In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2004: No. 196

BETWEEN:

ROBERT ROSS SALMON

Petitioner

-and-

SIMONE SALMON

Respondent

REASONS FOR RULING

Date of Hearing: 29 November 2007

Date of Reasons for Ruling: 10 December 2007

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

Ms Jacqueline MacLellan, MacLellan & Associates, for the Respondent

Introduction

1. These proceedings concern an application by the petitioner, to whom I will refer in the usual way as "the Husband", who by summons dated 18 July 2007 seeks a variation of the terms of an order made by consent on 13 May 2005 ("the Consent Order"). That order was comprehensive in its terms, and provided for the Husband to pay to the respondent ("the Wife") a lump sum payment, periodical payments for the Wife and the children, payment of educational costs and extracurricular activities for the children, and a variety of other provisions dealing with the division of the joint matrimonial assets.

2. One of the matters that was recited in the Consent Order was that the Husband consented to the Wife removing the children of the family from Bermuda for the purpose of taking up residence in the Wife's native Germany on or after 31 July 2006. Specifically, it was recognised that that move would constitute a material change of circumstances such that the level of maintenance to be paid by the Husband both for the Wife and the children would need to be readdressed at that time.

3. In the event, the Wife did leave Bermuda with the children on 6 August 2007, by which time of course the Husband had already filed his variation summons. As well as relying on the forthcoming move and consequent change in circumstances, the Husband averred that he had suffered a marked change of circumstances in regard to his income, by reason of a downturn in the economy of businesses such as that of which he is CEO ("ICS"). The Husband indicated that the revenue of ICS had been decreasing because of the overall decline in the market, that there were no big IT projects "in the pipeline", and that the market trend had shown that it was too expensive to run IT operations in Bermuda so that the big firms had moved to farm out this work to onshore cheaper localities in other jurisdictions. The Husband said that what this meant for ICS was that the work that his company used to do was now disappearing as it was going to the onshore service providers.

4. In terms of his income, the Husband said that his employment income amounted to $200,000 per annum ie $16,666 per month, a figure which he said had not changed since 1 April 2005.

5. However, the Husband was also a 30% shareholder in ICS, and had over the years received significant further income by way of both bonus and dividend. He was entitled to a bonus equalling 25% of the net income of the company, and in addition received dividends relating to his shareholding of 30% if there was net profit thereafter enabling a dividend to be declared.

6. In a document prepared by PricewaterhouseCoopers dated 27 September 2007 ("the PwC Letter"), exhibited to the Husband's fourth affidavit sworn on 12 October 2007, it appears that the Husband's net salary, bonus and dividends for the calendar year 2005 amounted to $349,781. For calendar year 2006 these figures had increased to $403,677, but for the first eight months of 2007, the total of salary, bonus and dividends was $191,684, which would extrapolate to an annual figure of $287,526. However, Mrs Marshall rightly cautioned that such an extrapolation should not be undertaken, given that the bulk of the bonus and dividend payments which the Husband had received had been in the first half of the year, and the outlook for the second half was poor.

This Application

7. This matter came before me on a standard directions hearing on 8 November 2007, at which time a timetable was set for responses to various rule 77 requests, and it was at this point that Ms MacLellan for the Wife indicated her intention to apply for an order that the Husband should be precluded from arguing his application for a variation, by reason of the fact that he was then in default of the terms of the Consent Order. That hearing took place on 14 November 2007, and at the conclusion of the hearing, I gave leave to the parties to file further affidavits with a view to clarify the Husband's financial position, principally because I did not believe that I then had a sufficiently clear grasp of the Husband's present financial position to be satisfied that he could indeed pay the maintenance pursuant to the terms of the Consent Order, as Ms MacLellan contended. I then adjourned for a final hearing on the issue to take place on 29 November.

8. Part of the problem in understanding the extent of the Husband's real income arose from the terms of the Husband's third affidavit sworn on 12 July 2007. In paragraph 14 of that affidavit, he had said:

> "my bonus and dividend are tied into the net income of the company and although in the first quarter there was some net income of $56,000, of which I received a bonus of 25% of that figure i.e $14,000, it does not look like the second quarter will produce any net income and, therefore, I will neither receive a bonus nor dividends".

The inference I drew from that passage was that the totality of the payments which the Husband had received over and above his regular salary from 1 January 2007 to 12 July 2007 was $14, 000.

