



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2011 No: 26

CAROLYN PATRICIA WILKINSON

Petitioner

-v-

NORRIS VICTOR WILKINSON

Respondent

RULING

(in Chambers)

Ancillary relief-property adjustment order embodied in Consent Order-application to vary-finality of property adjustment orders-enforcement of maintenance order

Date of hearing: April 25-26, 2016

Date of Ruling: April 27, 2016

Mrs Georgia Marshall, Marshall Diel & Myers Limited, for the Petitioner

Ms Nadia Hamza, Nadia W. Hamza Barrister & Attorney, for the Respondent

Introduction and Summary

1. The present hearing involved the adjudication of the following applications:

- (a) the Petitioner's Judgment Summons dated Petitioner seeking to enforce paragraph 5 of the December 20, 2011 Ancillary Relief Order ("the Consent Order") requiring the Respondent to pay the Petitioner \$4200 by way of maintenance;

- (b) the Petitioner's September 2, 2015¹ Judgment Summons seeking (primarily) to implement paragraphs 1-2 and 5-6 of the Consent Order requiring the Respondent to grant to the Petitioner a life interest in the former matrimonial home and to amend his Will to secure his maintenance obligations to the Petitioner ("the Enforcement Summons");
 - (c) the Respondent's Summons dated January 18, 2016 seeking to vary the Consent Order ("the Variation Summons") and effectively re-hear the ancillary relief application *de novo* on the grounds that the agreement reached between two legally represented parties² was not commercially viable;
 - (d) the Petitioner's Summons filed on February 1, 2016³ seeking to strike out the Variation Summons ("the Strike Out Summons").
2. The Respondent gave oral evidence and was cross-examined, as did his accountant Ms. Megan Nesbitt. By the end of the hearing the most difficult aspect of the applications which I felt warranted further reflection was the precise terms on which the payments sought by the Petitioner should be ordered to be made. The existence of the arrears was not disputed, but the ability of the Respondent to pay was very much in controversy.

The Variation Summons

- 3. It was ultimately common ground that the Consent Order disposed of the Petitioner's ancillary relief application on what were, from her perspective, far more modest terms than she might have been able to obtain. In essence, the Respondent was land rich and cash poor. To preserve his various properties intact (presumably both for his benefit and the benefit of their children), the Petitioner agreed to accept a life interest in the former matrimonial home and maintenance payments secured by a charge on the Respondent's estate. She also agreed not to seek her costs of the ancillary relief application and only obtain \$1500 costs with respect to the Petition.
- 4. The Respondent has not, 4 ½ years later, either executed the conveyance or paid the related stamp duty. Nor has he executed (or validly executed) a Will securing his maintenance obligations to the Petitioner, which she has been compelled to take legal action to enforce. From the Petitioner's perspective, this must have felt like salt being rubbed into wounds. However, the Respondent's position (as set out in his First

¹ I was unable to locate an original issued copy of this Summons on the Court file and relied upon counsel for the issue date.

² Ms Hamza did not appear for the respondent in the ancillary relief proceedings.

³ I was unable to locate an original issued copy of this Summons on the Court file and omitted to clarify the issue date with counsel.

Affidavit) was that the Consent Order “*is not financially tenableand...is open to being revisited in a situation such as this where it would be unjust to bind me to its terms.*” There was no suggestion that the Consent Order has, due to some unforeseeable or cataclysmic events, become commercially unviable. Nor did the Respondent even suggest or credibly assert that a change of circumstances, justifying a reduction in the maintenance sums to be paid by him, had occurred. The clear implication from his evidence was that he had struck an imprudent bargain and ought accordingly be permitted to set it aside.

5. Ms Hamza ultimately relied upon the practical submission that the Consent Order was clearly not working and, if Mrs Marshall was technically right that it could not be varied, the Consent Order should be renegotiated. However Mrs Marshall deployed detailed cross-examination of the Respondent and Ms Nesbitt succeeded in establishing that the Respondent’s cash-flow problems, linked to the income generating Court Street properties being managed by Progressive Realty, were somewhat less chronic than he suggested that they were.
6. There can be little doubt that the Court has no jurisdiction to set aside the Consent Order on a non-consensual basis. Section 35 (2) of the Matrimonial Causes Act 1973 proscribes the categories of order as which can be reviewed from time to time and a property adjustment made in a divorce is not one of them:

“Variation discharge, etc., of certain orders for financial relief

(1)Where the court has made an order to which this section applies, then, subject to this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2)This section applies to the following orders—

