The Court of Appeal for Bermuda

CIVIL APPEAL No 9 & 12 of 2014

Between:

F

Appellant

-v-

F

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: The Appellant in Person
Mrs Georgia Marshall, Marshall Diel & Myers Limited for the Respondent

Date of Hearing: 16 and 18 June 2015

Date of Judgment: 8 July 2015

JUDGMENT

Bell JA

Introduction

1. This is an appeal from a judgment of Wade-Miller J dated 12 March 2014, in which she dealt with applications on behalf of the Appellant, the petitioner in the original matrimonial proceedings, to whom I shall refer as "the Wife", and the Respondent, the respondent in those proceedings, to whom I shall refer as "the Husband". As appears from the heading of this judgment, the Wife appeared in person, both before the judge and on this appeal, and the

Husband was represented by counsel. There were originally two applications before the judge; on 7 March 2013 the Husband had made an application for lump sum provision, while on 18 March 2013 the Wife had made application for relief in a number of respects, although for the purposes of this appeal they can be divided between her application for lump sum provision and transfer of property, on the one hand, and maintenance for the children, on the other. In relation to this latter, the emphasis was primarily on the children's school fees, and the proportions in which these should be divided between the parties. The Wife had filed two affidavits, and the Husband one, and both parties gave oral evidence.

2. As appears from the judgment, the Wife is Bermudian, and the Husband is an American citizen. At the time of the judgment the Wife was said to be 41 and the Husband 40 years of age. The parties were married in July 1997, after they had cohabited for two years. They separated in December 2012; decree nisi was pronounced in February 2013 and was made absolute in April 2013. Accordingly, as the judge found, the marriage had lasted some 16 years. There are two children of the family, aged ten and seven. The Wife has care and control of the children and they reside with her in the former matrimonial home. They attend private school. Following the breakdown of the marriage the Husband left Bermuda, and now resides in New York.

The Judgment and Leave to Appeal

3. The judgment is dated 12 March 2014, following hearings which took place on 13 and 14 November, and 17 December 2013. So there was a delay of almost three months between closing submissions and judgment, a matter on which the Wife made complaint in her submissions. This complaint was justified – see the Guidelines for Judicial Conduct. On delivery of judgment, the Wife immediately made application for leave to appeal, and although her application referred merely to "ancillary relief", her application included a draft notice of appeal which contained some ten grounds, covering property adjustment, lump

sum provision and maintenance for the children. At various times subsequently the Wife filed a variety of documents purporting to set out her grounds of appeal in different ways.

4. When the application for leave to appeal came before the judge, she took the view that in respect of her order for ancillary relief, leave to appeal was not necessary, and refused leave on that ground. The formal order includes the judge's handwritten note that in respect of ancillary relief, "leave is not necessary". The judge also refused leave in respect of maintenance for the children, and in regard to this aspect of the case her note reads:-

> "The Wife may proceed to file her grounds of appeal to the Court of Appeal and to argue her grounds of appeal".

One would have expected, firstly, that the judge would have appreciated that leave to appeal is necessary in relation to an appeal from an order granting ancillary relief, which is always capable of amendment by subsequent application, and hence not final. In respect of child maintenance, where the judge refused leave, one would have expected her to indicate to the Wife as the prospective appellant that she could renew her application for leave directly to the Court of Appeal. Not surprisingly, the Wife did not make any subsequent application for leave in respect of ancillary relief or maintenance for the children. So no leave to appeal was granted by the lower court.

5. On 22 July 2014, the costs of the ancillary relief application were argued before the judge, and she made an order that the Wife should bear two thirds of the Husband's costs of the ancillary relief proceedings. It is to be noted that there were a variety of other proceedings going on at this time, which included the Husband's judgment summons, and an application by the Wife that the judge should recuse herself. That recusal application was refused on 25 August 2014, and on 16 September 2014 the judge refused the Wife leave to appeal her order of 22 July 2014 in respect of costs, and made an order that she should pay to the Husband the lump sum of $85,000 which was to be paid

pursuant to paragraph 1 of the formal order of 12 March 2014, drafted to reflect the terms of the judgment. There does not appear to have been a formal application for leave to appeal to the Court of Appeal against the costs order.

6. The position regarding leave to appeal was dealt with by this Court on 4 June, when the matter came before the Court on the Wife's application that the hearing then scheduled to commence on 16 June should be adjourned. That application was refused, and the Court granted leave to appeal so that all matters the subject of appeal could be dealt with during the session. Those matters included costs and recusal, which the Wife indicated at the commencement of her appeal remained open so far as she was concerned.

Amendment of the Judgment

7. The manner in which the judge altered her judgment after a draft had been sent to the parties was the subject of particular criticism from the Wife, and no doubt led in due course to the Wife's complaint that she had not been treated fairly, resulting in the recusal application. The judge's assistant had sent an email to the parties on 3 March 2014, enclosing a final draft of the judgment, indicating that it was not subject to correction or further argument, save for any typographical errors which might be identified. The email asked for any editorial corrections no later than "4:30 tomorrow Monday 10th March 2014 (sic)".

