In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2010 No: 100

BETWEEN:-

X

Petitioner

-and-

Y

Respondent

RULING

(In Chambers)

Date of Hearing: 11th April 2013
Date of Ruling: 16th April 2013

The Petitioner in person (by speakerphone)
Ms Nancy Vieira, Amicus Law Chambers, for the Respondent

Introduction

1. By a summons dated 28th February 2013, the Respondent, Y, ("the Husband") applies to set aside a consent order which he entered into with the Petitioner, X, ("the Wife"), dated 13th June 2011.

2. The consent order is expressed to be in full and final settlement of all claims for ancillary relief between the parties:

> "*UPON the Petitioner and the Respondent acknowledging that they have received independent legal advice on the terms of this Consent Order and that both parties have made full and frank disclosure of their financial resources.*
>
> *AND UPON the Petitioner and the Respondent agreeing that the terms of this Order are accepted in full and final satisfaction of all claims for income, capital, pension sharing orders, periodical payments and of any other nature whatsoever which either may be entitled to bring against the other or the other's estate in relation to their marriage.*
>
> *AND UPON the Court having heard Counsel for the Petitioner and Counsel for the Respondent*
>
> *IT IS HEREBY ORDERED as follows:-*
>
> . . . . .
>
> *8. The provisions herein are in full and final satisfaction of all claims of whatsoever nature which either party may be entitled to bring against the other in any proceedings including any claims for periodical payments for themselves which are hereby dismissed.*"

3. The consent order also makes arrangements about the child of the marriage. His name is Z and he is 15 years old.

4. The application to set aside the consent order came before me on 11th April 2013. The first part of the hearing concerned the provisions in the consent order providing for ancillary relief. That is the subject of this ruling. The second part of the hearing concerned the arrangements in the consent order for parenting Z. I shall address them briefly at the end of this ruling.

Hearing on 13th June 2011

5. Ms Vieira, who appeared for the Husband before me, and for whose assistance I am grateful, informed me that in fact the Husband was not represented at the date of the consent order as his attorneys, Christopher

E Swan & Co, had applied to come off the record due to non-payment of legal fees. Ms Vieira was with that firm at the time and had hitherto been acting for the Husband. She stated that, to the best of her recollection, at the hearing on 13th June 2011 she had at the request of the Court acted as an amicus curiae but that, as she no longer represented the Husband, she had been unable to advise him.

6. Subsequent to the hearing before me, I have had the advantage of reviewing the court file. On 10th June 2011 the Husband's attorneys filed a summons and supporting affidavit seeking an order that they be removed from the record as the Husband was unable properly to retain them. This was three days before the hearing of the application for ancillary relief, which had been set down on 9th May 2011 for hearing on 13th and 14th June 2011. The affidavit on the court file is not sworn, but it may be that the Court's copy of the document is incomplete. It was issued by the Registry with a return date of 13th June 2011.

7. Paragraph 72 of the Bar's Code of Professional Conduct 1981 states that:

"*A barrister may withdraw his services from a client if –*

. . . . .

(ii) his fees are not paid within a reasonable time of being demanded,

but that he may not withdraw his services at a time that will prejudice his client as for instance shortly before a trial when there is inadequate time for another barrister to be briefed properly, except with the leave [of the] Court."

8. The ancillary relief hearing took place before Mrs Justice Wade-Miller. I have read her notes of the hearing. At the start of the hearing the Husband was present without a lawyer. The Court had Ms Vieira called, and the summons to come off the record was drawn to the Court's attention. Upon Ms Vieira's arrival, the parties withdrew to discuss the matter. When they came back, the Wife's attorney, Adam Richards of Marshall Diel & Myers, stated that the time outside court had been productive and that he would draft a consent order. He outlined the terms

of the proposed consent order to the Court, and the Court made an order in those terms.

9. On 24th June 2011 Mr Richards wrote to the Registrar, copying his letter to Ms Vieira, enclosing a draft of the consent order. The letter read as follows:

> "*We confirm that our client's application for ancillary relief was listed for trial on 13 and 14 June 2011 before Justice Wade-Miller. On that occasion the Learned Judge allowed time for negotiations to take place and the parties were able to reach an agreement to settle all issues of ancillary relief.*
>
> *Following discussions, we attended before Justice Wade-Miller and advised her of the agreed Orders which she duly endorsed.*
>
> *Subsequently, we prepared a draft Consent Order and provided this to Swan & Co attorneys who continue to act for the Respondent. We have now been advised by Nancy Vieira of those Chambers that she has been unable to secure the signature of her client.*
>
> *In the circumstances we enclose, in triplicate for filing, an Order in the terms which the court endorsed on 13 June 2011 and would be grateful if this could be placed before Justice Wade-Miller for her consideration and signature."*

10. Mrs Justice Wade-Miller duly signed the draft order that was submitted. There is no record on the court file that any order was ever made on the summons to come off the record. Ms Vieira did not write to the Court to say that Mr Richardson's letter was incorrect in that her firm was no longer acting for the Husband.

