



In The Supreme Court of Bermuda

DIVORCE JURISDICTION

1998: No. 170

BETWEEN:

JOHN ALBERT GRAY GIBBONS

Petitioner

-and-

JULIETTE ANN LOUISE GIBBONS

Respondent

Dates of Hearing: 26-27 April 2010

Date of Judgment: 4 June 2010

Ms. Karen Williams-Smith of TROTT & DUNCAN for the Petitioner;
Mr. Adam Richards of MARSHALL DIEL & MYERS, for the Respondent

JUDGMENT

1. The applicant Juliette Ann Louise Gibbons by summons seeks an order that the consent order which dealt with ancillary relief issues after her divorce should be set aside inter-alia because of non-disclosure and false representation.
2. The parties even though divorced may conveniently be referred to as “the husband” and “the wife”.
3. At the outset Counsel for the parties informed the court that the parties had agreed that the issue as to whether the consent order dated September 25, 1998 should be set aside be remitted to be heard and determined as a preliminary issue.

4. Pursuant to this application the parties filed three affidavits two by the wife and one by the husband. Each party gave oral evidence.

BACKGROUND

5. The husband and wife married on December 29, 1989. The one child of the marriage was born on March 29, 1990. The wife had 2 children from a former relationship and the husband had one. They were separated on November 1997. Decree Nisi was pronounced on September 25, 1998 and Decree Absolute was pronounced on November 17, 1998.

6. At the time of the Decree Nisi on September 25, 1998, Meerbaux J. made an order (purported consent order) approving all ancillary relief financial arrangement agreed between the husband and the wife. The consent order reads:

1. *“The parties shall continue to have the joint custody of the one child of the family, namely, Jonathan Blair Gibbons born 29th March 1990, and the Respondent shall have his care and control and the Petitioner shall have reasonable access to him.*
2. *The Respondent do transfer to the Petitioner all that her interest in the jointly owned cottage known as Alywick Cottage on Floral Lane in St. Georges and the Petitioner shall be responsible for all the outgoings on the property as from the date of that transfer, being: the mortgage repayments, land tax and house insurance and any monies necessary to expend on the maintenance of the property to secure compliance with the terms of the mortgage deed.*
3. *The Respondent shall execute all deeds necessary to effect the said transfer of ownership and she shall execute such deeds within 7 days of the request being made of her and so long as the Respondent shall cooperate in effecting the said transfer, the Petitioner shall bear the responsibility of all costs and disbursements incidental to the said transfer.*

4. *If the Respondent shall fail to sign all necessary deeds to effect the said transfer, the Registrar of the Supreme Court is hereby empowered to sign such deed(s) for and on behalf of the Respondent.*
5. *The Petitioner shall pay the Respondent by way of maintenance for the one said child of the family the sum of \$50 per week and he will continue to contribute toward the child's clothing cost, school materials etc as before.*
6. *Upon the transfer being effected in accordance with clauses (2) to (4) hereof, each of the parties hereto agrees that their post-decree claims for financial provision for his and her own benefit shall be dismissed.”*

7. As to the wife’s contention she argues that the purported consent order (consent order) which shows that she signed the document in 1998 transferring her entire interest in the former matrimonial home to the husband, should be set aside. She only became aware that she had signed the document in 2005. She said the consent order was obtained by duress and by deliberate false representation by the husband of the circumstances so that she signed the document without understanding what she was signing and its legal implications. Further the husband did not provide full disclosure.

8. By a summons dated July 7, 2009 the wife applied to the Supreme Court for an order setting aside the consent order. It reads:

1. *That the Consent order dated 25 September, 1998 made in the above named proceedings be set aside.*
2. *That the conveyance in relation to the former matrimonial home located at Alnwick Cottage, # 5 Floral Lane, St Georges, Bermuda (the "Former Matrimonial Home") executed by the Supreme Court on the 28 October 2005, which transferred the Former Matrimonial Home from the names of the Petitioner and Respondent into the Petitioner's sole name, be set aside.*

3. *In the alternative, that this Honourable Court declare that the Respondent has a beneficial interest in the Former Matrimonial Home in equal shares or such other shares as the Court considers fair and just in the circumstances.*
4. *That the Petitioner be ordered to make a lump sum payment to the Respondent as is fair and just in the circumstances.*
5. *That there be such other order or relief as the court considers appropriate in all the circumstances.*
6. *That the Petitioner shall pay the costs of the application.”*

9. The main issues for the Court to consider are whether the husband made full, frank and clear disclosure to the court, whether the consent order was signed under the circumstance of duress or was induced by false representation

HISTORY

10. What is the evidence which led to the signing of the consent order? In April 1990 a few months after the parties were married they bought Alywick Cottage (sometimes called Alnwick), Floral Lane in St. George’s (the property) as joint tenants. After the purchase, the property was rented for a short period, thereafter the parties resided in it until November 1997 when unhappy differences beset the relationship and they separated. The husband remained living in the property while the wife moved in with her brother where she stayed for less than one year as this accommodation was inadequate to house four people. Eventually the wife and the child of the marriage and one of her children from a former relationship moved into accommodation which was secured by her eldest son.

