AOO *v* AON
[2011] SGCA 51

Case Number	: Civil Appeal No 192 of 2010
Decision Date	: 29 September 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Christopher Yap (Christopher Yap & Co) for the appellant; Wong Yoong Phin (Wong Yoong Phin & Co) for the respondent.
Parties	: AOO — AON

Family Law

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 2 SLR 926.]

29 September 2011

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal by the wife against a decision of the High Court which restored an ancillary order made in the Family Court (see *AON v AOO* [2011] 2 SLR 926 ("the GD")). In arriving at her decision, the learned judge ("the Judge") was of the view that the ancillary order should be construed as a consent judgment instead of a default judgment. As will be seen, the precise characterisation of the ancillary order was crucial to the resolution of the present appeal. Having allowed the appeal and having set aside the ancillary order, we now give the detailed grounds for our decision.

The factual background

2 The appellant wife and the respondent husband were married on 3 February 1994. There were two children ("the children") who at the time of the hearing before this court were 15 and 17 years of age, respectively. In January 2009, the husband confronted the wife with evidence of the latter's alleged infidelity. The evidence consisted primarily of photographs, obtained with the assistance of a private investigator, showing that the wife was behaving intimately with another man. After confronting the wife, the husband indicated his unequivocal desire to divorce the wife and engaged solicitors to act for him towards this end. On the instructions of the husband, the solicitors produced a draft deed of settlement ("the deed") in respect of ancillary matters. The deed purported to evince the parties' intention with regard to maintenance, division of matrimonial property and custody of the children and the wife was given a copy of the deed only some eight days after being confronted by the husband. The salient features of the deed are as follows:

(i) firstly, that the husband would have sole custody of the children with reasonable access granted to the wife;

(ii) secondly, that the matrimonial home would be transferred to the husband without any refund

of the wife's contributions *via* the Central Provident Fund ("CPF"); and

(iii) thirdly, that the wife would provide for herself and waive her right to claim for maintenance.

The deed was signed by the wife on 12 February 2009 and it was executed by the husband on 16 February 2009, this last mentioned date being approximately one month after the husband had confronted the wife about her alleged infidelity. We pause parenthetically to observe that the deed may be categorised as a postnuptial agreement as it was made with a view towards the dissolution of the marriage. Divorce proceedings commenced swiftly thereafter, with the husband filing a writ for divorce on 17 February 2009. The divorce proceeded on an uncontested basis with an interim judgment for divorce being granted on 5 May 2009 in the absence of the wife who elected not to attend the divorce hearing.

3 The manner in which the ancillary order came to be made on 7 October 2009 forms the bone of contention between parties. The first ancillary matters pre-trial conference ("APTC") was adjourned on 28 May 2009 due to the wife's absence. Thereafter, notwithstanding the wife being notified of their respective dates and timings, three further APTCs were adjourned due to her absence. The hearing for ancillary matters was eventually set for 7 October 2009. The wife did not appear during the hearing and the presiding District Judge made the following orders (for the avoidance of doubt, the plaintiff in the orders below referred to the respondent husband):

(1)... [T]he Plaintiff [shall] have sole custody and control of the two (2) children of the marriage...with reasonable access to the Defendant;

(2)... [T]he Defendant shall, within three (3) months from the grant of the Final Judgment and subject to the approval of the Housing & Development Board where required, transfer all her share and interest in the matrimonial flat at and known as Apartment Block 145 Lorong Ah Soo #02-141 Singapore 530145 ("the matrimonial flat") together with all furniture, fixtures and fittings and decorations therein to the Plaintiff with no CPF refund to be made to the Defendant's CPF account(s) and the Plaintiff shall henceforth bear: -

(a) the outstanding Housing & Development Board's loan;

(b) all moneys, if any, due to the Housing & Development Board; and

(c) all conveyancing, stamp registration and administrative fees relating to the said transfer;

(3) ... [T]his Order be made subject to the Central Provident Fund Act, Chapter 36 ("the CPF Act") and the subsidiary legislation made thereunder and the CPF Board shall give effect to the terms of this order in accordance with the provisions of the CPF Act and the subsidiary legislation made thereunder;

(4) [T]hat the Registrar or Deputy Registrar of the Subordinate Courts under Section 45 of the Subordinate Courts Act, Chapter 321 be empowered to execute, sign or indorse all documents necessary to effect the transfer of the matrimonial flat on behalf of the Defendant should the Defendant fail to do so within seven (7) days of a written request being made to her;

(5) ... [T]he parties, including CPF Board, be at liberty to apply for further direction(s) generally;

and

(6) ... [T]here be no order on costs.