11. In the circumstances I am satisfied that at the hearing on 13th June 2011 the Husband was legally represented and that the consent order was indeed made with his consent after receiving independent legal advice.

The law

12. It will be helpful to set out the principles governing the setting aside of a consent order made in matrimonial proceedings insofar as they are relevant to the Husband's application. I have been greatly assisted in this task by the judgement of Mrs Justice Wade-Miller in this Court in

Gibbons v Gibbons [2010] Bda LR 31. This summary is not exhaustive – it merely sets out those principles that are relevant to my decision in the present case.

(1) When the parties agree the provisions of a consent order, and the court subsequently gives effect to such agreement by approving the provisions concerned and embodying them in an order of the court, the legal effect of those provisions is derived from the court order itself and does not depend any longer on the agreement between the parties. See the speech of Lord Brandon, with whom the other Law Lords agreed, in the House of Lords in Jenkins v Livesey [1985] 1 AC 424 at 435G.

(2) A consent order may be set aside in cases (i) where the order was made on the basis of a mistake of fact by one or both parties, eg because of material non-disclosure by one of them, and (ii) where new events have occurred since the making of the order which invalidate the basis on which the order was made. See the judgment of Mrs Justice Bracewell in the Family Division in S v S (Ancillary Relief: Consent Order) [2003] Fam 1 at para 4.

(3) In ancillary relief proceedings, each party owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This is because without such disclosure the court will be unable to comply with its statutory duty in section 29(1) of the Matrimonial Causes Act 1974 when deciding whether to make any financial provision or property adjustment orders to have regard to all the circumstances of the case. See the speech of Lord Brandon in Jenkins v Livesey at 437H – 438A.

(4) Non-disclosure may take the form of either active concealment or passive failure to mention. See the leading judgment of Lord Justice Thorpe, with whom the other members of the Court agreed on this point, in the Court of Appeal of England and Wales in Shaw v Shaw [2002] EWCA Civ 1298 at para 44(ii).

(5) It is only in cases where the absence of full and frank disclosure has led to the court making an order which is substantially different to the order which it would have made if such disclosure had taken place that a case for setting aside a consent order can possibly be made good. See the speech of Lord Brandon in Jenkins v Livesey at 445G – H.

(6) A consent order can also be set aside in a case of undue influence or duress. See the judgment of Mrs Justice Wade-Miller in Gibbons v Gibbons at para 35, with which I agree. But the point is not free from doubt. In Tomney v Tomney [1983] Fam 15 in the Family Division at 26D, Mr Justice Balcombe (as he then was) held that it could not. In Jenkins v Livesey at 440F, Lord Brandon stated that he was not persuaded that Mr Justice Balcombe's decision on the question was necessarily correct. In L v L in the Family Division [2006] EWHC 956 at para 95, Mr Justice Munby (as he then was) was prepared to assume for the sake of argument that a consent order could be set aside on the grounds of duress or undue influence. "Duress" means the obtaining of agreement or consent by illegitimate means. See the judgment of the Privy Council on appeal from the Court of Appeal of Bermuda given by Lord Saville in Borrelli v Ting [2010] Bus LR 1718 at para 34.

(7) Pressure, even unfair pressure, falling short of undue influence or duress will not suffice to set a consent order aside. See the judgment of Mr Justice Munby in L v L at para 95.

(8) A consent order can be set aside for undue influence or duress because these factors form part of the circumstances of the case to which the court must have regard when deciding whether to make any financial provision or property adjustment orders. Had the court been aware that consent to the order which it was being invited to make had been obtained from one of the parties by illegitimate means then the court would have declined to make an order by consent and would instead have proceeded to investigate the merits of the case.

(9) Where an application to set aside a consent order is based on events which have occurred since the making of the order:

(a) Those events must invalidate the basis upon which the order was made such that if they had occurred before the order was made the court would have been certain, or very likely, not to have made an order in those terms.

(b) The events must have occurred within a relatively short time of the order having been made. While the length of time cannot be laid down precisely, it is very unlikely that it could be as much as a year and in most cases will be no more than a few months.

See the speech of Lord Brandon, with whom the other Law Lords agreed, in the House of Lords in Barder v Calouri [1988] AC 20 at 43B – E.

(10) There is an overriding need for finality in litigation. An application to set aside a consent order must therefore be made with reasonable promptness. As happened in Gibbons v Gibbons, an otherwise meritorious application that is not made with reasonable promptness will fail. This is not only on account of the need for finality but also to avoid the risk of an expensive and fruitless trial on oral evidence. See the judgment of Lord Justice Thorpe in Shaw v Shaw at para 44(iii) and (v).