- (a) any order for maintenance pending suit and any interim order for maintenance;*
- (b) any periodical payments order;*
- (c) any secured periodical payments order;*
- (d) any order made by virtue of section 27(3)(c) or 31(7) (b) (provision for payment of a lump sum by instalments);*
- (e) any order for a settlement of property under section 28(1) (b) or for a variation of settlement under section 28(1) (c) or (d), being an order made on or after the grant of a decree of judicial separation....”*

7. Mrs Marshall relied in this regard upon *Carson-v-Carson* [1983] 1 All ER 478 where the English Court of Appeal approved the decision of the trial judge who refused the application of an apparently deserving wife, whose circumstances had changed significantly for the worse, to make a fresh property adjustment order. Ormrod LJ, referring to section 31 of the of the Matrimonial Causes Act 1973 (UK) upon which are own section 35 is based, stated (at page 481h):

“This is a case where an attempt was being made to obtain a second property adjustment order in relation to the same capital asset and it is not necessary in this judgment to consider what the position might have been if some other capital asset was involved. In my judgment the learned judge in the court below was completely right in rejecting that application by the wife. If he had entertained it, he would clearly have been running counter to the provisions of section 31, which make it clear that the court has no power to vary a property adjustment order in any circumstances.”

8. Ms Hamza, despite being afforded an opportunity, overnight, to undermine the persuasive force of that case was (unsurprisingly) unable to diminish the compelling persuasive force of this authority.
9. The Petitioner’s counsel fortified her attack on the viability of the Variation Summons, generously viewed, alternatively, as an application by the Respondent to vary the periodical maintenance element of the Consent Order) by reference to the recent decision of Hellman J in *A-v-A* [2016] SC (Bda) 2 Div (7 January 2016). That case entailed an application by a husband to reduce his periodical payment obligations embodied in a consent order due to alleged material non-disclosure. After extensively reviewing the applicable authorities, Hellman J concluded:

“26. In summary, the Court has a broad jurisdiction under section 35 of the 1974 Act to vary or discharge an order made in ancillary relief proceedings, including a consent order. Where, as in the present case, the order is very recent, the Court is unlikely to exercise that jurisdiction unless there is a good reason to do so, eg because there has been a material change in circumstances or material non-disclosure by one of the parties. If the Court does decide to reopen the order, then it may do so in whole or in part, giving such weight to the existing order as it sees fit.”

10. I find that:

- (a) the Variation Summons, construed according to its terms, is liable to be struck out because it is plain and obvious that this Court has no jurisdiction to vary the Consent Order as regards the property adjustments elements of that Order; and/or
- (b) the Variation Summons should in any event be dismissed to the extent that it impliedly seeks to vary the Consent Order as regards the periodical

payment of maintenance elements of it. There is no or no credible evidence before the Court of any material change of circumstances since the Consent Order was made or material non-disclosure which vitiates the basis on which the Respondent agreed to its terms. I reject the Respondent's unconvincing complaint that he believes the Petitioner appropriated certain financial records relating to his properties. This complaint was, in any event, wholly detached from any assertions capable of even potentially invalidating the Respondent's decision to compromise the Petitioner's ancillary relief application on the terms embodied in the Consent Order.

The Judgment Summons

11. There is no dispute that, giving credit for payments made pursuant to, *inter alia*, the December 11, 2015 penal Order of Wade-Miller J and the July 23, 2015 payment Order of Hellman J, both made on the Judgment Summons, the following amounts payable by the Respondent to the Petitioner are outstanding:
 - (1) arrears of monthly maintenance payable on the first day of each month in the amount of \$4200 per month (January, February, March, April, 2016) : \$16,800;
 - (2) \$1500 in respect of the costs of the Petition herein pursuant to paragraph 11 of the Consent Order.

12. Ms Nesbitt conceded, based on further documents reviewed by her for the first time under cross-examination, that the Respondent's cash-flow position was not quite as dire as she had originally opined. Outstanding tax debts had been somewhat overstated; a recently rented commercial unit had not been taken into account; one significant personal debt of the Respondent's was probably now time-barred. If sensible arrangements were made to pay off other debts, the cash-flow position also becomes less drastic than initially appeared to be the case. However, Ms Nesbitt rightly pointed that appropriate account needed to be taken of the difference between accounting for income on an accrual basis and on a cash-flow basis. I find that it is obvious that rental income flows, under current economic conditions, are somewhat unstable. The provision made for the Respondent's personal expenses is purely nominal.

