



# In The Supreme Court of Bermuda

## DIVORCE JURISDICTION

2013 No: 135

**BETWEEN:-**

**T**

**Petitioner**

**-and-**

**T**

**Respondent**

### **RULING**

**(In Chambers)**

Date of Hearing: 16<sup>th</sup> April 2014

Date of Ruling: 17<sup>th</sup> April 2014

Ms Georgia Marshall, Marshall Diel & Myers Limited, for the Petitioner

Mr Ray De Silva, Moniz & George, for the Respondent

### **Introduction**

1. This is an appeal by the Respondent/Husband (“H”) against an order for maintenance pending suit made by the Registrar on 7<sup>th</sup> January 2014. She ordered that H make interim periodical payments to the Petitioner/Wife (“W”) in the sum of \$9,000 per month.

2. The appeal is governed by Order 58 of the Rules of the Supreme Court 1985 (“RSC”), which deals with appeals from the Registrar, and which is applied by reason of Rule 3 of the Matrimonial Causes Rules 1974. The appeal is by way of rehearing. See the ruling of Ground CJ in T v T [2007] Bda LR 7 at para 3.

3. Jurisdiction to make an order for maintenance pending suit is conferred by section 26 of the Matrimonial Causes Act 1974 (“the MCA”). This provides:

*“On a petition for divorce ... the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term ... as the court thinks reasonable.”*

4. Section 26 of the MCA is in the same terms as section 22 of the Matrimonial Causes Act 1973 in England and Wales. The Bermuda courts have previously drawn on the case law from that jurisdiction when construing section 26. See T v T at para 4 and the judgment of Kawaley J (as he then was) in F v F (Maintenance Pending Suit) [2011] Bda LR 43 at paras 6 and 8.

5. A helpful summary of the relevant principles, cited in the Eighth Edition of Jackson’s Matrimonial Finance and Taxation<sup>1</sup>, was given by Nicholas Mostyn QC (as he then was), sitting as a Deputy High Court Judge, in TL v ML [2005] EWHC 2860 (Fam), [2006] 1 FCR 465.

*“[123] The leading cases as to the principles to be applied on an application for maintenance pending suit are F v F (ancillary relief: substantial assets) [1996] 2 FCR 397, [1995] 2 FLR 45, G v G (maintenance pending suit; legal costs) [2002] EWHC 306 (Fam), [2002] 3 FCR 339, [2003] 2 FLR 71 and M v M (maintenance pending suit) [2002] EWHC 317 (Fam), [2002] FLR 123.*

*[124] From these cases I derive the following principles.*

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<sup>1</sup> 2008. There is a Ninth Edition (2012), but it was not available at court.

(i) *The sole criterion to be applied in determining the application is ‘reasonableness’ (s 22 of the Matrimonial Causes Act 1973), which, to my mind, is synonymous with ‘fairness’.*

(ii) *A very important factor in determining fairness is the marital standard of living (F v F). This is not to say that the exercise is merely to replicate that standard (M v M).*

.....

(iv) *Where the affidavit ... is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (G v G, M v M). In such a situation the court should err in favour of the payee.”*

6. An issue in the present case is whether the court should make provision in any periodical payment for a contribution towards W’s ongoing legal costs. The question was considered by Kawaley J in F v F at paras 9 – 10. He cited with approval paras 17 – 20 of the judgment of Wilson LJ (as he then was) in Currey v Currey [2006] EWCA Civ 1338; [2007] 2 Costs LR 227. Wilson LJ summarised the position at para 20:

*“In my view the initial, overarching enquiry is into whether the applicant for a costs allowance can demonstrate that she cannot reasonably procure legal advice and representation by any other means. Thus, to the extent that she has assets, the applicant has to demonstrate that they cannot reasonably be deployed, whether directly or as the means of raising a loan, in funding legal services. Furthermore, ... she has also to demonstrate that she cannot reasonably procure legal services by the offer of a charge upon ultimate capital recovery.”* [Emphasis in original.]

7. In so ruling, Wilson LJ rejected the proposition that the wife need show exceptional circumstances. Ms Marshall, who appeared for W, referred me to C v C (Maintenance Pending Suit: Legal Costs) [2006] 2 FLR 1207, Fam D, in which the now discredited “*exceptional circumstances*” test was applied. Hedley J found at para 14 that the exceptional circumstances which justified him adding a costs component to maintenance pending suit included the facts that the vast bulk of the assets were under the control of one party and there was a need for an investigation of them. I accept that those facts might be relevant in considering whether it was reasonable for a wife to procure legal advice and representation from her own resources.

8. As to the facts of the present case, H is a businessman who runs a cleaning company. W was throughout the marriage a homemaker. The couple lived an affluent lifestyle. I accept Ms Marshall's submissions that on the face of it that lifestyle did not come to an end until after W served a petition for divorce on 30<sup>th</sup> September 2013.
9. W's estimated monthly expenditure is \$6,464. (I have deducted the monthly expense of keeping a dog from the figure supplied by W as the dog has sadly been put down.) This figure does not include rent as W used the capital from her share of the sale of the matrimonial home (see below) to pay her annual rent of \$36,000 (expiring on 30<sup>th</sup> September 2014) and her outstanding legal fees. I accept that in the context of the marital standard of living these expenses are reasonable. W also seeks \$5,000 per month towards her ongoing legal fees. I accept that this amount, too, is reasonable.
10. The matrimonial home was sold for \$2.25 million. Of this, \$286,000 was applied to repay a revolving credit facility which H's cleaning company had obtained from its bank. Of that facility, roughly \$200,000 went to help with the cashflow of the business and \$86,000 to pay the mortgage for the matrimonial home.
11. W received half the remaining net proceeds of sale, which came to \$319,971.07. After payment of rent and legal fees she now has only around \$244,000 left.
12. H received the other half of the net proceeds of sale, but less \$19,064.75 which went to pay the management fees of the trust which had held the property on the couple's behalf and \$2,500 in extra conveyancing fees. Thus H only received \$298,406.32.
13. H complains that it was not reasonable for the Registrar to order interim maintenance against him given his historic reliance on borrowing against capital (the credit facility, and a previous facility which H or his company obtained in 2011) and his continuing reliance on capital distribution (the proceeds of sale of the matrimonial home).