4 What is clear from the facts is that, firstly, the wife made no appearances (whether in person or through a legal representative) in the ancillary proceedings despite having been accorded multiple opportunities to do so and, secondly, the ancillary order tracked the provisions of the deed (see [2] above).

5 The wife filed an application on 8 March 2010 to set aside the interim judgment and the final judgment (entered in November 2009) for divorce as well as the ancillary order.

Decision of the District Court

6 At the hearing of the wife's application on 10 June 2010, counsel for the wife informed the District Judge ("the DJ") that he was only applying to set aside the ancillary order. The DJ held that a court had the power to set aside regularly obtained orders where the party seeking to set aside the order had a real prospect of success if the matter was litigated. The threshold applied by the DJ was set out in the case of *Abdul Gaffer v Chua Kwang Yong* [1994] 3 SLR(R) 1056 ("*Abdul Gaffer*"), which essentially followed the English decision in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc (The Saudi Eagle)* [1986] 2 Lloyd's Rep 221 ("*Saudi Eagle*"). Having decided what the applicable legal principles were, the DJ then proceeded to set aside the ancillary order on the grounds that the wife, if given an opportunity to litigate, had a real prospect of success in obtaining some award of maintenance as well as a share in the matrimonial home.

7 Being dissatisfied with the decision of the DJ, the husband appealed to the High Court.

Decision of the High Court

8 When the matter was heard before the High Court, the Judge construed the main issue being whether the ancillary order should be treated as a consent judgment or a judgment obtained in default of appearance. In the Judge's view, the characterisation of the ancillary order was significant in so far as the legal thresholds which the wife had to fulfil prior to a court exercising its discretion to set aside the ancillary order were concerned.

9 The Judge first correctly highlighted the fact that the test for setting aside regular default judgments had been restated since *Abdul Gaffer*. In *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*"), this court held (at [50] and [60]) that the appropriate test to be applied when considering whether a regular default judgment should be set aside was that which was established in the House of Lords decision in *Evans v Bartlam* [1937] AC 437, *viz*, "whether the defendant could establish a *prima facie* defence in the sense of showing that there are triable or arguable issues" (see *Mercurine* at [60]), and not the "real prospect of success" test enunciated in *Saudi Eagle*.

10 The Judge then adopted the threshold for setting aside ancillary orders made by consent as stated in the Singapore High Court decision of *Lee Min Jai v Chua Cheow Koon* [2005] 1 SLR(R) 548 ("*Lee Min Jai*"), where Choo Han Teck J stated (at [5] and [6]) as follows:

> 5 Under s 112(4) of the Women's Charter (Cap 353, 1997 Rev Ed), the court 'may, at any time it thinks fit, extend, vary, revoke or discharge any order made under this section, and may vary any term or condition upon or subject to which any such order has been made'. But this section,

and the authorities referred by Mr Chia, should not be construed as an invitation to revise the terms of a settlement merely so that they appear more equitable or will be, in fact, more equitable in the objective opinion of the court. Privately settled terms in respect of the ancillary matters in a divorce may not always appear to be fair. But divorce is a very personal matter, and each party would have his own private reasons for demanding, or acquiescing to, any given term or condition in the ultimate settlement. What the court should be alert to, is that one party had not taken an unfair advantage over the other in the course of negotiating and settling the terms. Hence, in *Dean v Dean* [1978] 3 All ER 758, the court held (as set out in the headnote) that:

> [W]here an agreement between the parties had been reached at arm's length and the parties had been separately advised, the agreement itself would be *prima facie* evidence of the reasonableness of its terms, and formal discovery would probably be unnecessary.

6 In the present case, the matrimonial flat was a gift by the respondent's grandmother to him as well as the petitioner. The petitioner was aware that she had a share in that flat and told her previous solicitor so. The terms of settlement were clearly reached at arm's length, and there was no question of the respondent concealing any material fact from the petitioner.

