In The Supreme Court of Bermuda

DIVORCE JURISDICTION
2016 No: 100

BETWEEN:

A.R.M.F

Petitioner (Wife)

v

A.J.F

Respondent (Husband)

RULING
(On Costs)

Date of Hearings: 27 November 2018
Date of Judgment: 9 January 2019

Petitioner Adam Richards, Marshall Diel & Meyers Limited ("MDM")
Respondent Jai Pachai, Wakefield Quin Limited ("WQ")

Consolidated Cross-Applications for Ancillary Relief / Indemnity Costs
Displacement of Rule that Costs should follow the event in Matrimonial Proceedings
Calderbank Offers / Costs Orders for Unreasonable and/or Dishonest Litigation Conduct

RULING of Shade Subair Williams J

Introduction

1. This Court is concerned with a contested application for costs brought by the Petitioner ("the Wife"). The application follows my final judgment and order of 23 July 2018.

The Parties' Competing Arguments

2. The Wife's application for costs is made on the basis that costs should follow the event. Mr. Richards argued that the findings made in the 23 July 2018 judgment were most heavily weighted in favour of the Wife's case and so costs should be awarded to her accordingly. Mr. Richards further contended that costs should be awarded to the Wife on an indemnity basis primarily because of (1) the Husband's unreasonable litigation conduct through his non-replies to two separate Calderbank offers made by the Petitioner and (2) the Husband's dishonest litigation conduct.

3. The Husband opposed the Wife's application for a costs order and submitted that the Court should make no order as to costs. Mr. Pachai suggested that the net sum payable by the Husband to the Wife in compliance with the final judgment was modest and that the final findings of the Court were equally as favourable to the Husband as they were to the Wife.

4. Mr. Pachai further argued that an exorbitant level of costs had been incurred by the appointment of MDM to the record on behalf of the Wife. Prior to, the Wife had been represented by T&D during the divorce proceedings and then unrepresented by Counsel at the initial stage of the ancillary relief applications. (Paragraphs 4-13 of my final judgment in these proceedings provide a chronological outline of the background proceedings in this matter.) Mr. Pachai advocated that the Wife initiated an entirely new application for ancillary relief after having instructed MDM. On Counsel's submissions, this significantly increased the volume of court documents and consequently led to a colossal increase in legal costs.

5. In relation to the Wife's s. 41 avoidance of disposition application, Mr. Pachai emphasized that the financial evidence which became the subject of complaint had been disclosed to Mr. Richards in December 2017, affording him ample opportunity to file the application well in advance of the 5 February 2018 trial date. Counsel complained that he had instead been served with last-minute notice of the Wife's s. 41 application on Friday 2 February 2018 which did not reach him until the weekend immediately prior to the Monday trial start-date. Accordingly, Mr. Pachai complained that the costs occasioned by the adjournment of the February trial were wasted and should be treated as such.

6. Mr. Pachai concluded that these matters should be counter-balanced against any other costs order that this Court would otherwise be inclined to make in favour of the Wife.

Analysis of the Relevant Legal Principles

Displacement of Rule that Costs should follow the event in Matrimonial Proceedings

7. In respect of civil and commercial law proceedings, Order 62/3(3) of the Rules of the Supreme Court 1985 (RSC) provides, as a general principle and starting-point, that where the Court in the exercise of its discretion sees fit to make any order as to costs of any proceedings, that costs should follow the event unless it appears to the Court that another order should be made, having regard to the circumstances of the case.

8. Paragraph 3(1) of the Matrimonial Causes Rules 1974 (MCR) provides that the RSC shall, notwithstanding Order 1 rule 2(2), apply with the necessary modifications to practice and procedure in matrimonial proceedings. Paragraph 3(1) is expressly subject to any enactment. However, RSC Order 62/3(5) clearly excludes proceedings under the Matrimonial Causes Act 1974 from proceedings applicable to sub-paragraph (3). Order 62/3(5) was first introduced into the RSC and made effective from 1 January 2006.

9. The Court of Appeal decision delivered by Ward, JA in *Davy v Zouppas-Davy (Costs) [2005] Bda L.R. 51* pre-dated the operation of RSC 62/3(5). Prior to 1 January 2006, as seen in *Davy v Zouppas-Davy*, the rule that costs ordinarily follows the event applied to costs applications in matrimonial proceedings.

10. Notably, the Court of Appeal in *Davy v Zouppas-Davy* contrasted the position, as it then was in Bermuda, against the matrimonial law costs principles in England and Wales which were exempt from the general rule that costs followed the event by virtue of the Rules of the Supreme Court 1965 Order 62 rule 3(5). The Court of Appeal's distinction between English law and Bermuda law centered on the absence of RSC 62/3(5) which came into force only a year or so after the decision was delivered.