9. But, as Ms MacLellan pointed out in her submissions, the PwC Letter indicated that the total remuneration paid by ICS to the Husband from 1 January 2007 to 31 August 2007 included a figure of $66,159, to give the total figure for remuneration of $191,684 which I have referred to above. It was not clear from the PwC Letter whether the "tap had been turned back on" between 12 July 2007 and 31 August 2007, or if there was some other explanation, but the Husband eventually explained the position in his fifth affidavit sworn 27 November 2007. This confirmed that he had in fact received no less than four dividend payments of $7,500 each, three of them in the first six months of 2007, as well as a total bonus of $15,791.41, also paid in the first half of the year. There remained a disparity between the figures quoted by the Husband and the figures set out in the PwC Letter, something which the Husband acknowledged, and which he said he could seek to have clarified if that was required.

10. More importantly, this affidavit explained the reason for the difference in figures between the fifth affidavit and the third, which was that the third affidavit had ignored those payments made to the Husband in 2007, which had represented the bonuses and dividends declared during 2006. In my view it was incumbent upon the Husband to give the true picture from the outset, and I regard his affidavit of 12 July 2007 as unhelpful and misleading, at best.

The Relevant Law

11. The starting point for the purpose of Ms MacLellan's application is the judgment of Denning LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567. That case was concerned with the breach of an order that the child of the marriage should not be removed from the jurisdiction without the sanction of the court. An order was made directing that the mother return the child to the jurisdiction, and the mother sought to appeal this while in default of the court order. The Court of Appeal held that the mother was not entitled to be heard in support of her appeal until she had taken the first essential step towards purging her contempt of returning the child to the jurisdiction.

12. Romer LJ delivered a judgment with which Somervell LJ concurred, in which he described the obligation of a person against whom an order is made by a court of competent jurisdiction in the following terms:

> "such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application by such a person will be entertained until he has purged himself of his contempt."

13. Denning LJ did not go so far. He commented that the rule which the court was being asked to invoke – that a party in contempt will not be heard – was never a rule of the common law, and he detailed the history of the rule as it had been adopted by the ecclesiastical courts and the chancery courts, before coming to this conclusion:

> "Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance".

and

> "Applying this principle, I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed"

14. In *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1 the House of Lords made it clear that Denning LJ's approach was to be preferred. Lord Bridge referred (page 46) to that part of Denning LJ's judgment from which I have cited extracts above, and then said:

> "I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ better accords with contemporary judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions".

15. Ms MacLellan referred me to two further authorities in which the issue had arisen in the context of applications to vary periodical payments, *Mubarak v Mubarik* [2004] 2 FLR 932 and *Laing v Laing* [2007] 2 FLR 199. In *Laing*, the husband had terminated periodical payments on the basis of his retirement. The district judge had made an order for the husband to pay substantial maintenance arrears and reduce monthly periodical payments as conditions of pursuing an application for downward variation of maintenance. The district judge had found that at the time of retirement the husband had the resources to make the maintenance payments, was in wilful and continuing contempt of court, and had hindered the course of justice as the wife needed the money immediately and could not afford to issue a judgment summons or wait for hearing of the variation application. The husband's appeal was dismissed. In doing so, Sir Mark Potter P cautioned that the case involved an unusual application and should not be taken as a green light for similar applications in cases where it is not clear that the defaulting husband has ready means to pay.

The Pertinent Facts of this Case

16. As indicated, the Wife relocated to Germany in August 2007. She is not yet employed, but has had to pay substantial fees, including a large deposit, to ensure the children's attendance at the school which had been the choice of both parents, the International School in Stuttgart. The Husband had written a letter shortly

after the Wife's relocation indicating that he was no longer in a position to afford private schooling and that the children should attend public school. The amount which the Wife had paid in respect of schooling approximated to $30,000, which amount had been discharged from the lump sum which she had received pursuant to the terms of the Consent Order. Her payments approximated to 9% of the capital sum received, and of course further monies are due in the New Year when the next term's fees are due.

The Husband's Financial Position

17. Whilst I have been critical of the Husband's presentation of his financial affairs, it has to be acknowledged that his total income (comprising salary, bonus and dividends) is now lower than it was at the time that the Consent Order was put into effect. For calendar year 2005, the Husband's net earnings totalled approximately $350,000. This figure increased in 2006, but for the first six months of 2007, with lower amounts of bonus and dividend, the Husband's net earnings approximated to $125,000, and for the second half of the year, the Husband has received but one dividend payment in the sum of $7,500, paid to him on 14 November.