11. The wife said that after separation she and the husband maintained contact with each other to agree access to their son. She recalls the husband telling her that he was going to apply for a divorce. Although she did not believe that they would reconcile she was not expecting a divorce. She recalls telling him that if that was what he wanted she would not prevent it.

12. She said that to the best of her recollection she received the first official notification of the divorce from the husband, himself. At no time does she recall receiving correspondence from the husband's lawyer, setting out the husband's position as to the finances, requesting disclosure or advising that she should obtain independent legal advice.

13. At the time of the divorce the wife said that she was working at the Bank of Bermuda. She does not recall the process server attending her place of work and serving the divorce documents on her but accepts that she must have done so as the affidavit of service shows the date when she was served. She said that she must have signed the acknowledgment of service and returned it to the process server as it bears the same date – September 3, 1998 – as the date of service.

14. She said that the consent order was not served on her. She recalls the husband coming up the back stairwell at her place of work. She was called to the door by one of her co-workers where she met the husband. She could tell that he had been drinking. He informed her that he had some papers for her to sign and she told him that she would need to read them first. He began to get irate and he told her that the papers "just confirmed" that I was not contesting the divorce. The husband was visibly intoxicated and she was becoming increasingly embarrassed by his behaviour. The wife said she just signed the papers without considering it properly as she did not want a scene at her place of work.

15. In cross-examination the husband denied that he was intoxicated. He said that when he went to his lawyer to ascertain the position, she told him that his wife had not signed the divorce documents. He took the documents to her place of employment for her to sign them. The form that was presented to the judge that outlined the divorce settlement is part of the documents that he took for her to sign. There was no discussion about the documents.

16. In response to the suggestion by Counsel for the wife that by turning up at her job, he was putting pressure on her to sign the document, the husband responded "I do not see it that way". As far as he knew she did not respond to the documents which were sent to her by his Counsel. He went to her job with the divorce documents and the consent order – that is, the form that

outlined the conditions of the divorce. He thought the consent order was all part and parcel of the documents he took to her to sign. He was there no longer than five minutes. He cannot recall if she read them or not. He did not see anything irate about his behaviour. She seemed more interested in signing and getting me to go away. She did not want to be bothered. Her behaviour was akin to “when you have a fly around you want to sweep it away.”

17. The wife maintained that she was surprised at how quickly the divorce was concluded. Within a month of the petition for divorce Decree Nisi was granted and all financial matters were resolved. There was no request for financial disclosure and it would appear from the court records that there were no enquiry with respect to our respective financial positions.

18. The Court accepts the strength of the criticism advanced by Counsel for the wife that the husband did not give full and frank disclosure. In *Livesey (formerly Jenkins) v Jenkins* [1985] 2 FLR 813 Lord Brandon of Oakbrook states that “once it is accepted that this principle of full and frank disclosure exists, it is obvious that it must apply to contested proceedings heard with full evidence before the court, but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further enquiry made by the court.”

19. This Court does not accept Counsel for the husband’s argument, that it is evident that the wife received the acknowledgment of service and the consent order and agreed the terms and signed them without any difficulty at the time, but since the passage of time she has little or no recollection of signing or even reading them.

20. This Court is satisfied that the purported consent order was signed by the wife when the husband left his lawyers office for the expressed purpose of securing the wife’s signature. He took the consent order along with other papers to her job in order to get her to sign it.

21. In my judgment, even if the wife had read the Lomas and Associate’s letter dated August 11, 1998, as Counsel for the wife advanced, that letter did not fulfill the husband’s duty to make full, frank and clear disclosure of all financial resources and every relevant material fact.

22. The wife has denied reaching any agreement in the terms encapsulated in the consent order. The evidence of the wife and the husband support the view that the wife signed the documents after the husband's false representation or omission to state the full position. The court accepts that she was told by the husband that the purpose of the document was to facilitate ending the marriage. The husband accepts that he did not discuss the consent order with the wife when he took her the papers but denied that he placed her under duress. I prefer the evidence of the wife as to how the documents came to be executed. I am satisfied that her evidence is a true and accurate account of the circumstances under which she said she signed the order. I am satisfied that there was no discussion between the husband and the wife regarding the terms of the consent order. She was not given adequate time to read and understand the documents. I do not find the husband to be a credible witness and whenever there is a conflict I prefer the evidence of the wife. She signed the document brought to her by the husband under duress and without being made aware of its true contents.