8. The form of judgment sent out with that email was dated 28 February 2014. Having given details of the parties, it proceeded to deal with the parties' income, their expenses, and the children's education expenses, before turning to the assets. Regarding the parties' assets (paragraphs 41 to 45), the judgment dealt firstly with "matrimonial assets". This section of the judgment carried on to deal with pensions, the Husband's assets, the Wife's inherited assets, and the matrimonial home and its contents, before setting out of the judge's decisions from paragraph 58 onwards.

9. On 3 March 2014 at 5:50 p.m., Mrs Marshall sent a two page email to the judge's assistant. In it, she set out details of the parties' liquid assets, referred to as jointly owned, in the same terms as these were set out in paragraph 41 of the draft judgment. Mrs Marshall then made the point that the parties owned the matrimonial home jointly, something which the judge had dealt with in paragraph 50 of the draft judgment, before finally referring to the Wife's inherited assets. These were put by Mrs Marshall at a figure of $381,443, whereas the judge had said in paragraph 48 of the draft judgment that this was the Husband's assessment of their value, but that she accepted the Wife's assessment of $352,819.

10. Mrs Marshall then referred to the effect of the *Mesher* order which the judge had made in relation to the matrimonial home - see paragraphs 61 to 66 of the draft judgment, before saying that she had seen no reference in the orders made by the judge to the liquid assets of the parties in the sum of $231,453. In fact, as appears in paragraph 41 of the judgment, this was the Husband's assessment of the assets, whereas the Wife maintained that the combined assets of the parties totalled $316,081, divided as to $95,055 to those in the name of the Husband, and $221,021 to those in the name of the Wife. The judge had referred (paragraph 43) to the Wife's submission that from the sum mentioned above, $241,074 was available for distribution, and commented that, with a difference of approximately $10,000 between the parties' calculations, the court did not propose to get into the minutiae of the arithmetical calculations, and accepted that the combined assets of the parties were just under $240,000, thereby broadly accepting the Wife's figure. Mrs Marshall continued that although just under $200,000 of these assets were in the Wife's name, there had been no dispute that these were the joint funds of the parties. She then asked whether it was the intention of the judge that the Wife should retain the entirety of the joint cash savings of the parties in her name, in the sum of $199,239, in addition to her inherited assets, to which the Husband had made no claim. She asked whether there had been a paragraph

that had been inadvertently left out of the judgment, dealing with these funds. Mrs Marshall then referred to the payment which was being made with reference to the equity in the matrimonial home, submitting that the Husband should be entitled to receive $120,000, of which he already had $32,214, so that on an equal division of the liquid assets, the Wife should pay to the Husband a lump sum of $87,786 by way of "equalization". Mrs Marshall finished by saying that to do otherwise would give the Wife a windfall of the entirety of the joint liquid assets and asked if the judge could review certain identified paragraphs in the Husband's submissions.

11. This email prompted an email from the Wife, pointing out the terms of the original email of 3 March (that the draft was subject to correction of typographical errors only), and asking for confirmation that Mrs Marshall's arguments would be disregarded. There was a response email to the Wife, which did not give the confirmation which the Wife sought, and simply indicated that both sides had until 10 March to respond with comments. In fact the Wife responded by pointing out two typographical errors.

12. On 12 March, the judge's assistant sent a further email to the parties, indicating that the judge viewed Mrs Marshall's response as a request for clarification, continuing that "plainly something had been left out", and that accordingly she had made changes, which included a new paragraph 46, in the following terms:-

> "Having regard to the parties' contribution to the matrimonial assets, and to the Court's goal of overall fairness, I hereby order that the Husband should be paid $85,000 out of the joint matrimonial assets held in the Wife's name, within 90 (ninety) days of the date of this judgment."

13. So the position is that the original draft judgment, sent out to the parties for correction of typographical errors only, was the subject of a material change whereby the Wife was ordered to make a payment to the Husband of $85,000,

something which the judge had not provided for in the judgment as originally drafted. It may be true for the judge to say that "something had been left out", but at the same time, this could not be characterised as a mechanical error. In the draft judgment sent to the parties, the judge had failed to provide for a set-off payment by the Wife to the Husband from the liquid assets, to reflect the fact that the Wife held in her name the substantial majority of assets which should properly be regarded as jointly owned. And when Mrs Marshall drew the omission to the judge's attention, the position was changed without the Wife being given any proper opportunity to address the point.