14. In a nutshell, H submits that he has only two sources of liquid assets, namely the proceeds of sale of the matrimonial home and the income from his business. Since the onset of the recession in 2010/11, he states, the business income has declined very substantially. It is now insufficient, he submits, to meet his own or W's ongoing expenditure.
15. To substantiate this, H has exhibited accounts for the business for 2007, 2010, 2012 and 2013. The net profit for these years was \$412,174.54 in June 2006 through May 2007 and \$356,150.75 in June 2009 through May 2010, falling to \$30,955.28 in June 2011 through May 2012 and \$61,323.21 in June 2012 through May 2013. The accounts were prepared by H, who is qualified as an accountant.
16. H has also exhibited his personal bank and credit card statements and the company's bank statements for the last 3 years. However he has not supplied a schedule showing his own or the company's income on a monthly basis. Indeed, when I asked Mr De Silva, who appeared for H, what his client's income was, Mr De Silva was unable to assist, other than to say that H's sole source of income was the company, and that H measured his income in terms of his expenditure. Ie his income was whatever company monies he spent on himself or his family.
17. Mr De Silva also referred me to two personal financial statements made by H when applying for business credit facilities with two different banks. In the first statement, dated 10<sup>th</sup> May 2011, H states that his salary is \$150,000 and his dividend income, presumably from the company, is \$400,000. In his second statement, dated 6<sup>th</sup> February 2012 (ie 9 months later), H states that his total monthly income consists of a salary of \$25,000. This would give an annual income of \$300,000.
18. I am unable to relate these figures to the accounts which H has produced. Although the profit and loss account for June 2006 through May 2007 shows executive salaries of \$72,000, the subsequent accounts do not show any executive salaries. Indeed the profit and loss account for June 2011 through May 2012 shows an entry for executive salaries of \$0.00. By that time the company was on the face of its accounts not generating

sufficient net profit to account for such a salary. H has not seen fit to explain these apparent discrepancies.

19. There is therefore force in Ms Marshall's submission that H has failed to provide a full, frank and clear account of his income. She referred me to a judgment of this Court in H's previous divorce proceedings in which the learned judge found that H had given a deliberately confusing account of his finances, manipulated his business accounts, and been less than frank in many respects. I am not in a position to make any such findings and for present purposes I place limited weight on H's past shortcomings. I am nevertheless prepared to adopt a robust approach to H's ability to meet W's reasonable living expenses.
20. H has filed an affidavit setting out his monthly expenditure. Like W, he has paid his rent until 30<sup>th</sup> September 2014 from the net proceeds of sale of the matrimonial home. The rental amount was \$3,000 per month. He has also used the net proceeds from the sale of the matrimonial home to pay the annual mortgage on the couple's property in Canada. For the present, therefore, neither the rent nor the mortgage is an ongoing monthly expense. Thus adjusted, his monthly expenditure is \$10,733. This includes \$3,539 spent on maintaining the Canadian property, of which he has the use and enjoyment, and \$2,500 on his son's (by a previous marriage) university and living expenses. I accept that in the context of the marital standard of living these expenses are reasonable.
21. On H's own figures, however, after his monthly expenditure of \$10,733 is deducted from his monthly income of \$25,000, he is left with a surplus of \$14,267. I note that H has not included in his expenditure any provision for legal fees, which I anticipate would be similar to W's legal fees. I nonetheless conclude that H can afford to meet from income the figure of \$9,000 assessed by the Registrar.
22. That figure included a contribution by H towards W's ongoing legal expenses. The question is whether and to what extent it is reasonable that W should use the net proceeds of sale of the matrimonial home to pay her lawyers.

23. Ms Marshall submits as follows. It may prove difficult and time consuming for W to realise her interest in the parties' other main capital asset, the Canadian property. W ought not therefore to be required to deplete the one capital asset that is presently in her possession and control.
24. As in C v C, Ms Marshall further submits, the vast bulk of the assets – not just the Canadian property, but the business and various other items – are under the control of one party and, in the case of the business at least, there is a need for an investigation of them.
25. As against this, Mr De Silva submits that as W has the cash in hand to pay what are, after all, her legal fees, it is reasonable that she should do so.
26. There is force in both submissions. In the circumstances, I propose to leave the Registrar's order as it stands. For the present at least H will have to make a contribution to W's legal fees, but not pay them in their entirety.
27. Ms Marshall invited me to vary the order to provide for an additional payment of \$3,000 per month with effect from 1<sup>st</sup> October 2014 when W's rent will once more become due.
28. That is an application that must be made nearer the time. H will also need to pay rent with effect from 1<sup>st</sup> October 2014 and at some stage the mortgage on the Canadian property will require further repayments. Such application may prompt H to provide a more detailed explanation of his income than he has hitherto chosen to do.
29. Unless either party applies within 21 days to be heard on the question, H shall pay W's costs of and incidental to this appeal, to be taxed if not agreed.

Dated this 17<sup>th</sup> day of April, 2014

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Hellman J