Neutral Citation Number: [2021] CA (Bda) 11 Civ

Case No: Civ/2020/10

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL DIVORCE JURISDICTION
THE HON. MRS. JUSTICE STONEHAM
CASE NUMBER 2008: No. 221

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

2 June 2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

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Between:

MICHAEL WOODROFFE

Appellant

- and -

PAMELA WOODROFFE (NEE COLLINS)

Respondent

Mr. Cameron Hill of Westwater Hill & Co. for the Appellant

The Respondent appeared in person

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RULING ON COSTS

BELL JA:

Introduction

1. This is the Ruling of the full Court.

2. In relation to the above appeal, we delivered judgment on 12 April 2021, and in that judgment reduced the trial judge's net award of $185,456.35 (representing the arrears of maintenance the judge had found to be recoverable under section 36 of the Matrimonial Causes Act 1974, being $216,599.35, less a sum of $31,143 representing a deduction for maintenance for one of the children, who by then was living with the Husband) to an amount of $75,863.87. In relation to costs, we asked the parties to submit written submissions, which both sides did.

3. The judge's figure of $216,599.35 represented a complete acceptance of the figures which the Wife had claimed, even though, in relation to the largest item, representing reimbursement for the cost of an apartment which the Wife had rented in order for one of the children to attend the school of her choice, the Wife's original claim had been for 50% of the apartment expense, whereas during the course of the trial, the Wife's counsel had arbitrarily increased the claim to 100% of the expenses, for which, as we found, there was no legal justification whatsoever. The judge nevertheless accepted the sum claimed on the Wife's behalf.

4. There were many aspects of the judge's judgment of which we were critical. She had accepted the various figures put forward by the Wife without any assessment as to whether they were properly claimed (indeed, she said in terms that she did not propose to undertake that exercise), and in relation to the fundamental issue which she was asked to determine, whether special circumstances existed which justified arrears more than 12 months old being recovered, the judge had failed to apply the correct principles, or to undertake the requisite exercise in respect of the five or so different heads of claim, each of which needed to be examined to see whether special circumstances did indeed exist justifying allowing recovery of the arrears in question. We undertook that exercise in reaching the figure of $75,863.87 which we allowed the Wife to recover.

5. Before addressing the submissions of the parties, it is necessary to make three points. First, it is clearly the case that it was necessary for the Wife to take proceedings to enable her to effect recovery of at least some of the stale arrears. The Husband was seeking an order that the Wife should not be able to recover any of them. Secondly, although the Husband's attorneys did make a *Calderbank* offer (Without Prejudice save as to Costs), that offer was in a lesser amount than both the sum allowed by the judge, and that which we allowed on the appeal. It does not, therefore, factor in as a matter to be considered in making the appropriate costs order. And thirdly, the Husband did succeed in securing a substantial reduction (approximately 60%) in the amount which the Wife was able to recover by way of stale arrears. But in this regard it should be mentioned that the Husband only conceded one of the heads of claim in issue, that of the medical expenses in the sum of $7,474. And in relation to one further item, the cost of living adjustment, to be applied towards the children's maintenance, the

Husband conceded in his evidence at trial that the adjustment should have been made, but did nothing thereafter to correct the position and make payment of the adjusted amount of maintenance. That remained the position throughout the appellate proceedings.

The Parties' Submissions

6. The Wife's submissions were approached with reference to the expenditure she had actually incurred, both at first instance and for part of the appellate proceedings, before she found it necessary to represent herself because of the expense of continuing to be represented by counsel. The submissions for the Husband were based, primarily, on the principle that costs should follow the event, and that the Husband was, in practical terms, the successful party in the proceedings. There was, it was said, no issue on which the Wife's approach had been approved by the Court. Therefore, it was claimed that the Husband should have his costs in relation to both the first instance and appellate proceedings. Alternatively, it was submitted that as a family law matter, there should be no order as to costs.

Finding of the Court

7. Perhaps unsurprisingly, we do not find either approach particularly helpful. The reality is as we have set it out in paragraph 4 above. Without taking proceedings the Wife would have achieved no recovery whatsoever. It can therefore fairly be said that she succeeded, both at first instance and, arguably, on the appeal. On the other hand, the Wife's claim was overstated in almost every respect, particularly in relation to the apartment expense, and as said in the judgment, there was absolutely no justification for the Wife's claim to recover 100% of the apartment expenses, made for the first time during the course of the trial. And in relation to items such as the travel expenses for the children, there was no evidence that the Wife had ever previously sought recovery for those expenses, and hence no basis upon which it could be argued that special circumstances existed to justify their recovery. Mr Hill's submissions referred to the document produced by the Wife dated 9 January 2019, in which she claimed amounts ranging from $135,002 to $208,007. The figures in that document were hard to follow, but must be looked at in the same way as the *Calderbank* offer made by the Husband, referred to in paragraph 4 above. And looking at matters from the Husband's perspective, the judge awarded an inflated amount, at the urging of counsel for the Wife, which the Husband successfully challenged, at least to the extent of securing a 60% reduction in the amount of stale arrears the Wife was entitled to recover.

8. In these circumstances, we feel bound to make an award of the costs at first instance in favour of the Wife, but given the Wife's inflated claim, and the difficulty in achieving any negotiated settlement in consequence of the Wife's approach, we think that there should be a substantial reduction to the costs which the Wife would otherwise be entitled to. We would therefore award the Wife two thirds of her costs at first instance. In relation to the costs of the appeal, we recognise that Mr Hill was appealing against an award significantly higher than that which we made, and that many of the judge's findings could not be justified, either in relation to the amounts claimed, or in relation to the existence of special circumstances. On the other hand, the Husband continued to press for a substantially lower figure than

that awarded to the Wife, so it is perhaps misleading to look at the Husband's success only as measured against the reduction in the total of the arrears now recoverable by the Wife. The Husband was seeking a still further reduction which he failed to secure. In the circumstances we would award the Husband one half of the costs of the appeal.