" which it was said sets out a record of what was paid on the credit card over a two year period post separation, December 2010 – March 2012, the monthly expense was averaged at J\$227,141.00. This figure it was said included expenses for the contributing spouse, as well as medical expenses for the children and motor vehicle expenses. Disaggregating the figures, the contributing spouse's counsel sought to falsify the dependant spouse's claim to expending in excess of \$200,000 monthly at the supermarket. For the month of December 2011 the supermarket bill came to J\$171,177.08 and for January 2012 it was J\$120,821.47.

[35] Mr. Steer said that the dependant spouse now receives J\$421,000.00 per month from the contributing spouse. That with the J\$250,000.00 from her mother amounts to J\$671,000.00 per month which counsel said includes the dependant spouse's expenses. Counsel advanced that based on the Notice of Application the contributing spouse has more than fulfilled his parental obligations. The interim order is in fact more than the sum being applied for. Further, counsel went on, the contributing spouse makes a contribution to the living accommodation of the children.

[36] Mr Steer then posited that the question is can the contributing spouse afford to pay the amount under the interim order. To that question he said the answer must be no. Neither the contributing spouse's income nor expenses have been challenged, counsel said. On the other hand, it has been clearly shown that the dependant spouse has not been spending the exorbitant sums set out in her spreadsheet. Counsel opined that the dependant spouse cannot adopt a lifestyle and expect the contributing spouse to pay the amount claimed.

[37] On the other hand, although the dependant spouse has an obligation under the **Maintenance Act** towards the children, she gave no evidence of her willingness to so

assist. Neither did her evidence disclose any such willingness in her own behalf. All this counsel placed against the background of the dependant spouse owning a company which can earn substantial income from the importation of goods. The existence of the company was raised by the contributing spouse. However, the dependant spouse said it ceased importations in 2011. Counsel then highlighted what he termed a contradiction in this area during cross-examination.

[38] According to Mr Steer, when the dependant spouse was asked if she earned an income from this business her answer was no. To the next question, “does anybody earn an income?” her answer was “produce is brought in and sold through the storefront.” She was then asked, “are the produce brought in under the company’s name?” to that her response was “yes”. Counsel contended if the company is no longer in operation then it is a contradiction to say produce is brought in and sold through the storefront.

[39] On the specific question of spousal maintenance, the argument was that when one bears in mind that the average monthly credit card bill was less than J\$250,000.00, the current figure for maintenance with minor adjustments would be adequate. That argument appears to rests on three premises. The first premise appears to be, the dependant spouse’s receipt of J\$250,000.00 monthly from her mother. The second premise is her own admission that she does not spend J\$766,000.00 on herself monthly but instead the sum of J\$8,000.00. Thirdly, the admission that the credit card paid for all their expenses and J\$250,000.00 was the average monthly expenditure for the then family of four.

[40] Having cited sections 4 and 5 of the **Maintenance Act**, counsel poured cold water on what he termed the dependant spouse’s effort to have the court believe she is unable to work because the children are attending school. He found it amazing that at the same time the dependant spouse found time to run errands for her mother and friends. Underlining the point, counsel referenced section 12 of the old **Maintenance Act** of 1881 which required a man to maintain his wife ‘irrespective of her being able to maintain herself’. It was Mr Steer’s position that maintenance of a wife is no longer a

sure thing. Consequently, a spouse must prove to the satisfaction of the court the inability to support herself and her 'reasonable needs'. In the instant case, he said, the dependant spouse has not met the threshold for an order to be made in her favour.

[41] In any event, this court could only make an interim order in the absence of a precedent order for a decree nisi. This submission was based on sections 22, 20(1)(c) and 23(2) of the **Matrimonial Causes Act** (MCA). Section 22 of the **MCA** reads:

“When a petition for dissolution or nullity of marriage has been presented, proceedings under section 20 or section 23(2) may, subject to and in accordance with rules of court, be commenced at any time after the presentation of the petition:

“Provided that no order in any of the sections referred to in this section (other than an interim order for the payment of money under section 20) shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution, or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute.”

[42] In support of the preceding submissions counsel for the contributing spouse relied on four cases, including **McEwan v McEwan**, *supra*. **Slater v Slater** [1983] NZLR 166 is a decision of the New Zealand Court of Appeal in which the court was called upon to interpret the provisions of section 64 of the Family Proceedings Act 1980. It was held, *inter alia*, that one spouse is liable to maintain the other after the dissolution of the marriage when because of the effects of the marriage-related disabilities, the spouse seeking maintenance cannot reasonably meet his or her reasonable needs. Those disabilities are set out in section 64.