11 In reinstating the ancillary order, the Judge considered that the ancillary order should be construed as a consent judgment rather than a default judgment. The Judge's reasons were succinctly stated at [15] of the GD:

> The reason that I thought that the Ancillary Order here had to be considered in the same light as a consent order is that it tracked the provisions of paras 5, 6.1, 6.2 and 7 of the Deed in relation to custody, matrimonial property and maintenance. What the court had ordered in the wife's absence was only what she had agreed to in the Deed. As long as the wife had freely consented to the Deed, the Ancillary Order, which reflected the provisions of the Deed, should in my view be regarded as having essentially been made by consent. The wife's failure to participate in the divorce proceedings was an indication of her consent and took the Ancillary Order out of the category of orders obtained by default. After a detailed consideration of the circumstances I considered that on the evidence the wife had, on the balance of probabilities, freely agreed to the Deed.

The issues

12 The crucial (and related) issues for the purposes of this appeal were simple ones, the apparent simplicity of which (as we shall see) belied a number of difficulties which arose from both conceptual as well as practical points of view. In essence, the crucial issues which arose before this court were as follows:

(a) Was the Judge correct in finding that the ancillary order was a consent judgment ("Issue 1")?

(b) If the answer to the preceding issue is in the negative, did the court nevertheless have jurisdiction to decide the proceedings and, if so, was it correct in making the ancillary order ("Issue 2")?

Our decision

Issue 1

13 It is clear, in the first place, that a "consent *order*" (here, in the form of an alleged consent judgment) *must necessarily* involve the court. In other words, whilst a consent *order* might be based on a prior *agreement* between the parties (and, in *that* sense, involves a quite *distinct* conception of the concept of consent), *the court's* scrutiny – as well as official confirmation and endorsement – of the prior agreement is necessary. For example, as Lord Denning MR observed in the English Court of Appeal decision of *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 (at 189; and following the observation by Lord Greene MR in another English Court of Appeal decision of *Chandless-Chandless v Nicholson* [1942] 2 KB 321 at 324), the phrase "by consent" might either evidence a real contract between the parties or mean instead "the parties hereto not objecting". It is of course the task of the court to ensure that the parties intended the former and not the latter (reference may also be made to the Singapore High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 (for related proceedings in the Court of Appeal, see *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525)).

14 The importance of the role of the court cannot be overemphasised, not least because of the legal consequences which would ensue; as Lord Diplock, delivering the judgment of the Board in the leading Hong Kong Privy Council decision of *Ernest Ferdinand de Lasala v Hannelore de Lasala* [1980] AC 546 ("*de Lasala*"), observed (at 560):

> Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made subject of a consent order of 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 executor ... is not by action but by summons under the court order...

We pause to observe parenthetically that, although the court's pronouncement in *de Lasala* in the context of the doctrine of precedent in general and the binding effect of English case law in relation to recent local legislation which is in *pari materia* with its English equivalent in particular has generated some discussion and even controversy (see, for example, Ho Peng Kee, "Fettering the Discretion of the Privy Council" (1979) 21 Mal LR 377; Andrew Phang Boon Leong, "'Overseas Fetters': Myth or Reality?" [1983] 2 MLJ cxxxix, especially at cxlvii–cxlix; Peter Wesley-Smith, "The Effect of De Lasala in Hong Kong" (1986) 28 Mal LR 50; and Robert C Beckman, "Divergent Development of the Common Law in Jurisdictions which Retain Appeals to the Privy Council" (1987) 29 Mal LR 254, especially at 265–267), the *general legal principle* referred to above is good law (and which has in fact been endorsed in numerous cases since).

15 Further, the actual consent of the parties must be signified to the court as this is no mere order (that, as we have seen, must be made by the court) but is also a "*consent* order". In the present appeal, this second requirement was wholly absent. As we have already noted, the ancillary order in question was obtained by the husband with no participation by the wife (or her legal representative) whatsoever.

16 The second requirement referred to briefly in the preceding paragraph is no pedantic or mechanistic one that exists for its own sake. As has been aptly observed by Balcombe J in the English High Court decision of *Tommey v Tommey* [1983] Fam 15 ("*Tommey*") (at 21):

> A judge who is asked to make a consent order cannot be compelled to do so: he is *no mere rubber stamp*. If he thinks there are matters about which he needs to be more fully informed before he makes the order, he is entitled to make such inquiries and require such evidence to be put before him as he considers necessary. But, per contra, he is under no obligation to make

inquiries or require evidence. He is entitled to assume that parties of full age and capacity know what is in their own best interest, more especially when they are represented before him by counsel or solicitors. [emphasis added]