14. There is one other relatively minor change between the first draft of the judgment, sent to the parties on 28 February 2014, and the final version, and this is in paragraph 65 of the first version, paragraph 66 in the second, in relation to the payment which the judge ordered to be made by the Wife to the Husband of $106,000, representing a portion of the Husband's equity in the former matrimonial home – see paragraphs 30 and 31 below. In the first version, the judge stated that this was the Wife's proposal, and that the schedule of payments was not opposed by the Husband, and was adopted by the court. In the second version, this wording has disappeared, and the judge has added wording to indicate that the Wife "should have no difficulty paying this sum as it can be paid from the liquid assets in her sole name". It does not seem that either side had requested a change to this paragraph, but neither does it seem that anything turns on this. It is nevertheless curious that such a change should have been made without either party having requested it.

15. Given the significance of the change made by the new paragraph 46, and the extent to which the Wife felt aggrieved by it, it is as well to deal with this matter at the outset.

16. In argument, Mrs Marshall suggested that the change made by the judge was no more than an application of what is known to the legal profession as the

Slip Rule, and she referred the Court to authority to support her argument. The Slip Rule is contained in RSC 1985 Order 20 r 11, which is in the following terms:

> "Clerical mistakes in judgments or order or errors arising therein from any accidental slip or omission, may at any time be corrected by the Registrar."

17. In regard to this aspect of matters, the Court was referred to two cases. In the case of *Re L and B (children)* [2013] 2 All ER 294, the judge had given an oral judgment. The perfected judgment had been distributed some two months later, and in it the judge stated that she had reconsidered the matter, and reached a different view. The matter had been appealed to the Court of Appeal, which said that a judge was entitled to reverse his or her decision at any time before the order was drawn up and perfected, but emphasised that every case was going to depend upon its particular circumstances, and that the discretion might entail offering the parties the opportunity of addressing the judge on whether she should or should not change her decision.

18. In *Wellman v Wellman* [2013] Bda LR 63, Kawaley CJ addressed the position where what he described as "an obvious and elementary arithmetical error" had been identified. Kawaley CJ applied the Slip Rule, but it is of note that he did so with the parties before him, following the issue of a summons for clarification of the relevant paragraph.

19. I do not think that the change made by the judge in this case fits within the application of the Slip Rule, and in my view the judge fell into error in dealing with the matter without giving the parties (and particularly the Wife) an opportunity to be heard. It may well be that the judge's original intention had been to divide those liquid assets which represented joint matrimonial assets, but which were held in the sole name of the Wife, equally as between the Husband and the Wife. But that is not the point. Having realised her error, the

judge should have given the Wife an opportunity to be heard. In my view, much of the course of subsequent events flows back to this error on the judge's part. And the judge having made this error, it is open to this Court to substitute its finding for that made by the judge. But the appropriate order in relation to the division of the liquid assets is one which must be considered looking at the financial resources of the parties as a whole.

Overview

20. I confess that I have found it difficult to determine from the very considerable quantity of material filed on behalf of the Wife what her real complaints about the judgment are, the obvious point regarding its amendment apart. She filed any number of different grounds of appeal, as well as extensive submissions, but did not address all of the matters in argument. And it was apparent throughout the Wife's submissions, and particularly her written submissions, that she approached the issue of division of the matrimonial assets as if a precise mathematical calculation could be applied. Particularly where the parties' assets are limited, that is rarely possible. Nevertheless, I will do my best to identify the Wife's complaints, made with reference to the Notice of Appeal which was filed and dated 26 March 2014.

21. As I can best discern them, the Wife's complaints are as follows:

    (i) The obligation to pay $27,000 to the Husband from the liquid assets in her name, calculated with reference to her payment of legal fees and half the value of the motor car - see paragraph 58 of the judgment;

    (ii) The shares in which the parties should pay the children's private school fees, and the adjustment in the initial percentages, effective November 2014 - see paragraphs 60 and 61 of the judgment;

    (iii) The *Mesher* order in respect of the former matrimonial home - see paragraphs 62 and 63 of the judgment;

(iv) The order that the Husband should pay to the Wife 50% of his after tax LTI – see paragraphs 74 to 76 of the judgment.

(v) Maintenance for the children at $700 per month per child – see paragraph 77 of the judgment;

(vi) The Wife's obligation to be responsible for land tax, insurance and ordinary maintenance and upkeep of the former matrimonial home – see paragraph 79 of the judgment, and

(vii) The obligation on the part of the Wife to sign the relevant tax exemption form to enable the Husband to make the appropriate claim for tax relief – see paragraph 80 of the judgment.

22. Before turning to these separate grounds, I will deal with the judgment generally. The judgment sets out in appropriate detail the various factors to be taken into account in reaching her conclusions, and I will deal with the different topics in turn.

The Judgment – the Parties' Assets

23. I have referred in paragraphs 9 and 10 above to the liquid assets of the parties, and particularly to the judge's finding in paragraph 43 of the judgment that she accepted the Wife's submissions in relation to the total assets of the parties, which led the judge to the conclusion in paragraph 45 that the combined assets of the parties (and here the judge was clearly referring to the liquid assets) were just under $240,000, of which the Husband retained $32,214. It was with a view to remedying the advantage which the Wife had by virtue of holding the bulk of the liquid assets in accounts in her name that led the judge to order a payment of $85,000 to be made by the Wife to the Husband.