(11) What constitutes reasonable promptness will depend upon the particular facts of the case. The application to set aside cannot precede the discovery of the undisclosed fact or subsequent event, as the case may be, upon which the application is based. The need to obtain competent legal representation, and to find the means to pay for it or alternatively to obtain public funding, may also be relevant. See the judgment of Lord Justice Thorpe in Shaw v Shaw at para 44 (v).

Ancillary relief

13. The arrangements in the consent order as to ancillary relief were as follows:

(1) The Wife would pay the Husband a lump sum of $30,000 within 60 days.

(2) The Husband would transfer to the Wife all his legal and beneficial interest in the former matrimonial home ("the Property").

(3) The Wife would use her best endeavours to have the Husband released from his obligations under the mortgage on the Property and would indemnify him from any actions, demands or claims relating to the Property from the date of transfer.

(4) The Husband and Wife would each retain all his or her other assets.

(5) The Husband would continue to pay $125 per week maintenance to the Wife for the benefit of Z until he reached the age of 18 or completed his full time university education, whichever was later. When he started school in the United Kingdom (as dealt with elsewhere in the consent order), and for as long as he was educated in the United Kingdom, the child maintenance payments would increase to $150 per week.

(6) There was no provision that the Husband would pay maintenance to the Wife for her benefit in addition to the maintenance payable for the benefit of Z.

14. The Husband seeks to set aside the provisions in the consent order relating to ancillary relief on the grounds (i) that there was material non-disclosure by the Wife and (ii) that he agreed to the consent order under duress.

Material non-disclosure

15. The Husband complains that the Wife failed to disclose that at the date of the hearing she was planning to move to the United Kingdom. It is common ground that the consent order contained provisions for Z to be educated in the United Kingdom. It is also common ground that the Wife did move to the United Kingdom with Z in or about November 2011, some 5 months after the date of the consent order. The Husband submits that had he known of the Wife's intended move, he would not have agreed that the Wife should have the Property, at least not in its entirety.

16. I heard oral evidence from both the Husband and the Wife about the move. The Husband said in evidence that he did not know that the Wife was moving to the United Kingdom until the day before she left and that this was something that they had never discussed. I note from the court file that on 20th April 2010 in the magistrates' court a domestic violence protection order was entered against the Husband by consent for a period of 6 months. It is not clear from the court file whether there was any further protection order. The Husband said that protection orders had been in force during the 12 months or so prior to the making of the consent order and that, as they had prohibited him from communicating with the Wife, during that time he had been unable to discuss things with her.

17. The Wife said in evidence that before the marriage broke down in 2008/2009 she and the Husband had discussed leaving Bermuda as a family. She said that she had spoken to the Husband about this as long as they were talking, and mentioned a specific occasion in 2009 when she had told him that she still had to take her son away from Bermuda and asked the Husband if he was going to help her. Her underlying concern, which the Husband shared, was to prevent Z from getting involved with gangs and gang violence. It was implicit in her evidence that as a result of these conversations the Husband would have been well aware that she intended to leave Bermuda. The Wife said that as at the date of the consent order the Husband would have had no reason to assume that her intention to leave Bermuda had changed.

18. The Wife filed 2 affidavits of means in the ancillary relief proceedings. In neither affidavit did she mention that she was intending to leave Bermuda.

19. I accept the Wife's evidence that she had discussed with the Husband moving to the United Kingdom in terms which made it plain that such a move was a real possibility. I reject as implausible the Husband's evidence that he was unaware of her intention to move until the day before her departure. However I find that the Wife's admitted intention to move to the United Kingdom was a material fact which ought to have been disclosed in her affidavits as it was potentially relevant to the question of ancillary relief. Her failure to do so breached her duty of full and frank disclosure.

20. To assess what weight should be given to this material non-disclosure I turn to consider the evidence about the Property. The Wife's affidavit evidence was that in November 1996 she bought the land on which the Property now stands for $75,000. She met the purchase price solely from her savings. In April 1997 she married the Husband. In 2002 she borrowed $400,000 from Bank of Butterfield and $100,000 from Capital G Bank to fund the construction of the Property. At that time she conveyed the Property into the joint names of her and the Husband because the Bank of Butterfield required a co-signatory on the loan. The Wife hired the Husband's company to build the Property and paid the appropriate fees for the work and materials. Throughout the marriage she continued to meet all the expenses in relation to the Property and has met the mortgage payments throughout.

21. As at 9th June 2010 the amount outstanding on the mortgage with Bank of Butterfield was $331,953.63 and on the mortgage with Capital G was $33,686.00. Monthly mortgage repayments were $4,470.00. The estimated value of the Property was $600,000. Thus the equity was $234,360.37.