17 Indeed, Lord Brandon of Oakbrook, who delivered the leading judgment of the House of Lords in *Livesey (formerly Jenkins) v Jenkins* [1985] 1 AC 424 ("*Jenkins*"), was of the view (at 441) that the above observations contained "a great deal of practical common sense" (although it should be also observed that the learned law lord did in fact disagree with certain *other* aspects of Balcombe J's judgment in *Tommey*). On a related note, one can see why the judge, whilst respecting the agreement entered into by the parties, cannot be expected to be a "mere rubber stamp". Indeed, *Jenkins* itself illustrates one important reason why this must be so. In that case, the consent order entered into between the husband and wife was set aside as the wife had failed to make full and frank disclosure of all material facts both to the husband as well as to the court before the consent order concerned was made. Indeed, in order to facilitate as well as improve the mechanism for full and frank disclosure, there have been a number of related developments in the UK context in relation to applications for consent orders in relation (only) to financial relief (including the then introduction of a new s 33A to the Matrimonial Causes Act 1973 (c 18) (UK) ("the 1973 UK Act")) – all of which have been summarised excellently by Lord Brandon in *Jenkins* itself (at 443–444). The absence of full and frank disclosure leading to the making of a consent order is, of course, a paradigm (albeit not the only) example of why a court must not only be involved but must also be aware of all the relevant facts and circumstances leading to its making of the consent order concerned. However, as Lord Brandon pointed out in *Jenkins* (at 445–446):

> I would end with an emphatic word of warning. It is not every failure of full and frank disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good. Parties who apply to set aside orders on the ground of failure to disclose some relatively minor matter or matters, the disclosure of which would not have made any substantial difference to the order which the court would have made or approved, are likely to find their applications summarily dismissed, with costs against them, or, if they are legally aided, against the legal aid fund.

18 That having been said, what is of the first importance in the context of the present appeal is, as already noted, the more general principle to the effect that, before a consent order can be made, the court making the order cannot be a "mere rubber stamp". The reality of the consents of *both* parties is of the first importance (see, for example, David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 7th Ed, 2010) ("*Foskett*") at paras 10-03 and 24-48 (part of the latter paragraph also being quoted below)). Scrutiny by the court is imperative to confirm the reality of the consents of the parties but also to ensure that everything is in order, for example, that there has been a full and frank disclosure of all material facts by the parties to the court. *It bears repeating that, on the facts of the present case, this threshold requirement was not met in the first place inasmuch as the wife (or her legal representative) was not present at the time the ancillary order was made. The wife (or her legal representative) also did not, in any other manner, indicate to the court her real consent to the ancillary order*. It should, however, also be noted that the present situation in the UK is somewhat different as a result of s 33A of the 1973 UK Act, to which reference has been made in the preceding paragraph. Under this particular provision, "on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application". However, *no* equivalent of such a provision

apparently exists in the *Singapore* context. Indeed, s 33A of the 1973 UK Act operates in the context of the relevant rules dealing with the procedure to be followed in relation to applications for consent orders for financial relief (which were, in turn, further developments arising from Practice Directions issued by the Family Division and which (and more importantly) are *absent* in the *Singapore* context). Further, s 33A itself does not preclude the court concerned from requiring further information to be furnished by the parties if "it has reason to think that there are other circumstances into which it ought to inquire". Indeed, as observed in *Foskett* at para 24-48:

> [w]here either or both of the parties do not have solicitors acting for them, it is unlikely that a court would make a consent order without the personal attendance of the parties or, at the very least, compelling evidence of their genuine and informed consent.

It is also important to note that s 33A of the 1973 UK Act deals *only* with consent orders for *financial relief* and does *not* deal, for example, with consent orders in relation to *custody of children* (which was also part of the deed between the husband and the wife in the present case). Indeed, given the fact that any agreement between the parties relating to their children is of a *quite different* nature altogether (compared to, for example, agreements relating to financial relief), such an agreement would obviously not bind the court. This is clearly the case in Singapore (see the decision of this court in *TQ v TR* [2009] 2 SLR(R) 961 ("*TQ v TR*")) as well as in England (see, for example, *Foskett*, at para 24-130). Indeed, in *TQ v TR*, this court referred to s 129 of the Women's Charter (Cap 353, 2009 Rev Ed) ("the Act") and it was observed as follows (at [70]):