24. In paragraph 41 of her judgment, the judge listed the parties' matrimonial assets as they had been set out in the submissions made on behalf of the Husband. These showed accounts in the Wife's name totalling $199,239, and

in the Husband's name totalling $32,214, for a total of $231,453. The judge then pointed out that the Wife's comparable figures gave a total of $316,081, divided as to $95,055 in the Husband's name and $221,026 in the Wife's name. Although the judge did not refer to it, one of the reasons that the Wife's figures were significantly higher than those of the Husband was that the Wife had used figures as at the date of the decree absolute. The Wife indicated during the course of argument that she recognised that the court was concerned with the value of the assets as they were at the time of the hearing, and in fact the Wife's submissions had indicated that the "assets available due to combined usage" amounted to $241,074, and the judge had noted this figure. Given the relatively small difference of approximately $10,000, the judge had accepted that the combined assets of the parties were just under $240,000, very close to the Wife's figure, and indicated that she accepted that of this amount, the Husband retained $32,214. I see no reason to fault the judge's approach.

25. In her submissions before the judge, the Wife had proposed that these assets should be divided with a split in her favour of 65/35. There was no rationale given for a departure from a 50/50 split, which would be a fair division given that these assets represented the joint efforts of the parties during the course of the marriage. I take the position that a proper division should be on the basis of a 50/50 split, and that accordingly it is appropriate for there to be a payment by the Wife to the Husband of $85,000, the amount of the payment which the judge ordered to be made in the new paragraph 46. Accordingly, in the substitute exercise of this Court's discretion, I would in fact take the same approach as the judge took in the new paragraph 46.

The Parties' Other Assets and Income

26. Between paragraphs 47 and 50, the judge dealt with pensions, the Husband's relatively nominal shareholding in the company for which he worked, and the Wife's inherited assets. In relation to pensions, the judge found that these were

of comparable value and noted that each of the parties had agreed that they should retain their respective pension plans. However, the Wife had argued that the Husband's pension was worth some $62,421 more than that of the Wife, because the figures put forward for the Husband had neglected to add the value of his Bermuda pension. The disparity between the parties' pensions is relatively nominal when one considers the extent of the Wife's inherited assets, in respect of which the judge had accepted the Wife's assessment of their value at $352,819. The Husband had agreed that these should not be taken into account as part of the "matrimonial pot", although the judge had indicated that she regarded these assets as one of the financial resources that the Wife had for the foreseeable future.

27. There was one other matter in relation to the Husband's income, and this was the Husband's long-term incentive payment, or LTI, effectively a bonus payable over three years provided that the Husband remained employed with the company for which he worked. The judge dealt with this between paragraphs 23 and 28. She said firstly that she could not pro-rate what was variable and discretionary, but continued that she had factored in the relevant amount notwithstanding that it was entirely discretionary, and put the value of it at $2,600 per month, or $31,200 per year. This amount appears to be closer to the Husband's figures than it is to the Wife's, but it is not possible to determine the precise nature of the judge's calculation. Given the fact that the judge's figure is between the two proposals, I do not believe that objection can properly be taken to the manner in which the judge has dealt with this part of the Husband's income.

The Matrimonial Home

28. The judge dealt with the value of this property in paragraph 51 of her judgment. The parties had agreed a valuer who had appraised the value of the property at $850,000. There was an outstanding mortgage of $155,000, so that the equity on a gross basis would have been just under $700,000. Taking into

account the usual deductions which would operate on a sale, the judge held that the net equity in the property was $635,248. This is exactly the figure that was put forward on behalf of the Husband in counsel's written submissions, and appears to have been accepted by the Wife.

29. In those submissions, counsel for the Husband indicated that while there were sufficient funds for the Wife to buy out the Husband's interest in the home through the payment of a lump sum, which the submissions referred to as "doable", nevertheless it was indicated on behalf of the Husband that since this would effectively wipe out the Wife's liquid savings, and was likely to cause unnecessary stress, the Husband was not seeking an order for an immediate payment out of his 50% interest in the matrimonial home. The Husband therefore proposed a form of *Mesher* order in broadly the same terms as were accepted by the judge. The Wife's submissions were in relatively similar terms, the principal difference being in relation to remarriage as opposed to cohabitation, as a factor terminating the trust for sale created by the *Mesher* order.

30. However, counsel for the Husband went on to propose that a further lump sum equal to one third of the current net equity be paid by the Wife to the Husband. This was calculated to be $106,000, and the proposal made on behalf of the Husband was that $53,000 should be payable within 14 days of the order of the court, $26,500 payable within one year of the date of the order, and $26,500 payable within two years of the date of the order. The Wife's submissions again made very similar proposals, with slightly different levels and dates of payment. But the Wife clearly accepted the principle of such a payment. In any event, the judge set out in her judgment the proposals as put forward on behalf of the Husband, apart from the payment of interest on the unpaid tranches. Before this Court, there was no serious argument as to the principle of an early payment by the Wife to the Husband representing one

third of the Husband's interest in the equity in the home, and it does not feature in the grounds of appeal.

