In The Supreme Court of Bermuda

DIVORCE JURISDICTION

2011 No. 22

BETWEEN:

JC

Petitioner

-and-

BC

Respondent

Dates of Hearing: 25 July 2013, 30 July 2013 and 28 October 2013

Date Judgement Circulated: 9 May 2014

Cox Hallett Wilkinson – David Kessaram for the Petitioner

Marshall Diel & Myers – Georgia Marshall for the Respondent

1. This is an application for costs. The petitioner (JC) and the respondent (BC) are now divorced but for convenience they are referred to in this judgement as the wife and the husband respectively.

2. The petitioner (the wife, JC) and the respondent (the husband, BC) were married on 4 February 2006. They were married after a period of cohabitation. They have one child who was born in November 2007. The wife filed her petition for dissolution of the marriage in February 2011. A divorce *decree nisi* was made absolute in June 2011.

3. The matrimonial assets consist of two items:
   i. the property known as "A" which stood in the wife's sole name and was depreciating because of market conditions
   ii. the business known as "R" which was in the possession and control of the husband and which was of disputed value.

4. The wife and the husband both filed applications for ancillary financial relief. The husband filed his application on 11 May 2011 seeking a lump sum provision. The wife filed her application on 19 May 2011.

   According to the submission from counsel for the husband, the wife sought *inter alia*: maintenance pending suit, periodical payments for herself and for the child of the marriage, transfer of property, avoidance of the disposition order in respect of the business, and a lump sum provision.

   The wife also sought by a writ of summons dated 3 May 2011:

   > *"damages for fraudulent conversion relating to [the business], a mandatory injunction for the transfer of assets and undertakings to the wife of the shares in [the business], an account of profits; dividends or other payments; an order for payment of all amounts found due on the taking of the account; interest and costs." (Submission from counsel for the husband, Mrs Marshall, para 9)*

5. Counsel for the wife, Mr Kessaram, submitted that the wife should receive all her legal costs and expenses from 11 May 2011 i.e. approximately 28 days from the date of her offer made on 11 April 2011 on the indemnity basis.

   Alternatively, the wife should be awarded her costs from 11 May 2011 on the standard basis, with the costs of the trial to be awarded to her on the indemnity basis to be taxed if the amount put forward was not agreed.

6. Counsel for the husband, Mrs Marshall, submitted that the husband is entitled to his costs in the civil proceedings commenced by the wife on 3 May 2011, and also to those costs

associated with the S41 MCA application as the wife did not make an offer of settlement that the husband could have accepted.

The wife's case

7. In support of the wife's contention, Mr Kessaram submitted that there were two matrimonial assets: (i) the property known as "A" and (ii) the family business "R".

8. The wife always maintained that she should receive half of the net proceeds of sale of property "A" and half of the value of the business receipts, tools, stock and cash balances (the hard assets) and its goodwill (its soft assets).

9. After dissolution of the marriage there were several Calderbank offers. Mr Kessaram submitted that in Bermuda *Gojkovic v Gojkovic* (No. 2) (1991) 2 FLR 233 is the governing authority on costs in ancillary relief matters. He argued that it would be wrong for the Court to approach the question of costs on the basis that the starting point is no orders as to costs (citing Araujo v Araujo [2008] Bda LR 1138).

   Mr Kessaram continued:

   > *"The starting point in Bermuda where a Calderbank offer or an open offer has been made is as follows: if the applicant receives no more or less than the offer made, he/she is at risk not only of not being awarded costs but also of paying the costs of the other party after communication of the offer and a reasonable time to consider it. The same principle applies where the respondent's offer is less than the award made by the court. In that case, prima facie, costs follow the event." (Submission from counsel for the wife, Mr Kessaram, para 48)*

10. Mr Kessaram submitted that both parties were applicants in the sense that each applied for ancillary relief against the other. He maintained that applying the Calderbank principles to the facts of this case required the Court to consider which side made an offer that ought to have been accepted by the other side, and to determine what effect the failure to accept the offer had on the costs of the proceedings.

11. Mr Kessaram went on to list the chronology of offers and stressed that of the various offers and counter-offers, the husband ought to have accepted the wife's open offer contained in her then counsel's letter dated 11 April 2011.

    The wife had offered to accept (a) 50% of the net proceeds of sale of the property A (after payment of the costs of sale and the mortgage only) and (b) 50% of the money in the bank account of the business ("R") which was approximately $75,000 (allowing for a deduction

from her share of approximately $11,000 withdrawn by the wife from the business bank account to buy necessities).

12. Mr Kessaram continued that if the husband had accepted the wife's 11 April 2011 offer, the parties would have avoided a protracted and expensive legal battle (including the need for the wife to commence civil proceedings). The wife received a court award from the ancillary relief proceedings that far exceeded what she had originally been prepared to accept.

    The husband's without prejudice and open offers to settle were unacceptable and his final offer did not include any payment to the wife of the net proceeds of the sale of property A.

13. Mr Kessaram maintained that the husband's subsequent rejection at the trial of the valuation of the business, and the manner of his conduct of the litigation, justify that the husband should pay the wife's costs from a date after 11 April 2011.

    Mr Kessaram stressed that the husband's conduct of the litigation was not just wrong or misguided it was unreasonable to a high degree.

