



The Court of Appeal for Bermuda

CIVIL APPEAL NO 10 of 2015

Between:

JENNIFER LINDSEY CALKO

Appellant

-v-

BILL CALKO

Respondent

**Before: Baker, P.
Bell, J.A.
Bernard, J.A.**

Appearances: Mr. David Kessaram, Cox Hallett Wilkinson Limited for the Appellant
Mrs. Georgia Marshall, Marshall Diel & Myers, for the Respondent

Date of Hearing: 5 November 2015

Date of Reasons for Judgment: 20 November 2015

REASONS FOR JUDGMENT

Bell, J.A.

Reasons for Judgment

1. This matter came before the Court on the morning of the 5th November, when Mr Kessaram, appearing for the Intended Appellant (“the Wife”) made application for leave to appeal a ruling which had been made by Wade-Miller J on the 6th May 2015. At the close of submissions, we indicated that we refused

the application for leave to appeal, and indicated that we would give the reasons for such refusal in writing. This we now do.

2. The ruling by Wade-Miller J followed the issue of a summons by Mrs Marshall, for the Intended Respondent (“the Husband”), seeking a determination as to the proportion of time expended between certain ancillary relief proceedings between the parties, and civil proceedings between the same parties relating to a business operated by the Husband. The two sets of proceedings had been heard together by the judge, in July, August and October of 2014, after the civil proceedings had been adjourned to be dealt with on the date fixed for the hearing of the ancillary relief proceedings, by the terms of a consent order dated 15th August 2011. The judge had apportioned for the purpose of taxations of costs before the Registrar the time spent in relation to the civil proceedings, and that spent in relation to the ancillary relief proceedings, and having heard counsel, chose to make an apportionment to the effect that one third of the time spent on preparation and trial arose from the civil proceedings, and two thirds from the ancillary relief proceedings.
3. The judge had dealt with the various matters in a judgment dated 26th April 2013, and in the course of that judgment, she had dismissed the civil proceedings, and an application which had been made under the provisions of section 41 of the Matrimonial Causes Act 1974. Following the judge’s ruling on ancillary relief, there had then been a lengthy costs hearing, in which the judge had given the Wife her costs of the ancillary relief proceedings, and the Husband his costs in relation to the civil proceedings. Neither the judgment on ancillary relief nor the judgment on the costs orders was the subject of appeal.
4. When counsel attended for taxation, there had been discussion between counsel which led to a request being made to the Registrar for the taxation to be adjourned so that the summons described in paragraph 2 could be issued, requesting the judge to apportion the time spent between the civil proceedings

and that spent on the ancillary relief proceedings. It was pointed out to us that the summons itself referred to “the time expended at trial”, whereas the judge’s order was wider, insofar as it clearly dealt with preparation for trial, but no point turns on that for the purpose of these proceedings.

5. By the time the matter came back before the judge, Mr Kessaram had had second thoughts about the efficacy of that course, and submitted at the outset that the judge should decline to rule on the summons, on the basis that she was *functus officio*. The judge declined to follow that course and proceeded to hear counsel and make her ruling.
6. In the course of his submissions before us, Mr Kessaram accepted that if the judge had apportioned the time between the two sets of proceedings at the time that she was first being asked to deal with the issue of costs, he could not complain. He also accepted that there were circumstances where the parties can properly go back to the judge for clarification of the judgment, but submitted that that was not this case. He submitted that this was not a “Slip Rule” case (with which we agree) and sought to distinguish the cases upon which Mrs Marshall had relied.
7. The first point made by Mrs Marshall was that the judge was uniquely well placed to make the determination sought, having dealt with the issues at trial. She relied upon a passage from the judgment of Lord Phillips MR in the case of *English -v- Emery Reimbold & Strick* [2002] EWCA Civ 605, in which Lord Phillips stated:


“An order which allows or disallows costs of certain issues creates difficulties at the stage of the assessment of costs because the costs judge will have to master the issue in detail to understand what costs were properly incurred in dealing with it and then analyse the work done by the receiving party’s legal advisors to determine whether or not it

was attributable to the issue the costs of which had been disallowed.”

8. Not surprisingly, the authorities relied upon by Mrs Marshall turn upon their own particular facts, and were not in the same terms as in the case before us. They do, however, set out in general terms the circumstances upon which it is appropriate for a matter to go back in to the judge who had made the original ruling, with a view to clarifying the position in some way.
9. We think that on this occasion it was eminently sensible for the determination as to the appropriate apportionment of costs between the civil proceedings and the ancillary relief proceedings to be made by the judge who had had conduct of those proceedings. Indeed, we venture to say that if Mr Kessaram’s arguments had been successful in front of the judge (to the effect that no costs following the consent order of 15th August 2011 could properly be taxed) then the matter would have gone no further.
10. As a matter of general principle, this Court is reluctant to grant leave to appeal in respect of costs matters, and while recognising that there was potentially a jurisdictional issue to be determined, we take the view that this is not an appropriate case for which leave to appeal should be granted, and for the reasons set out above, we refused the application for leave to appeal, with costs to the Husband.



Bell, JA

 *I Agree* Baker, P.*I Agree*

Bernard, JA