31. During the course of argument, I raised the issue of whether the payment of $106,000 should be made in addition to the payment of $85,000 which the judge had ordered to be paid by the Wife to the Husband in the new paragraph 46. When I asked that question of Mrs Marshall, I had not appreciated that the principle of the payment to the Husband of one third of his equity in the home was one which the Wife had embraced, and the Wife had made no argument before the judge to suggest that this payment was inappropriate. Neither did she before this Court.

32. In relation to the Wife's continued occupation of the home, there was one material difference between the Husband's proposal, and the order made by the judge. In paragraph 62(ii) of the judgment, the judge provided that the trust for sale should continue until "the remarriage of the wife". The Husband had proposed that the trust for sale should continue until "the cohabitation by the Wife in a marital type relationship or upon her remarriage". This latter wording may be regarded as the norm in *Mesher* style orders, but this was something to which the Wife clearly made objection (or at least that was her position before this Court), and in regard to this significant factor, the judge tailored her order to reflect the Wife's wishes. No point arises on this in the appeal, but it is a demonstration that the judge did not, as the Wife frequently suggested, for example in the recusal proceedings, simply adopt all of the proposals which had been made on behalf of the Husband, without further thought on her part. The true position is that the Husband did not secure everything he sought. The judge's acceptance of the Wife's estimate of the liquid assets is another such example, and there are others, as a reading of the judgment shows.

33. The other significant point of issue between the parties in regard to the Wife's occupation of the home related to the obligation imposed upon the Wife

(paragraph 79 of the judgment) to be responsible for land tax, insurance, maintenance and upkeep of the property. The Wife had sought to make the Husband responsible for one half of these. In fact, the requirement that the occupying party should be responsible for taxes, insurance and maintenance is relatively common. It reflects the fact that the Wife is enjoying all the amenities of the home by virtue of her occupation of it, while the Husband has no such enjoyment. The judge did make provision that if there were to be "extraordinary expenses", then the Wife had liberty to apply to the court in the event that the parties were not able to agree the position. I would not accept the Wife's submissions that these provisions of the *Mesher* order should be varied.

The Wife's Concessions

34. The submissions made on behalf of the Husband provided that the liquid assets (and the judge appears to have adopted the figures contained in the Husband's submissions, since these are quoted in identical terms in paragraph 41 of the judgment) were increased in the Husband's submissions to take account of payments which the Wife had made from the jointly held funds relating to matters such as legal fees, a new car, payments for air conditioning, and for orthodontic care. According to the calculations for the Husband, the Wife should then make a payment to the Husband of $103,012. Although the judge referred to the Wife's evidence in paragraph 58 of the judgment, citing the Wife's agreement to the Husband having the benefit of an equal sum to $18,000 (the Wife's payment of legal fees), plus one half of the value of the car she had bought ($9,000), nowhere in the judgment does the judge appear to have made an order providing for any offset to cover these items. And by virtue of the judge's order for the payment to be made by the Wife to the Husband of $85,000 (which compares to a figure of $87,786 in strictly arithmetical terms), the figure which appeared in the new paragraph 46 of the judgment, the judge appears to have rejected the notion of any further offset. Notwithstanding the fact that the judge had made no provision in her judgment that the Wife should make a compensatory payment to the Husband in respect of these amounts,

there was provision for payment of the amount of $27,000 in the formal order, prepared by counsel for the Husband and signed by the judge, purportedly to reflect the provisions of the judgment (paragraph 3).

35. The fact is that the order represents the perfected version of the judgment, and this was signed by the judge and reflected her finding in paragraph 58. Moreover, not only had the Wife conceded both positions in cross-examination, but in her second affidavit, the Wife had agreed that the value of the car should be included in the joint list of assets, effectively conceding the point which she later conceded in cross-examination. In her submissions, the Wife put the position as being that she was happy to purchase the Husband's share in the car for $9,000. So no issue remains in regard to that aspect of matters.

36. But in relation to the payment of legal fees in the sum of $18,000, the Wife maintained that the judge had erred in her calculation of the liquid assets, and had failed to appreciate that the Wife's figures took this payment into account. The Wife submitted that the judge had been wrong to accept the position taken by Mrs Marshall. But the fact remains that the Wife did concede in cross-examination that the Husband should have the benefit of an equal sum to the $18,000, as well as the $9,000 representing one half of the value of the car. In these circumstances it seems to me impossible to criticise the judge for the conclusion which she reached at paragraph 58 of the judgment, and this part of the Wife's appeal must fail.