    He argued that on the basis of established and applicable principles of law, the husband should pay the wife all the costs of the ancillary relief proceedings and such costs should be paid on an indemnity basis to reflect the manner in which the husband ran his case at the trial. He asserted that

> *"Where litigation has been fought bitterly and unreasonably by a party he may be ordered to pay the other side's costs on an indemnity basis: Phoenix Global Fund Limited et al v Citigroup Fund Services (Bermuda) Limited et al [2009] Bda LR 70; Re Highland Crusader Fund II Ltd. [2011] Bda LR 50. One form of unreasonableness is the refusal of a party to accept a reasonable offer and thereby avoid litigation or bring existing litigation to an end: Fourie v Le Roux et al [2007] UK HL 571." (Submission from counsel for the wife, Mr Kessaram, para 55)*

The husband's case

14. Mrs Marshall, counsel for the husband, submitted that the husband should have the costs of the civil proceedings. She asserted that costs follow the event and the husband should not be deprived of the costs of those proceedings. Additionally, Mrs Marshall submitted that the dismissal of the S41 MCA application in the divorce jurisdiction should be "weighed heavily in the husband's favor" when determining who should bear the costs of those proceedings.

15. Mrs Marshall referred to a letter dated 28 June 2011 from counsel for the wife in response to criticism that the civil proceedings would be more appropriately dealt with in the matrimonial forum. Counsel for the wife had said

> *"Further, we dispute your contention that the civil proceeding would be more appropriately dealt with in the matrimonial forum, particularly when two of the three defendants, who are necessary parties, in the civil proceedings are not and cannot properly be joined to the divorce proceedings; and where your client is refusing to attribute any value to the business which was completely owned by our client before it was appropriated by your client; or procure the return to our client of at least 60% of the shares in the company that now nominally owns it"*

Mrs Marshall maintained that instigation of the civil proceedings was unnecessary and ignited the already inflamed emotions. The court ultimately, having considered the evidence, dismissed the wife's civil claim and the claim pursuant to section 41 MCA for an avoidance of disposition.

16. Mrs Marshall cited *Davy v Davy Divorce Jurisdiction 1999 No. 236 Supreme Court Jurisdiction* where Bell J applied the principles for costs in ancillary relief as set out in *Gojkovic v Gojkovic* (No. 2) (1991) 2 FLR 233:

> *"In Davy, Justice Bell confirmed the following principles when dealing with costs in the context of matrimonial cases (paragraph 6):*
>
> *'(i) The starting point is that costs, prima facie, follow the event;*
>
> *(ii) The starting point may be displaced much more easily than in circumstances which would not apply in other causes or matters;*
>
> *(iii) If an ancillary relief application is contested and the applicant succeeds, the applicant spouse is prima facie entitled to and likely to obtain an order for costs against the respondent;*
>
> *(iv) In relation to a Calderbank offer, if an applicant spouse failed to exceed the sum offered, prima facie, he or she would pay the costs from the date of communication of the offer and a reasonable time to consider it;*
>
> *(v) Conversely where the respondent to an application makes a Calderbank offer which fails to meet the award made by the court, prima facie costs should follow the event as they would do in regard to a payment into court, with the proviso that other factors in relation to ancillary relief proceedings may alter the prima facie position;*
>
> *(vi) There are many such factors, but it is both inappropriate and unhelpful to seek to enumerate them and to be thought to constrain in any way the exercise of the court's wide discretion in regards to costs.'"*

Conclusion

17. In dealing with this application for costs the parties referred to several authorities, among them *Davy v Davy Divorce Jurisdiction 1999 No. 236 Supreme Court Jurisdiction* and *Gojkovic v Gojkovic* (No. 2) (1991) 2 FLR 233.

18. This Court sees no reason to disagree with the principles that Bell J extrapolated from *Gojkovic supra*. It is clear that where offers to settle have been seriously made then they ought to be considered seriously. This would help curtail the cost of litigation and reduce the workload of the Court.

19. The Court considers that had the 11 April 2011 offer to settle this matter been accepted, the subsequent unhealthy litigation would have been avoided.

20. After the 11 April 2011 offer the wife changed counsel: the nature of the litigation changed and the civil claim dated 3 May 2011 mentioned in paragraph 4 was filed. The Court agrees with counsel for the husband that the issues raised in the civil claim could have been dealt with in the ancillary relief proceedings.

21. Counsel for the wife argued that the husband's complaint about the civil proceedings is that his relief could have been obtained in the matrimonial proceedings, but the wife had not commenced her matrimonial proceedings at that time. Counsel argued *inter alia* that the purpose of the writ was to maintain the status quo.

    This Court accepts that from the outset the wife's position was that she was not seeking to retain ownership of the business. She could have filed her ancillary relief application and asked the Court to simultaneously retain the status quo.

22. In the circumstances the wife should have her cost of the ancillary relief litigation. The Court has not been persuaded that it should be on an indemnity basis.

    The Court has had regard to all the material placed before it and recalls the trial of this matter. Its conclusion on the conduct of the trial is not sufficient to lead the Court to agree with Mr Kessaram that the respondent, the husband, should pay costs on an indemnity basis.

23. The circumstances of the case were fully covered in the substantive ancillary relief hearing judgement dated 26 April 2013. The Court is satisfied, after careful examination of the facts and circumstances of the case, and the parties conduct, that this is not a case where indemnity costs should be awarded.

24. The wife should receive her costs of the ancillary relief proceedings on a standard basis.

25. The Court disagrees with counsel for the wife that the dismissed civil proceedings were necessary and appropriate. The civil proceedings were unnecessarily instigated by the wife. In the circumstances, the husband should receive his costs incurred in the dismissed civil proceedings on a standard basis.

Dated _____ day of _____

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Justice Norma Wade-Miller PJ