> Indeed, as a matter of general logic as well as principle, we are of the view that the courts must always have the power (whether at common law or under statute) to scrutinise both prenuptial *as well as* postnuptial agreements relating to the custody (as well as the care and control) of children. There ought, in our view, to be a *presumption* that such agreements are unenforceable *unless* it is clearly demonstrated by the party relying on the agreement that that agreement is in the *best interests* of the child or the children concerned. This is because such agreements focus on the will of the parents rather than on *the welfare of the child* which has (and always will be) *the paramount consideration* for the court in relation to such issues (see s 125(2) of the Act). It might well be the case that the *content* of the prenuptial agreement concerned *coincide with* the welfare of the child or the children concerned. However, *the court* ought nevertheless to be the final arbiter as to the appropriateness of the arrangements embodied within such an agreement. [emphasis in original]

19 On a related note, we would also observe that even agreements between parties in respect of the *division of matrimonial property* are not enforceable in and of themselves. The law governing agreements on division of matrimonial assets is well established: ultimate power is vested in the court in the case at hand to divide matrimonial assets in a proportion which is just and equitable. In particular, a postnuptial agreement between parties is *only one of* the factors to be considered by court, and any such agreement cannot oust the jurisdiction of court. This is made clear by s 112 of the Act itself, which reads as follows:

> **112 –** (1) The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset *in such proportions as the court thinks just and equitable*.
>
> (2) It shall be the duty of the court in deciding whether to exercise its powers under subsection (1) and, if so, in what manner, to have regards to all the circumstances of the case, including

the following matters:

(a) the extent of the contributions made by each party in money, property or work towards acquiring, improving or maintaining the matrimonial assets;

(b) any debt owing or obligation incurred or undertaken by either party for their joint benefit or for the benefit of any child of the marriage;

(c) the needs of the children (if any) of the marriage;

(d) the extent of the contributions made by each party to the welfare of the family, including looking after the home or caring for the family or any aged or infirm relative or dependant of either party;

(*e*) *any agreement between the parties with respect to the ownership and division of the matrimonial assets made in contemplation of divorce*;

(f) any period of rent-free occupation or other benefit enjoyed by one party in the matrimonial home to the exclusion of the other party;

(g) the giving of assistance or support by one party to the other party (whether or not of a material kind), including the giving of assistance or support which aids the other party in the carrying on of his or her occupation or business; and

(h) the matters referred to in section 114(1) so far as they are relevant.

[emphasis added]

20 Finally, s 119 of the Act makes it clear that any agreement between parties with regard to *maintenance* may be varied by courts, subject only to situations where composition of maintenance has been effected pursuant to s 116 of the Act. Section 119 reads as follows:

Power of court to vary agreements for maintenance

119. Subject to section 116, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after 1st June 1981, where it is satisfied that there has been any material change in the circumstances and notwithstanding any provision to the contrary in any such agreement.

21 Indeed, in *TQ v TR*, this court observed as follows (at [61]):

It is clear [from ss 116, 119 and 132 of the Act] that all *postnuptial* agreements with respect to *maintenance* are subject to the scrutiny of the court and may, in fact, even be varied if there has been any material change in circumstances. In other words, *the courts* have the *statutory* power to *override* any *postnuptial* agreement entered into between the spouses with regard to maintenance. [emphasis in original]

22 Before proceeding to consider Issue 2, we pause to observe that, in addition to the absence of full and frank disclosure of material facts, there may well be other grounds upon which a consent order might be set aside even after having been made. However, as this particular issue was not before us, we do not state anything further, particularly given the fact that the law in this area does not appear to be entirely settled (see, for example, *Foskett*, especially at paras 24-73–24-106, and

the authorities cited therein).

Issue 2

23 However, this was not an end to the matter. As already noted, the wife in the present case did not appear either in person or through a legal representative at the hearing at which the ancillary order was made. The further issue that arises in this regard is whether or not the ancillary order was a default judgment. The immediate question that arises in this regard is whether or not the concept of a default judgment in general and O 13 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") are in fact applicable in the context of the present proceedings. In this regard, it is clear that (with limited exceptions) the operative rules are not the Rules of Court as such but, rather, the Women's Charter (Matrimonial Proceedings) Rules (Cap 353, R 4, 2006 Rev Ed) ("Matrimonial Proceedings Rules") (see O 1 r 2(2) of the Rules of Court). Turning, then, to the Matrimonial Proceedings Rules, it would appear that there is no provision for the concept of a default judgment in the context of matrimonial proceedings as the aforementioned rules *expressly exclude* the operation of O 13 of the Rules of Court (see r 3(2) of the Matrimonial Proceedings Rules). If so, does this preclude the court from making an ancillary order if one of the parties refuses to appear in court? Consistent with the analysis rendered above, in such a situation, there can be no *consent* judgment entered as such. However, can the court concerned nevertheless proceed to hear the case and render judgment accordingly?