23. On the husband's version of events he was at the wife's job no longer than five minutes. He testified that she was more interested in signing and getting him to go away. This scenario hardly depicts a situation where the wife discussed with the husband, read and understood that she was signing away her beneficial interest in the jointly held property.

24. What was the value of the asset at the time of the separation? Counsel for the husband submitted that in September 1999 the outstanding mortgage was \$240,000. The property was purchased for \$235,000 therefore there was no equity in the property.

I agree with counsel for the wife that this argument is unsustainable given the period of time that had elapsed (7years) since its purchase. He argued that the work that was carried out in the property during the subsistence of the marriage was bound to increase its value. He added that normal market fluctuations would have an impact. The value was likely to increase during the strength of market fluctuations. Mr. Adams submitted that the husband applied to Bermuda Housing Corporation (BHC) for re-financing eight months after separation. The BHC valuers placed a value of \$420,000 on the property. To explain this increase in value the husband said that he undertook a considerable amount of construction work between the date of the consent

order and the date of his application to BHC for refinancing. The wife is not aware of what work was undertaken.

I agree with counsel's suggestion, that when one looks at the history of the work undertaken and the husband's evidence in paragraph 12 of his affidavit – that two years after the divorce or just under he undertook a lot of work on the home and turned a shell into a 3 bedroom and although it still needed plastering the foundation was there – that the work the husband contends he undertook could not have been completed in eight months. Thereafter he still needed to borrow a further \$80,000.

I reject the husband's evidence that he undertook a considerable amount of improvement to the property, between the date of the consent order and the date of his application to BHC for refinancing, which increased the value. Given the time frame when he was supposed to have carried out these improvements, as Counsel for the wife submits, that seems hardly plausible. Whenever there is a conflict between the husband and the wife evidence, I find the wife's evidence to be more reliable.

25. Counsel for the husband's letter dated August 11, 1998 minimized the value of the equity in the asset. It reads: "*...we understand that the property is burdened with indebtedness to the bank that if it was sold there would be nothing left over to divide between you and Mr. Gibbons.*" The evidence shows that the wife would be unaware of the value of the equity in the property as the husband paid the mortgage and dealt with all other financial arrangements related to the property, while the wife was responsible for the payment of utilities and other household expenses. It was only during his oral evidence that the husband indicated that two people had made him offers to purchase the property for \$250,000 and \$260,000. I agree with the suggestion by counsel for the wife that two developers without a valuation of the property thought that the property was worth more than the debt.

In Livesey supra, it is shown that a party can be in breach of the duty to disclose by actively presenting a false case or passively by their failure to reveal relevant facts and circumstances. The court has the power to set aside the order in order to do justice whether or not the order was made by consent.

26. Shortly after the Decree Nisi was pronounced, the wife and the husband reconciled for a period of about one year. The parties and the children moved into rent free accommodation on Darrell's Island where the husband had secured a job. The parties separated again in 1999.

27. Around the time of separation the wife said the mortgage which was with the Bank of Bermuda was in considerable arrears and the husband approached her with the suggestion that they try and secure a mortgage from the BHC as he wanted to try and avert foreclosure.

28. On December 1, 1999 the parties by a joint application re-mortgaged the property with BHC in the amount of \$330,000. This sum was to allow renovation to be completed which would produce a three bedroom apartment. BHC was to rent out the property. Delays and costs over-run necessitated the husband and wife to jointly apply for a further charge in the amount of \$88,000.

29. It merits attention that one day after the parties signed the further charge the husband sought to have the wife removed as a mortgagee. In her letter dated 31 May 2000 Counsel wrote to BHC:

"...we acted for Mr. Gibbons in the matter of his divorce when, on the 25th September 1998, the Supreme Court ordered that Mrs. Gibbons was to transfer to Mr. Gibbons all her interest in the jointly owned cottage and that Mr. Gibbons was to be responsible for all the outgoings in respect of it including the mortgage repayments, land tax and house insurance and indeed, it was also required by the Supreme Court Order that he maintain the property in compliance with the terms of the Mortgage Deed.

Mr. Gibbons advises us that Mrs. Juliette Gibbons has never contributed to those outgoings on the cottage since the Supreme Court Order was made and he has instructed us to proceed with the conveyance from himself and his former wife to himself alone.

In order to carry out this voluntary conveyance pursuant to the Supreme Court Order, we need your consent to the transaction..."

Court

30. It is correct that except for putting her own credit at risk by jointly entering into the BHC mortgage the husband developed the house without any tangible financial support or contribution from the wife. It is undisputed that the wife raised the two children by herself. She did not even receive the \$50.00 per week promised by the husband in the consent order although he said and it is accepted that he assisted his son otherwise.