[43] The liability to maintain is coterminous with the cessation of those disabilities. Further, each party is required to assume responsibility within a reasonable time for meeting the party's own needs. Lastly, the ages of the parties and the duration of the marriage must provide the justification for the conclusion that the circumstances are such that it is unreasonable to require one party to do without maintenance from the other and it is reasonable to require the other to continue to provide maintenance.

[44] According to Richardson J, at page 173:

“There are four features of section 64 which deserve some emphasis. The first is the express provision of subs (4) that except as provided in the section neither party to a marriage is liable to maintain the other party after the dissolution of the marriage. The second is that the section and the associated provisions of Part VI speak in terms of a liability for maintenance to meet the reasonable needs of the other party. The Act clearly avoids any mention of a right or entitlement to maintenance and subs (2) refers explicitly to the responsibility of each party to meet that party’s own maintenance needs. The overall theme is that any liability on one party flows from a present inability of the other to be self-supporting. The third is that the liability is expressed in neutral terms: it applies in exactly the same way to former husband and former wife. The fourth and perhaps the dominant feature of the statutory scheme is the Act sets clearly defined limits to maintenance liability.”

[45] The second case cited is that of **Alfred Robb v Beverley Robb** Claim No. D01148/2005 delivered on the 11th December, 2009, a decision of this Supreme Court. It is sufficient to quote from the summary at the beginning of the case:

“The obligation to maintain one’s spouse is in the first instance, latent. It is activated by the inability of the other spouse to maintain himself or herself. So, the court has to make, as a condition precedent to a maintenance order, a threshold finding that the dependant spouse cannot practically meet the whole or any part of her reasonable needs. The maintenance order reflects that assessment, together with the capability of the respondent to maintain the applicant to the extent that is necessary to meet her reasonable needs.”

[46] **Ivor Allen Francis v Pearl Francis** [2013] JMSC Civ 25 was a case in which the application for maintenance was made by the wife after the husband filed his petition for divorce. The parties had been married for some 37 years, lived in England but at the time of their separation had retired to Jamaica. Mrs Francis sought maintenance in the form of a lump sum payment of \$40,000.00 for the duration of her life, and costs. The court found that Mrs Francis had significant liquid and fixed assets which she could apply towards her own maintenance. The court also found that Mrs Francis neither demonstrated how she arrived at the sum claimed nor her need for that sum. Based on

the fact that her lifestyle had been unaffected and the similarity of the parties' respective assets, the application for maintenance failed.

Law and Reasoning

[47] It is settled law, certainly since the passage of the **Maintenance Act** in 2005 (**MA**), that each spouse has an obligation to maintain the other. That obligation is now cast in a mould which recognises that few persons, if any, can support two households at the same standard. So, there is no longer any right to lifelong support from a former spouse. The emphasis is now on the former spouses becoming financially independent of each other at the earliest possible time post divorce.

[48] This financial independence philosophy undergirding the modern legislation is amply reflected in a number of the provisions of the **MA**. In making a maintenance order for the support of the dependant spouse, the court is mandated to reflect in that order provisions that will ensure two things. First, ensure that the economic burden of child support is shared equitably, if not equally: **MA** section 5 (1) (a). It is axiomatic that an equitable sharing of economic burden presupposes the financial independence of the spouses. Secondly, fair provisions are to be made to assist the dependant spouse to become able to contribute to that spouse's own support: **MA** section 5 (1) (b).

[49] The financial independence philosophy is evident not only in the making of the order but also in the determination of the amount and duration of the support for the dependent spouse. To this end, the financial independence philosophy runs through the veins of the **MA** sections 14 (4) (a); 14 (4) (b); 14 (4) (c); 14 (4) (f) and 14 (4) (k). Taking the subsections sequentially, the first two deal with the parties present as well as future assets and means. The third addresses the dependant spouse's capacity to support herself. The fourth invites an examination of the measures available to the dependant spouse to become able to provide support for herself, together with the duration and cost involved to enable her to take those measures. Lastly, consideration has to be given to the extent that maintenance will increase the dependant spouse's earning capacity by enabling her to pursue education, training or entrepreneurial endeavour.