The Children

37. In relation to both the children's education expenses, and their maintenance, the judge set out the respective incomes of both the Husband and the Wife. There were issues as to whether the Wife, who had worked on a full time basis until 2011, was capable of earning more. The judge noted that there was room for the Wife to increase her work hours so as to augment her earnings, without adversely affecting her care of the children. The judge indicated that such

increase was not quantifiable at that stage, but said that the Wife should be able to increase her earnings by September 2014. And although the judge then indicated that "however, the parties' contribution to the welfare of the children must reflect the parties' current income", she then continued to give figures which were to be adjusted as of November 2014. In respect of the children's private school fees, the judge ruled that the Husband should pay 60% and the Wife 40% of these, but that these percentages should be adjusted starting in November 2014, so that the Husband's share would reduce to 55% and the Wife's increase to 45% (paragraph 60 and 61 of the judgment). The revised percentages appear to have been based on the judge's finding in paragraph 29 that the parties' monthly income accorded with these percentages.

38. In respect of maintenance, the judge ordered that the Husband should pay ongoing maintenance for the children at the rate of $700 per month each. This was a figure only marginally above that proposed in the written submissions for the Husband, which had been proposed at $687 per month for each child. That proposal had been made on the basis that maintenance would be payable until the particular child reached the age of 18 or completed high school education, whichever came first. The judge's order was to run until otherwise altered by the court or by agreement.

39. The Wife's real complaint is in regard to the shares in which the parties were to be responsible for the expense of the children's school fees, which in effective terms was governed by the judge's findings as to the parties' incomes. The affidavits, and more particularly the Wife's submissions, went into very considerable detail on these matters. The judge similarly went into great detail as to the respective incomes of the parties – see paragraphs 8 to 30 of the judgment. She explained her conclusion at paragraph 29, where she set out her findings as to the respective incomes of the parties, which she then put in percentage terms, approximating to the figures of 45% and 55% which are at the end of that paragraph.

40. The problem from the Wife's perspective in relation to this aspect of matters is that the general principle in relation to appeals which concern the exercise of the judge's discretion is that the Court of Appeal will not (indeed cannot properly) interfere with the decision of the judge exercising his or her discretion unless it can be shown that the judge exercised that discretion upon wrong principles or upon a wrong view of the facts. So it is said that the mere fact that the judge reached a different conclusion than an appellate court might have done if it had dealt with the matter at first instance does not warrant interference with the judge's order. In relation to an exercise of the judge's discretion, it must be shown that the conclusion reached by the judge was "outside the generous ambit within which a reasonable disagreement is possible". As mentioned in paragraph 20, the Wife, perhaps understandably as a litigant in person, appears to have approached these matters as if a precise mathematical calculation could be applied, when this is not the case.

41. In the event, while it is the case that the judge seems to have accepted the numbers proposed for the Husband, it cannot be said that she fell into error in doing so, and accordingly this ground must fail, and the percentages set by the judge in relation to the parties' obligations for school fees must stand, with the adjustment in terms of timing set by the judge.

42. In relation to maintenance, the Husband had offered (at least in open terms) $687 per child per month, and the judge ordered $700 per month for each child. The Wife's complaint in relation to the judge's finding appears to amount to no more than that the judge accepted, in broad terms, the figures proposed by Mrs Marshall. Again, as said elsewhere, the judge did not accept everything proposed by Mrs Marshall, and there are no grounds made out for substituting any other figure. Indeed, the Wife does not suggest one as such, although she did give detail of the total expenses for the children, which she put at $3,433 per month. The problem again is that this figure necessarily contains estimates of the division of expenses, and of course one is only looking here at what the

Husband's contribution should be. I would not vary the figure given by the judge.

Summary re Grounds of Appeal

43. Accordingly, referring to the various findings above, the position in regard to the Wife's grounds of appeal is as follows:

    (i) The ground relating to the $27,000 ordered to be paid by the Wife in respect of the car and legal fees fails.

    (ii) The ground relating to the shares which the parties must pay for the children's school fees fails.

    (iii) The appeal against the liability for taxes, insurance and maintenance in the *Mesher* order fails.

    (iv) The value of the Husband's LTI stands as found by the judge.

    (v) The level of maintenance for the children is not to be varied.

    The remaining ground was not argued and does not require comment.

Recusal

44. As indicated in paragraph 5 above, there were a variety of applications made subsequent to the delivery of judgment. These included a judgment summons, and the issue of costs, but on 18 June 2014, when the matter of costs was still pending before the judge, the Wife made application that the judge should "recuse herself from hearing any further matters involving me before the Supreme Court". The application was refused by the judge on 19 June 2014, with costs, and reasons to be delivered, with the provision that the costs hearing itself would proceed on 22 July.

45. The request that the judge should recuse herself began with a letter dated 27 May 2014 written by the Wife directly to the judge, copied to various other persons including the Chief Justice. The Wife indicated at the outset that she made this request because the judge had failed to execute her duties with the

disinterest and duty of care that could reasonably be expected of her. Among the matters on which the Wife relied were:

(i) The number of significant factual errors made by the judge.