31. Counsel for the parties agree that when the court is asked to set aside an ancillary relief consent order it must have regard to certain issues and certain grounds upon which no order can be set aside. An order can be set aside *inter alia* if there is fraud, mistake, non-disclosure, or misrepresentation of material facts at the time the order was made. I have had regard to the arguments of Counsel for the husband and the wife set out in their skeleton and developed during oral submission. It seems unnecessary to repeat the points made as the legal consequences are the same irrespective of whether the order was secured by non-disclosure, duress or false representation.

33. When the consent order was presented to the court and made an order, the husband did not make a full, frank and clear disclosure. He did not disclose to the wife or to the court the value of the equity in the former matrimonial home.

34. Parties have a duty to provide full, frank and clear disclosure of financial resources of every fact that is material. In *Livesey supra* at page 424 it was held that not every example of non-disclosure could justify setting aside a consent order. It is a question of degree and relevance.

35. To justify setting aside a consent order for non-disclosure it must be shown that the court would have made an order which is substantially different from the order it would have made had disclosure taken place.

36. In my judgment given the level of the equity existing at the time the order was made I find that the husband either actively or passively failed to make full and frank disclosure. If the husband had made full, frank and clear disclosure the wife in all likelihood would have taken a different position and the court would have made a different order.

37. Further, the wife's signature was obtained under duress. She was not represented by Counsel at the material time and her subsequent conduct and that of the husband has left the court with considerable doubt that she had received, read let alone understood Lomas & Associates letter of August 11, 1998. The husband has not been able to dispel the doubt in which the evidence leaves the court.

38. This Court accepts the evidence of the wife and finds that the husband misrepresented the position. I reject the husband's evidence in so far as he testified otherwise. The consent order was executed by the wife without the knowledge on her part as to its nature and effect.

39. If the matter ended here it would follow that the court would allow the wife's summons and the wife would be entitled to an order striking out the purported consent order. However, I must deal with the wife's delay in bringing this matter.

40. Counsel for the wife submits that the court can have regard to delay in bringing the application but urges that delay is not an automatic bar and constitutes only one factor in the court's assessment. In the unusual circumstances of this case the wife could not have brought the proceedings before 2005 six years after the wrongful advantage had been taken. In *Shaw v Shaw* [2002] EWCA CIV 1298 at paragraph 44 (v) Thorpe LJ says: "...each case must be determined upon its own facts and circumstances. In cases falling within the *Livesey v. Jenkins* category, no application can precede the discovery of the evidence that suggest or proves the wrongful advantage taken by the adversary at trial." Counsel argued that given the very unusual facts of this case it is no surprise that the wife took some time to digest the information before proceeding with her applications.

41. Counsel for the husband argues that there has been a long lapse of time from September 25, 1998 when the consent order was signed to the date when proceedings were taken in November 2009. The Respondent has been supporting herself for the past 12 years. She has bought herself another home and has had no dealings with the property. During that period the husband has arranged his affairs believing that there would be no further financial matter to settle "particularly as upon divorce all had already been settled." In an effort to organize his affairs in 2005 the

husband has joined his eldest son on the property. The property is fully restored and is being financed by the husband and his eldest son.

42. It is without doubt that applications must be made reasonably promptly. The case of *Shaw v Shaw supra* underscores the importance of promptness.

43. The issue for the court now is whether the wife has fulfilled this requirement of reasonable promptitude. In the court's judgment she has not. At the latest, since 2005 some seven years after the consent order and four years before this application she had the knowledge with which she could have acted. Why did she not seek to file an application in 2005 to set aside the consent order? In 2005 the wife had legal Counsel acting for her and all the correspondence at that time shows that the husband was taking steps to have the property conveyed to him solely. Counsel's state of knowledge which is revealed in this correspondence must be taken as the state of knowledge of the wife. This correspondence gives a reasonable accurate picture that a consent order existed. It was some four years later that the wife consulted another counsel and filed her action. Nothing has been put before this court to justify the period of four years between 2005 and 2009 in which the wife did nothing. In response to a question put to her by the court she has explained the delay by saying words to the effect that she did not believe she would have succeeded in her claim. This in the court's judgment does not justify the delay. There must be finality in litigation and courts must exact promptitude and censure delay.

I have concluded that the wife has demonstrated that the consent order made by the court on 25 September 1998 justified and required setting aside because of the husband's failure to make full and frank disclosure in addition the husband obtained the wife's signature by duress and false representation. However the wife has lost her right to that review by her failure to act with reasonable promptitude in applying to the court to have the order set aside.

Given these factors the wife fails as a result of her delay. Her application to set aside the consent order is refused. Taking into account all the circumstances outlined in this judgment although costs usually follow the event exercising my discretion I hereby order that each party should bear

his or her own costs. I take particular note to account of the fact that the husband has benefited from his wrong doing and the wife unduly delayed in commencing proceedings.

Dated the 4th day of June 2010.

Justice Norma Wade-Miller
Puisne Judge