[50] Financial independence is but one of the two bedrocks underpinning the modern legislation identified by Lord Scarman. Although he was speaking in relation to the English legislation, his dictum is entirely *apropos* the Jamaican context. In ***Minton v Minton*** [1979] AC 593,608 Lord Scarman said:

“There are two principles which inform the modern legislation. One is the public interest that the spouses, to the extent that that their means permit, should provide for themselves and their children. But the other - of equal importance – is the principle of “the clean break”. The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.”

[51] So then, consistent with the underlining philosophy, the duty of spousal maintenance is not absolute (see for example ***Alfred Robb v Beverley Robb***, *supra*). In the language of Edwards, J “maintenance of a spouse is not automatic”: ***Margaret Gardner v Rivington Gardner*** [2012] JMSC Civ.54. The duty is circumscribed by capability, necessity, reasonability and practicality, collectively, the four ingredients. A perusal of the **MA** section 4 makes this clear. I quote section 4:

“Each spouse has an obligation, so far as he or she is capable, to maintain the other spouse, where the other spouse cannot practically meet the whole or any part of those needs.”

[52] It must be demonstrated by evidence, firstly that the spouse who is tasked with the responsibility of spousal maintenance has the capability to fulfil that role. Secondly, the claimed maintenance must be demonstrably necessary. Thirdly, the needs being considered must meet the bar of reasonableness. Finally, the evidence must show that it is impractical for the spouse to wholly or partially satisfy those needs.

[53] The court’s power to make financial provisions on any decree for dissolution of marriage is derived from section 20 of the ***Matrimonial Clauses Act (MCA)***. Under section 22 of the **MCA** proceedings under section 20 may be commenced at any time after the filing of the petition for dissolution of marriage. However, under the proviso to section 22 only an interim order may be made, prior to the pronouncement of the decree

nisi. No decree nisi has been pronounced in the instant case. Therefore, I am in agreement with learned counsel for the contributing spouse that the court is presently confined to make only an interim order for maintenance.

[54] The spousal order for maintenance being sought is contemplated by section 20(2) of the **MCA**. The relevant part of section 20(2) reads:

“the Court may, if it thinks fit, by order, ... direct the contributing spouse to pay to the dependant spouse during their joint lives such monthly or weekly sums for the maintenance and support of the dependant spouse as the Court may think reasonable.”

In the making of this order the court is enjoined by section 20(4) of the **MCA** to have regard to the matters set out in *the MA* section 14(4).

[55] **MA** section 14(4) is in the following terms:

“In determining the amount and duration of support, the Court shall consider all the circumstance of the parties including the matters specified in sections 5(2), 9(2) or 10(2), as the case may require, and -----

- (a) the respondent’s and the dependant’s assets and means;*
- (b) the assets and means that the dependant and the respondent are likely to have in the future;*
- (c) the dependant’s capacity to contribute to the dependant’s own support;*
- (d) the capacity of the respondent to provide support;*
- (e) the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;*
- (f) the measures available for the defendant to become able to provide for the defendant’s own support and the length of time and cost involved to enable the dependant to take those measures;*
- (g) and legal obligation of the respondent or the dependant to provide support for another person;*

- (h) *the desirability of the dependant or respondent staying at home to care for a child;*
- (i) *any contribution made by the dependant to the realization of the respondent's career potential;*
- (j) *any other legal right of the dependant to support other than out of public funds;*
- (k) *the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;*
- (l) *the quality of the relationship between the dependant and the respondent;*
- (m) *any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account."*

[56] It is appropriate at this time to quote **MA** section 5(2):

"In determining the amount and duration of support to be given to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4)-

- a) *the length of time of the marriage or cohabitation;*
- b) *the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse;*
- c) *the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity;*
- d) *the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation;*
- e) *whether the spouse has taken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself;*
- f) *any housekeeping, child care or other domestic service performed by the spouse for the family, as if he spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support;*

- g) the effect of the spouse's child care responsibilities on the spouse's earnings and career development;*
- h) the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties;*
- i) the eligibility of spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit."*

[57] So then, before I consider the amount and duration of any proposed maintenance order, the predicate question of whether the dependant spouse can practically meet the whole or any part of her reasonable needs, must be answered. The dependant spouse presently receives from her mother and the contributing spouse a monthly sum of J\$671,000.00. On the other hand, her monthly expenses amount to J\$637,674.70. That leaves her with a surplus of J\$33,325.30 each month.