(ii) The judge's handling of an issue regarding access, where the Wife said the judge had refused to read email evidence which was offered to her.

(iii) The fact that the judge cited no statute or case law to substantiate her conclusions, the Wife noting that other cases decided by the judge which appeared on the Bermuda Judiciary website did cite the Matrimonial Causes Act or the relevant case law. The Wife asked why the judge had considered it unnecessary to compile a reasoned judgment with respect to her case.

(iv) The alterations made to the original draft judgment.

(v) An apparent unwillingness on the part of the judge to discuss the errors with the Wife at a hearing which took place on 8 April 2014.

The Wife closed that letter by referring to two English authorities on the question of recusal.

46. Upon issuing the summons, the Wife filed an affidavit which I have not been able to find in the record (it was not in the binder the Court was given regarding the recusal application), but which appears to have set out those matters which the Wife had raised in her letter to the judge. The judge's reasoned ruling on recusal was dated 25 August 2014, and set out the matters of which the Wife complained, on which she had been cross-examined by Mrs Marshall. In that cross-examination, the Wife maintained that this was a case of bias or perceived bias, since the judge had taken up the viewpoint presented on behalf of the Husband when the evidence presented was contradictory.

47. The reasoned decision of the judge set out extensive extracts from the cross-examination. In relation to the factual errors, which the Wife said had led to bias on the part of the judge, the Wife conceded that if her arguments as to factual errors were accepted by the Court of Appeal, then she would be successful, and if not then she would not be successful.

48. The judge dealt with the issue of recusal fully. She referred to the relevant law and concluded in paragraph 43 in these terms:

> "Given the details of this case and the material presented, a fair-minded informed observer would not believe that the Judge was biased. It has not been suggested that the Judge has any personal or pecuniary interest in the outcome of the case. The observer would also be aware that any decision the Judge makes is not final: the final decision does not rest with the Judge, but with the Court of Appeal."

The judge consequently concluded that the Wife had failed to establish the alleged bias and dismissed the recusal application.

49. I have reviewed the various notes of trial, and the judge's ruling. I do believe that the root cause of the Wife's complaint of bias in fact goes back to the amendment of the judgment, referred to in paragraphs 7 to 14 above, and the Wife's view that the judge had simply accepted the submissions of counsel for the Husband improperly. But there is an important distinction to be made between an error on the part of the judge which, as the Wife recognised, is always capable of correction by an appellate court, and bias. In arguing her appeal, the Wife indicated that she persisted with her appeal against the judge's refusal to recuse herself, since there might be further applications to be made in the future and she did not wish those applications to be heard before Wade-Miller J.

50. I do not accept that there is any evidence of bias or apparent bias, and the judge was right not to recuse herself. Accordingly, I would dismiss the Wife's

appeal against the judge's order of 25 August 2014, in which the judge dismissed the recusal application with costs to the Husband. That order and the order for costs of the recusal application in the court below therefore stand.

51. That said, the Wife's concern at appearing before this same judge in the future should the need arise is understandable. I would therefore direct that any future applications in matrimonial proceedings between the Husband and the Wife should be heard by a judge other than Wade-Miller J.

Costs

52. The judge dealt with the issue of costs on 22 July 2014, and made an order that the Wife should pay two thirds of the Husband's costs of the ancillary relief proceedings and the costs application. In her submissions, the Wife suggested that it was surprising that the judge would have a hearing on costs at all, with an experienced professional on one side and a litigant in person on the other, also saying that the judge's acceptance of the position put forward by Mrs Marshall meant that it was reasonable to consider the result of any hearing on costs to be a forgone conclusion in favour of the Husband.

53. However, the application having been made that the Husband should be awarded his costs, the judge had no alternative but to hold the hearing, as she did. At the hearing before the judge, Mrs Marshall went through the extensive *Calderbank* correspondence between the parties, and she did the same before this Court. The starting point is that both parties are under an obligation to engage in genuine negotiation, failing which one party might be penalised in costs. Mrs Marshall referred to the judgment of Singer J in *A v A* [1996] 1 FCR, and emphasised two principles laid down by the judge in that case:

> "A spouse who does not respond constructively to a *Calderbank* offer, whether a good offer as in this case or only one that is bad or indifferent, stymies whatever chance there is of settlement", and

> "While one can never say that this or any other case would have settled if the *Calderbank* door had been kept open by timely and reasonable reply, the critical point is that to slam the door through inactivity, lack of objectivity, indecision or for whatever other reason makes potentially avoidable litigation inevitable."