22. The Property was not complete. It consisted of a 3 bedroom main unit in which, at the date of the consent order, the Wife lived with Z. Due to difficulties meeting her monthly outgoings, the Wife had taken in up to 3

boarders to live in the main unit as well. They would pay from $150 to $300 per week. Attached to the main unit were two, 2 bedroom apartments. Each had an estimated rental value of $2,500 per month. However in the current climate it was difficult to find tenants and boarders, and the income from these sources had fluctuated.

23. The parties had separated in March 2009. The Husband had not been living at the Property since then. Indeed on his affidavit evidence he had left in 2008. Prior to their separation the rental payments had funded half of the total mortgage payment, and the Wife had met the shortfall from her own resources.

24. The Property was not yet completed. In the 2 years prior to February 2011 the Wife had undertaken work on the Property costing $36,440.

25. The Husband stated in his affidavit that he built the Property and provided all labour and materials. But he did not dispute the Wife's statement that she had paid for the labour and materials.

26. The Husband submits that he agreed to relinquish his claims to the Property on the understanding that the Wife and Z would continue to live there. Had he known that they would be living in the United Kingdom, he would have maintained a claim to one of the rental apartments.

27. I am not satisfied that the lack of full and frank disclosure by the Wife has led to the Court making an order which is substantially different to the order which it would have made if such disclosure had taken place. Had a contested hearing taken place at which the full facts were known, or alternatively if the Wife had moved to the United Kingdom before a contested hearing took place, the Court might well have made an order in substantially the same terms as the consent order. The possibility of continued shared ownership of the Property was not realistic in light of the allegations of domestic violence made by the Wife against the Husband in the divorce petition.

28. Moreover, it is clear from the affidavit filed in support of the application to set aside the consent order that the Husband was keen to settle the

matter. I am satisfied that he knew that the possibility of a move to the United Kingdom was something to which the Wife had given serious consideration in recent years. If the Husband considered such a move material, therefore, I would have expected him to raise it with the Wife during the course of settlement negotiations. In fact, he did not even raise her move as a reason to set aside the consent order in relation to the Property (as opposed to other aspects of the consent order) in his affidavit in support of the present application. What the Husband said there was that the Property has fallen into disrepair, and that he had agreed to the transfer in the belief that his son would ultimately benefit from the Property. He raised the move in relation to the Property for the first time, through Ms Vieira, before me. In the circumstances I am satisfied that, if the Wife had disclosed in her affidavits her intended move to the United Kingdom, the Husband would have entered into the consent order nonetheless.

29. Further, and in any event, the Husband failed to apply to set aside the consent order with reasonable promptness. The Wife moved to the United Kingdom in November 2011. On his own account, the Husband knew of her move no later than the day before she left. Thus he waited 15 months before applying to set aside the consent order. Even allowing for possible difficulties in getting together enough money to instruct counsel, that is far too long. His failure to apply to set aside the consent order with reasonable promptness is in itself sufficient reason to dismiss this application.

Duress

30. The Husband alleges that at the hearing on 13th June 2011 – at which, I have found, he had the benefit of independent legal representation – the Wife's counsel told him that the protection order would be withdrawn if he agreed to the terms of the consent order. Assuming that were true, it could not amount to duress unless the protection order were obtained in bad faith as a tactic to put pressure on the Husband in the divorce proceedings. There is no material before me from which I could reasonably conclude that such was the case.

31. Further, and in any event, the Husband failed to act with reasonable promptness with respect to the allegation of duress, waiting for 20 months after the hearing before applying to set aside the consent order. This delay is fatal to his application.

Child maintenance

32. Irrespective of the merits of the Husband's arguments with respect to non-disclosure and duress, it is difficult to see how they could justify varying the consent order insofar as it provides for maintenance payments for the benefit of Z.

Conclusion

33. For the reasons set out above, the application to set aside the consent order with respect to questions of ancillary relief is dismissed.

Endnote: parenting arrangements

34. The Husband has expressed concern about how the parenting arrangements made in the consent order are working in relation to him. The consent order provides that there shall be liberty to apply as to its implementation. That, rather than an application to set aside the consent order, is the appropriate way in which to address these concerns.

35. I have listened to both parties and have made various directions aimed at getting the parenting arrangements in relation to the Husband back on track. I need not set them out here. The matter will come back before me again shortly. But I should like to emphasise that it is in the best interests of Z that both parents are involved in his upbringing. Both parents are responsible for making this happen.

36. It is important that both parties should focus on looking forward rather than back. In those circumstances I make no order as to costs.

Dated this 16th day of April, 2013 _____

Hellman J