[58] I need to make what I consider to be a pertinent observation at this juncture. None of the items appearing in the schedule of expenditure submitted by the dependant spouse is supported by any documentary evidence, even where services were supplied in the formal sector of the economy. For motor vehicle expenses no invoice was exhibited. Similarly, no utility bills were submitted to support the sums allegedly expended on utilities. This is especially unfortunate in the case of the claim for telephone and Flow. It is notorious that Flow supplies a bundle of services viz internet, telephone and cable. It therefore would have been useful to know what precisely was being received from Flow. On the other hand, the credit card statements provide some guide for the monthly supermarket expenses. It should be said that I did not see any documentary support for items such as wages for the helper and the miscellany described as 'personal expenses'.

[59] The same observation is made in respect of the contributing spouse. The only verifiable expenses for the contributing spouse are those which were ordered by the court. Neither spouse made any effort to take the contest beyond their say so. Neither was prepared to be brutally frank with the court concerning their income and expenditure and assets. In my view each spouse was overly concerned in painting a

picture of inability. It is clear to me that the dependant spouse sought to exaggerate her dependency and the contributing spouse made an equal effort to understate his capacity to support his family.

[60] Having said that, I revert to the question of the dependant spouse's inability to practically meet her reasonable needs, either in whole or in part. On the forgoing mathematical analysis, the simplistic answer is that the dependant spouse is meeting the whole of her reasonable needs. The answer is simplistic because the maths, without more, gives an illusion of self-sufficiency, masking the total dependency of the dependant spouse. In spite of the valiant effort made in cross-examination to show the receipt of some income from Sahai Distributors, that evidence is inconclusive, at best. Not being in receipt of an income, the dependant spouse is able to meet her reasonable needs through the contribution of the contributing spouse and matriarchal beneficence.

[61] Outside of a monthly income, is the dependant spouse possessed of such liquid and fixed assets which could be deployed towards her own maintenance? The evidence did not disclose that she owns any fixed assets aside from lots 15 and 16 Peter's Rock, which is jointly owned with the contributing spouse. The value of this asset is unknown. Neither spouse made this asset a focal point in the case before me. That notwithstanding, I am constrained to bear it in mind in seeking to answer the predicate question.

[62] Similarly, the most liquid asset to the dependant spouse's name is the joint account with her mother at Charles Schwab. Standing at US\$161,237.39 as at the 31st August, 2012, applying an exchange rate of US\$1: J\$90, this converts to J\$14,511,365.10. Since this is a joint account, there is a presumption that the dependant spouse owns one half the funds therein, that is J\$7,255,682.55: ***Catlin v Cyprus Finance Corp (London) Ltd; (Catlin, third party) [1983] 1 ALL ER 809***. To this figure should be added J\$2,610,000.00, which is what the account at Mayberry Investments converts to using the same exchange rate. That gives a total of J\$9,865,682.55.

[63] When this figure is divided by J\$637,674.70, the monthly expenses, it is seen that the available liquid assets of the dependant spouse could sustain her maintenance for just over 15 months. Whatever might accrue to her from the sale of the Peter's Rock property would take her some distance beyond this. How far? That is not susceptible of proof on the evidence before me. However that may be, liquid assets capable of support for approximately 15 months cannot in any language be properly described as significant. Even making allowance for the perceived exaggeration in the expenses, before long these resources would be depleted, leaving the dependant spouse teetering on the brink of penury. It is therefore palpable that the true answer to the predicate question must resound in the negative.

[64] Having so found, the analysis takes me to the question of the contributing spouse's capability to provide support for the dependant spouse. Although a vain attempt was made to show that the contributing spouse is incapable of satisfying his monthly expenditure, the evidence discloses a contrary position. In addition to the observation made concerning his expenses, the following further observations are made of his attempt to demonstrate incapacity to provide spousal support.

[65] The first additional point to note is the sheer incongruity between the contributing spouse's lifestyle and the posited incapacity to provide spousal support. The evidence paints a picture of the contributing spouse as a shrewd, farsighted and successful businessman who routinely makes investments in either tens or hundreds of thousands of United States dollars. Secondly, his children attended an elite educational institution, using the fees and some of the extracurricular activities as a guide. Thirdly, he and the dependant spouse both drove high end or luxury vehicles. Fourthly, he is an avid golfer, playing not only locally but overseas biennially. Fifthly, he both owned property and resided in an upscale residential neighbourhood.