54. I have reviewed the *Calderbank* correspondence in detail; this took place over a period of approximately one year, beginning with a letter from the Husband's attorneys on 21 November 2012. This was followed by some communication directly between the parties, and this led to an interim maintenance proposal made by the Husband's attorneys on 23 January 2013. Neither the Wife nor the attorneys acting for her at that time responded, and in a letter dated 8 March 2013, the Husband's attorneys referred to the fact that the Wife had indicated that she did not wish to engage a lawyer to respond to correspondence, as she did not wish to incur the associated fees. There was further correspondence, and in particular a letter of 12 June 2013 put forward on the Husband's behalf dealing comprehensively with the various matters in issue. This did elicit a response, on 27 June 2013. However, that response was withdrawn within a matter of days, and at that point the litigation process continued, in particular with regard to the usual documentary requests. On 10 October 2013, the Husband's attorneys asked the Wife if she would be responding to the offer which had been made on 12 June 2013, and on 14 October 2013, the Wife gave her response. In relation to liquid assets, she proposed a 50/50 split (which incidentally validates the division made by the judge in the contentious new paragraph 46, and the view taken in this Court). In relation to the matrimonial home, the Husband's attorneys had proposed that the Wife buy out the Husband with a lump sum payment of $447,975; the Wife's response was to suggest a payment of $250,000, due in June 2024, with a payment of $70,000 to be made by instalments over the next three years, for a total of $320,000. With reference to maintenance for the children, and

particularly the education expenses, the Wife was seeking a division of 65/35 as between the Husband and Wife.

55. That letter prompted a response dated 29 October 2013 in which the attorneys for the Husband indicated that he was prepared to delay the payment of the lump sum, which was then put at $316,000, of which $50,000 would be payable within 30 days of any consent order and the balance of $266,000 payable in instalments which were to be secured, and which also included *Mesher* style provisions. In respect of general maintenance for the children, the Husband offered an amount of $1,600 per month, an amount greater than that ordered in the judgment.

56. The Wife's response made various counter-proposals in respect of the matrimonial home, and this led to further offers on the part of the Husband. In respect of the lump sum that he was to receive for his interest in the matrimonial home, the proposal contemplated payments of $110,000 over the first three years, with the balance of $206,000 payable in June 2024, together with other *Mesher* style provisions. In relation to school fees, the Husband agreed to be responsible for 65% of these, and his offer of general maintenance for the children was slightly increased.

57. The Wife's response came on 9 October 2013 and did constitute a detailed response. The payment of $106,000 appeared for the first time, and this response went into the figures in considerable detail. However, on 8 November 2013, less than a week before the hearing was due to commence, the Wife again made comprehensive proposals, and these in turn were met by a response dated 12 November 2013, which was rejected by a response made on the day scheduled for the start of the hearing. On many of the matters then in issue between the parties, the Husband's proposals went as far or further than the orders ultimately made by the judge, for example in the level of maintenance for the children. But that was not the case in all repects; one of

the contentious issues between the parties was whether the *Mesher* order should determine on cohabitation, as opposed to remarriage, an issue on which the judge sided with the Wife. On the payment of the sum of $106,000, which the Wife had accepted in principle, the Husband had sought interest on the second and third tranches, something which the judge did not order; she provided for interest at the statutory rate in the event of late payment, but not otherwise.

58. So the position was that the Husband did not succeed on all of the matters which were in issue between the parties, and neither can it be said that the Wife failed to respond constructively to the negotiation process; broadly speaking, she responded comprehensively, though not always on a timely basis. But it cannot be said that the Wife "slammed the door" through inactivity or for any other reason. It must be borne in mind that the Wife was acting in person, simply because she took the view that she could not afford the cost of legal representation. The Husband was represented by experienced counsel. The Wife was clearly doing her best to negotiate, although it has to be conceded that in some instances her position might be regarded as intransigent, and as previously mentioned, there was a time when she insisted on calculating the assets at the time of the divorce proceedings, rather than at the time of the hearing. It appears from the notes of the recusal hearing that the Wife was taking advice from attorneys at the Legal Advice Centre, and it does not appear that her interests were always well served by all of that advice.

59. While one must recognise that the judge has a very wide discretion, particularly on costs, it simply does not seem right to me that the Wife should be penalised by an order obliging her to pay two thirds of the Husband's costs, in circumstances where it cannot be said that the Husband succeeded beyond the level of his proposals during the course of negotiation. Indeed, the judge accepted the Wife's position over the Husband's on a number of occasions – see, for instance paragraphs 39, 49 and 55 of the judgment, as well as the

position regarding remarriage in the *Mesher* order, and no order for interest on the delayed tranches of the $106,000.

60. Mrs Marshall indicated that the Husband's actual costs were over $100,000. The Wife herself had incurred costs approaching half that amount before she resolved to represent herself.

61. Notwithstanding the reluctance of this Court ordinarily to vary the judge's order on costs, in my judgment the appropriate order in this case would be to set aside the judge's order of 22 July 2014 and to make no order as to costs, either in respect of the ancillary relief proceedings, or the costs application itself .

Costs of this Appeal

62. Subject to any written submissions from the parties within 21 days, I would make no order as to the costs of this appeal.

Signed

Bell, JA

I agree *Signed*

Baker, P

I agree *Signed*

Bernard, JA