18. But that reduction in income should not cause the Court to lose sight of the fact that the Husband's net income in terms of salary remains substantial, and it appears from the estimate of his expenses (as exhibited to his third affidavit) that even having arbitrarily adjusted the maintenance payments for the Wife and his children, the Husband still listed travel of $1,500 per month, $200 per month for each of leisure and dining out, and more than $500 per month in respect of payments on the children which I very much doubt the Husband continues to make now that they are in Germany. And the "proposal" which the Husband made in that affidavit as to the maintenance that he was prepared to pay included an amount of $2,550 per month in respect of education costs for the children, which amount of course the Husband has not paid.

19. In the event, the view that I took was that this is a Husband who has continued to earn very substantial amounts through the first half of 2007, albeit with a reduction in his bonus and dividend for the second part of 2007. I cannot believe that the Husband could not have organised his affairs so that he ensured that funds were available to meet the children's educational expenses, and I have no doubt that he will be able to organise his financial such that these funds can be made available. Instead the Husband has behaved as if it is he, not the Court, that has the right to determine when and to what extent his maintenance obligations should change. The fact that the Husband seeks an order that any variation made in the future should have retrospective effect does not mean that the Court should assume, at this stage, both that there will be a reduction in maintenance and that

such reduction will be ordered to have retrospective effect. And the Husband should certainly not assume those matters.

The Children's Education

20. Before turning to the orders which I made, I should further refer to the position of the children, which is what has concerned me most in relation to this matter. I referred during the course of argument to the fact that it must necessarily have been very traumatic for two young children, both born in Bermuda, aged eleven (11) and eight (8) to relocate to Germany. I appreciate that they had visited frequently, and spoke conversational German, but it must surely have been obvious to the Husband that it was of paramount importance for the trauma of that relocation to be minimised as much as possible, and that education at an English speaking school was likely to be a highly significant factor in achieving this. I also referred in the course of argument to the fact that I regarded it as "unconscionable" for the Husband to expect the Wife to discharge these fees from the lump sum which she received from the Husband. That would allow the Husband to preserve his capital assets while the Wife's assets slowly reduced to discharge obligations which belonged to the Husband.

Conclusion

21. In considering Ms MacLellan's application, I had very much in mind that the primary question, per *Hadkinson*, was whether or not the Husband's failure to make the payments ordered impeded the course of justice. With particular reference to payment of the education expenses, it seemed to me that to allow the Husband to ignore the terms of the Consent Order would indeed impede the course of justice. In this regard, it is to be noted that the children had attended fee paying school in Bermuda and that the cost of their private schooling in Bermuda was apparently higher than it will be in Germany. It seemed to me that it would be quite inappropriate to allow the Husband to decide when and to what extent he should comply with orders of the Court, and that the best means of ensuring that the children's education is safeguarded, in accordance with the terms of the Consent Order, would be to ensure that the Husband made the requisite payments without delay.

22. The other question of concern to the Court was obviously the Husband's ability to make the payments, and whether his failure to make them could be described as wilful. Mrs Marshall stressed the Husband's inability to make these payments by reason of the reduction in his bonus and dividend income. But the fact remains the even without those payments this is a man who earns a very substantial salary. I have no doubt whatever that if the Husband had chosen to organise his affairs such that he discharged his obligations towards his children's education, he would

have been able to do so. I similarly have no doubt that he will be able to arrange his affairs so that he can do so now, albeit with a need, now, to do some reorganisation in terms of his financial obligations, so as to ensure that his obligation towards his children is discharged. But in this regard I note that on 14 November 2007 the Husband had received the sum of $7,500, and there is a further sum still due to be paid to him.

23. Having considered the above matters, the orders which I made on 29 November 2007 were that

(i) the Husband should reimburse the Wife for all fees paid by her in respect of the children's education fees, within 30 days, in accordance with the obligation imposed upon him by the Consent Order

(ii) the Husband should pay all future school fees in respect of the children as they fell due, and

(iii) on an interim basis, the maintenance payable by the Husband in respect of the Wife and the children should be reduced to an amount of $6,000 per month, pending a determination of the variation application, without prejudice to the Wife's ability to argue that the full or a greater amount should be paid, at the hearing itself.

Dated the 10th of December 2007.

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Hon. Geoffrey R. Bell
Puisne Judge