[66] I isolate the vehicle the contributing spouse drove to underline the point, if emphasis be needed. The contributing spouse drove a Porsche Cayenne. In the motor vehicle market the Porsche Cayenne is described as a luxury SUV. The evidence does not disclose any details of the one owned by the contributing spouse. That

notwithstanding, in no language can the Porsche Cayenne be accurately described as a poor man's wagon. It is notoriously the mobile of those who live, move and have their being well north of the poverty line. So, the image of the contributing spouse owning a Porsche Cayenne and simultaneously being propped up by parental support strains the imagination and blurs the line between fact and fiction.

[67] The second point of note is the nature of the interim order made by Beckford, J and varied by Batts, J. Both orders were made with the consent of the contributing spouse. Under the interim order, as varied, the monthly liability of the contributing spouse is J\$693,666.66. He is now offering to pay J\$315,000.00 plus half the educational, medical, dental and optical expenses for the children. So, having consented to full maintenance of his children, this shrewd businessman now says he cannot afford to pay.

[68] I do not accept the contributing spouse's barefaced volte-face as credible. At the core of this pretence at being Galileo before the Inquisition, is the contributing spouse's insistence that his unemployed spouse should in a heartbeat assume responsibility not only for her own maintenance, but also provide financial support for their children. His insistence is perhaps born of his unanswered allegation of spousal infidelity which, interestingly, under the old dispensation would disentitle the dependant spouse to a claim for maintenance. However that might be, the novelty of this position is amply demonstrated by the conspicuous absence of any evidence showing that at any time during the marriage the contributing spouse insisted, even suggested, that there be any such sharing of the responsibilities. His shrewdness as a businessman is reflected in the order freely consented to, not his about-face.

[69] This takes me to the financial difficulties being experienced by the contributing spouse, the third remarkable point. On one view, this might be explanatory of the retreat from the consent order. My rejection of this will hopefully be made clear by the ensuing analysis. These financial difficulties appear to rest on a downturn in the economy which has negatively affected Clean Chem. Nothing was placed before me to support this bald assertion. I would have expected even a sliver of paper to support the demand by the

revenue authorities upon the company. The acceptance of the company's financial position depends on the credibility of the contributing spouse, and that is not an area in which he scored a passing grade.

[70] Lastly, the contributing spouse would have me believe there is little or no return to be expected from his US\$250,000.00 investment in the townhouse development. That is implicit in his request for the return of the funds soon after having parted with it. Not having obtained the return of his money, I would have expected the contributing spouse to have kept an eye on the townhouse development. To have his eye peeled, as the saying goes.

[71] To some extent he did, being aware of its nigh completion. However, these were not being built as monuments of attraction. Rather, they were commodities in the real estate market. So, it is a tad surprising that he would have been unaware of the townhouses being advertised. Why? Because it is notorious that housing developments are advertised for sale close to completion, indeed, often times in advance of foundation work. This ignorance is no more than part of the exaggerated attempt to demonstrate an inability to discharge his liability to the dependant spouse.

[72] I have come to the conclusion that the truth of the contributing spouse's income and liabilities has not been told. I accept that his lifestyle is that of a rich man. I accept the proposition culled from *Brett v Brett, supra*, that a person's standard of living may be the best guide to the level of his income. I find that the dependant spouse is capable to fully support his family, in particular his wife, at the standard to which they had become accustomed.

[73] The remaining issue for resolution is the amount and duration of maintenance for the dependant spouse. In the resolution of this issue I am to be guided by the relevant provisions of the **MA** and the philosophy informing the legislation, succinctly set out in *Minton v Minton, supra*. The union of the parties lasted for twelve years up to their separation, which was preceded by three years cohabitation. So, this was a marriage of reasonably long duration.

[74] I accept that for most of this time the dependant spouse worked in the businesses in which the contributing spouse was concerned. Her involvement in Clean Chem is amply demonstrative of this. It is to be noted that the dependant spouse's involvement in the operations of Clean Chem came to an end two years after the parties separated. That is an abiding interest which belies the allegation of waning interest after four months. This was the person who was trained to manage the business, a business which grew to the point of becoming the family's milch cow. I do not think it unreasonable to attribute that success, wholly or in part, to the dependant spouse who was both its midwife and shepherd, taking it as she did, from birth through its different stages of growth and development.