24 In our view, the answer to the question posed at the end of the preceding paragraph ought to be answered in the affirmative. However, this would mean that the judge concerned would need to hear the case on its merits as the concept of a default judgment is unavailable. But would this not result in prejudice to the party who did not attend the proceedings if judgment is given in favour of the other party? The simple answer to that would be that the losing party would, presumably, have a right to apply – pursuant to O 35 r 2 of the Rules of Court – to set aside the judgment given in his or her absence (and see generally *Supreme Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009), especially at para 35/2/1 and (in particular) the decision of this court in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*")). Although this particular rule presumably applies (pursuant to r 3(1) of the Matrimonial Proceedings Rules), it should be noted that, unlike other civil cases, it does not apply in tandem with the legal principles applicable to a default judgment pursuant to O 13 of the Rules of Court simply because (as noted in the preceding paragraph) O 13 of the Rules of Court has been expressly excluded by the Matrimonial Proceedings Rules. It should also be noted that the losing party would have the right of appeal (in this situation, to the High Court).

25 Unfortunately, however, the present case did not proceed in the manner just described. This was due to the fact that there was an underlying assumption throughout (in fact, in both the Family Court and the High Court and, so it appeared, by the wife in her case before this court) that the ancillary order was a default judgment that could then be (as it in fact was) set aside if the requisite test (now under *Mercurine*) was met. With respect, this was the incorrect approach to adopt. As we have noted, there is no concept of a default judgment along the lines of O 13 of the Rules of Court in proceedings under Part X of the Act. This is perhaps not surprising in view of the fact that matrimonial matters are not ordinary civil matters and possess a social dimension as well. In the circumstances, the concept of a default judgment would not sit easily with such proceedings. With respect, therefore, the concept of a default judgment ought not to have been applied by the DJ. What, then, of the original hearing leading to the making of the ancillary order?

26 As alluded to above (at [24]), the DJ ought to have considered whether the ancillary order ought to have been set aside pursuant to O 35 r 2 of the Rules of Court. We do note parenthetically that, in applying the test she did in respect of what she thought (with respect, erroneously) was a

default judgment, the DJ did in fact apply a more stringent test than that which now exists with respect to the setting aside of a default judgment (as laid down by this court in *Mercurine* (see above at [9])); this was in fact a test which overlaps with one of the factors applicable in the context of an application under O 35 r 2 of the Rules of Court (*viz*, the prospect of success (see *Su Sh-Hsyu* at [44])). Be that as it may, it seemed to us that, applying the applicable legal principles with respect to the setting aside of a judgment pursuant to O 35 r 2 of the Rules of Court, the ancillary order ought to have been set aside based on the evidence before us. Although the wife had not appeared before the court as required on a number of occasions, we bear in mind the fact that she was not legally represented then. More importantly, as the DJ pertinently pointed out, the husband "sought to have the terms of the [deed] agreed upon immediately after confronting [the wife] of [*sic*] the PI report" and that the husband "clearly acted on her sense of guilt". [note: 1] Indeed, in her brief reasons for her decision, the DJ again reiterated that "[i]t seems to me that the [husband] was capitalizing on the Defendant's sense of guilt". [note: 2] This is clearly borne out by the relevant facts as well as context as set out at the outset of this judgment. Taking into account all these circumstances as a whole, it was perhaps not surprising that the wife had not attended the subsequent hearings. Furthermore, it appeared to us that the wife also enjoyed a real prospect of success – a point which was also expressed by the DJ as part of her brief reasons for her decision. In her view: [note: 3]

> This is a 15-year marriage. The Defendant [the wife] was a homemaker and raised 2 children. I am of the view that the Defendant has a real prospect of success in having a share in the matrimonial assets and/or maintenance (whatever amounts it may be) if she is given the opportunity to have her case adjudicated upon. The ancillary orders sought to be set aside gave her absolutely nothing at all.

To this, we would add that the legal principles set out in *TQ v TR* (which were briefly referred to above) would also be applicable to the relevant facts.

Conclusions

27 For the reasons set out above, we allowed the appeal with costs of $5,000 awarded to the wife and with the usual consequential orders. Taking into account all the circumstances of the case, we ordered that the costs order in the proceedings below should remain.

[note: 1] Notes of Evidence, p 9.

[note: 2] *Ibid*, p 14, para 7.

[note: 3] *Ibid*, para 8.