13. Under cross-examination, the Respondent indicated that, despite being well past the usual retirement age, he is seeking to supplement his income through part-time work. Although Mrs Marshall suggested that it was not necessary to incur the property management expenses of Progressive Realty, in my judgment the Respondent acted reasonably in appointing professional agents to carry out difficult work in difficult economic times. He also very fairly admitted in the witness box that the Petitioner might fairly feel that she was at the bottom of the payment priority list. However, while I accept that cash-flow from the Respondent's rental units is neither consistent nor voluminous, it does not lie in the Respondent's mouth, having benefitted from entering into the Consent Order on terms that protected his assets from a forced sale

to pay the Respondent a lump sum settlement, to complain that he cannot keep his side of the bargain: meeting the maintenance obligations to which he agreed.

14. The primary duty of the Court is to enforce the Consent Order in a way which does not compel the Respondent to pay sums he genuinely is unable to afford. I accept that Progressive Realty controls the rental income which is the primary source of funding for the Respondent's payment obligations and that any payment Order should be directed at both the Respondent and his agents and served on Progressive Realty. Taking into account Ms Hamza's plea to be more lenient with the arrears schedule than the \$1300 per month sought by Mrs Marshall, I make the following Order on the Judgment Summons:

- (1) the Respondent shall pay \$4200 (maintenance due on January 1, 2016) + \$1500 (costs of the Petition outstanding since December 20, 2011)- \$5700- on or before April 30, 2016;
- (2) the Respondent shall pay the arrears for February, March and April 2016 (\$12,600) in payments of not less than \$800 per month commencing June 1, 2016;
- (3) the Respondent shall in addition continue to pay monthly maintenance in the amount of \$4200 in accordance with the Consent Order.

15. I have sought to take into account the spirit as well as the letter of the Consent Order. Although the Petitioner gave up much, she also agreed to support the Respondent's desire to keep his real estate portfolio intact. The Court should, within reasonable limits, support this objective. However, ultimately the Respondent cannot cry poverty when his overall financial position is rosy. He must do better to honour his maintenance obligations or, in the absence of some agreed new bargain, encumber or liquidate his capital assets to meet his financial obligations to the Petitioner and this Court.

The Enforcement Summons

16. While it is perhaps understandable that the Respondent may well have had genuine difficulties with marshalling the funds necessary to pay the stamp duty liability attached to the creation of the Petitioner's life interest in the former matrimonial home, there is no justification for the Respondent refusing to even execute the relevant deed of conveyance. An imperfect attempt to comply with the requirement that he charge his estate with his maintenance obligations to the Petitioner as he agreed to do under paragraph 7 of the Consent Order within 30 days should now be perfected within a further 60 days (to allow for appropriate advice to be obtained and drafting to be done and agreed between counsel).

17. It was eventually agreed that to protect the Petitioner's rights as regards her life interest and the security for her maintenance rights in the event that the two legal instruments contemplated by the Consent Order are not duly executed, this Court

should grant a declaration that the Respondent's legal and/or beneficial interest in all of his Bermuda real estate (in particular the former matrimonial home, 5 Fairway Drive, Warwick; 10 Mount View Road, Pembroke, 41, 43 and 45 Court Street and 39 Dundonald Street, Hamilton) is held subject to a constructive trust in favour of the Petitioner to the extent of her life interest in the former matrimonial home and otherwise to the extent of her lifetime entitlement to receive such sums as may be payable by the Respondent by way of maintenance from time to time pursuant to the Consent Order and any supplementary Orders of this Court. There shall of course be liberty to apply to discharge or vary this Order on the grounds that the relevant instruments have been duly executed or because the parties have reached some alternative agreement.

18. In light of the declaratory relief granted and the likely burden of the financial Orders made on the Judgment Summons, I would adjourn the application for relief in respect of the stamp duty costs generally with liberty to the Petitioner to restore the application, by letter to the Registrar, after August 1, 2017, by which date the existing maintenance arrears should have been fully extinguished.

Costs

19. Ms Hamza sensibly did not attempt to resist Mrs Marshall's application for her client to be awarded the costs of the present applications which have been necessitated by the Respondent's non-compliance with the Consent Order. The Petitioner is awarded the costs of each of the present applications to be taxed if not agreed.

Conclusion

20. I will hear counsel, if required, as to the terms of Orders required to be drawn up to give effect to the present Ruling on the various Summonses which have been disposed of on the terms set out above.

Dated this 27th day of April, 2016 _____
IAN RC KAWALEY CJ