[75] In addition to working in the businesses, the dependant spouse had the responsibility of rearing the children of the family. These two activities had economic consequences for the dependant spouse. In the first place, working in the businesses would have negatively impacted her ability to continue her tertiary education. Secondly, only part-time employment, at best, would have been available to her out side of the family businesses while she carried the burden of care and control of the children. Indeed, the dependant spouse's child-rearing responsibilities are coterminous with the marriage. Interestingly, the dependant spouse was asked to manage Clean Chem seven months after the birth of their second child; in other words, while she had the responsibility to raise two infants, the children having been born less than two years apart.

[76] Although the dependant spouse did not complete university, she does have the capacity for gainful employment. During the marriage she managed Clean Chem and did the payroll. Further, at the time of the trial she ran errands for her mother and others. I understand errands to be a euphemism for unpaid work of a casual nature. There is no better evidence of the dependant spouse's capacity for gainful employment than her own admission that physically she is able to work. Further, being a healthy forty three year old woman, she has an appreciable number of years ahead of her in the job market, the vicissitudes of life notwithstanding. It is therefore palpable that the

dependant spouse has the capacity to contribute to her own support, once she finds employment.

[77] While the capacity of the dependant spouse to provide for herself was explored, the measures available to her to do so were not. I am therefore left in a position of ignorance as to whether she wishes to continue her university education or start her own business and how long any of this would take. That notwithstanding, I bear in mind that some measure will have to be taken by her to maintain herself at her accustomed standard since the contributing spouse cannot be expected to maintain her in perpetuity.

[78] Having said that, it appears to me that the justice of the case demands that a spousal order for maintenance be made of sufficient duration to enable the parties to make a clean break and exercise financial independence. That is, the order for spousal maintenance must facilitate the dependant spouse being placed in a position to assume the responsibility for her own support and to fulfil her legal obligations to maintain the children of the family. Three years appears to be adequate time to allow the dependant spouse either to complete her university education or start and establish a business venture. For either venture J\$5,000,000.00 seems to be sufficient. In addition, I make an order for periodic monthly payments of J\$150,000.00 for spousal maintenance.

[79] Returning to the question of child maintenance, it is clear that the dependant spouse cannot shoulder any of this responsibility presently, being unemployed. I therefore cannot make an order requiring her to assume responsibility for half the educational, medical, dental and optical expenses. These were responsibilities for which the contributing spouse had sole carriage during the marriage. It is plain to me that the choice of school for the children was chosen with this assumption of financial responsibility in mind.

[80] At this stage, it is neither just nor practical that the dependant spouse be yoked with half that responsibility. I would therefore make a minor adjustment to consent orders three and four made by Beckford, J. That is, the dependant spouse is to assume her legal obligation to maintain her children upon the expiry of the three years allowed

to place her in a position to earn an income. Until then the contributing spouse will continue to bear the full economic cost for the education of the children of the family.

[81] I therefore make the following interim orders; to be made final upon the grant of the decree absolute:

- i. The contributing spouse to make a lump sum payment of J\$5,000,000.00 to the dependant spouse within six months of the date hereof.
- ii. The contributing spouse to make periodic payments of J\$150,000.00 per month to the dependant spouse for spousal maintenance for a period of three years commencing on the 25th January, 2015, and on the 25th of each succeeding month until the expiration of the order on the 25th January, 2018.
- iii. The contributing spouse to pay to the dependant spouse the sum of J\$165,000.00 per month for the maintenance of both children of the family until each attains the age of eighteen years or until the attainment of twenty-three years, provided each is enrolled in a tertiary institution.
- iv. The contributing spouse shall continue to pay the full school fees of both relevant children and their full medical, dental, and optical expenses reasonably incurred for the space of three years commencing 25th January, 2015. Thereafter, this responsibility is to be shared equitably between the contributing and dependant spouses as then decided by the court.
- v. The contributing spouse to pay to the dependant spouse the sum of J\$150,000.00 per month towards accommodation commencing on the 25th of January, 2015 and on the 25th of each succeeding month.
- vi. Liberty to apply.
- vii. Leave to appeal granted.