11. Under English law, the general rule is that each party will pay their own costs. Rule 28.3(5) of the English Family Procedure Rules 2010 provides: "*Subject to paragraph (6) the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party*." The English rule is to be distinguished from the position in Northern Ireland where the starting point is that costs should follow the event. (NI) Order 62/3 states in material part; "*If the Court in its exercise of its discretion sees fit to make any order as to costs in any proceedings, the Court should order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs*."

12. The English Family Procedure Rules 2010 refer to the Civil Procedure Rules 1998. Prior to 26 April 1999 when the Civil Procedure Rules superseded the Rules of the Supreme Court 1965, the English rule as to costs following the event was excluded by Order 62 rule 3(5) which was later mirrored by RSC O. 62/3(5) under Bermuda civil procedure on 1 January 2006. Thus, the statutory rule in England that costs do not ordinarily follow the event in

matrimonial proceedings has been in existence for nearly a half century while this rule was implemented into Bermuda law by the legislature only some thirteen years ago.

13. RSC Order 62/3(5) was not yet in force in Bermuda when the Court of Appeal in *Davy v Zouppas-Davy* found that English authorities decided under the Family Procedure Rules 1991, as amended, and the Civil Procedure Rules 1998 had no application in Bermuda. The decision in *Davy v Zouppas-Davy* was a costs appeal against the first instance decision on costs handed down by the learned Justice Mr. Geoffrey Bell (as he then was) who relied on reasoning of Butler Sloss, LJ in *Gojkovic v Gojkovic (No 2) (Ca) [1991] 2 FLR 233* which at page 236E read:

"*However, in the Family Division there still remains the necessity for some starting-point. That starting-point, in my judgment, is that costs prima facie follow the event (see Cumming-Bruce, LJ in Singer v Shareign [1984] FLR 114 at p.119) but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court*."

14. Notwithstanding, Butler-Sloss LJ referred to the English RSC Order 62 rule 3(5) provision which was clearly in force when the decision was handed down. While Bell J was persuaded by the application of the starting point rule in *Gojkovic v Gojkovic*, ie. that costs should prima facie follow the event, it must not be forgotten that this approach was endorsed by the Bermuda Court of Appeal prior to the implementation of our RSC O. 62/3(5).

15. At page 2 of the judgment in *Davy v Zouppas-Davy*, the Court of Appeal remarked:

"*There are indeed good arguments which can be advanced for changing the rule that costs should follow the event in matrimonial matters, but that is not to say that this Court, constrained by statutory provisions as it is, should ignore them and proceed to create new law without the blessing of the Legislature. We think that the learned judge was right to resist the invitation to re-write the law of costs in matrimonial proceedings without legislative assistance. It is a simple matter for the Legislature to amend Order 62 if it should wish…*"

16. The amendment made operative on 1 January 2006 is not only relevant but a clear blessing and indication from the Legislature that law was to change after the *Davy v Zouppas-Davy* decision. This statutory rule ought not to be ignored and I now resist any invitation to substitute Parliament's obvious intention to change the law notwithstanding an alternative approach suggested by old and non-binding English authority.

17. In my judgment, the Court of Appeal decision in *Davy v Zouppas-Davy* stated the relevant and governing law on costs in matrimonial proceedings as it was up until 1 January 2006. Notably, this Court has not been made aware of any reported judgments from the Bermuda

Court of Appeal[1] which outline the correct starting approach to costs in matrimonial proceedings post 1 January 2006. I am, therefore, bound to acknowledge that the Legislature took the requisite steps to effectively change the rule on the starting point to costs in matrimonial proceedings in Bermuda. The correct position, as I see it, is that the general rule that costs follows the event no longer applies to matrimonial proceedings in Bermuda post 1 January 2006. Thus, I find that the starting point for post-2006 matrimonial litigation must be that no order for costs will be made.

18. It is important to note, however, that the Court is unfettered in its discretion in determining any other factors which may be relevant in deciding whether to grant a costs order. After all, the Court must not be constrained or restricted from making a costs order which is just and fair in all circumstances of the case.

Unreasonable and/or Dishonest Litigation Conduct

19. As observed by Kawaley J (as he then was) in *Francis v Carruthers: Costs [2007] Bda L.R. 32 at para 19*, RSC Order 62/10(1) empowers the Court to have regard to any unreasonable acts or omissions on a litigant's part. It provides:

"*10 (1) Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party*."

20. I see no reason why this rule would not apply to costs in matrimonial proceedings.

21. The current English matrimonial rule that each party should bear its own costs may be displaced under certain specified circumstances. For example, where the Court deems it appropriate to do so, a costs order may be made on the grounds of litigation misconduct of a party. Rule 28.3(6) of the English Family Procedure Rules states: "*The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)*."

22. Rule 28.3(7) outlines various relevant factors for the Court's consideration of a litigant's conduct under paragraph (6). Rule 28.3(7) states:

"*(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –*

[1] Counsel cited the unreported case of *C v C Appellate Jurisdiction No. 2 of 2011* in which a written judgment was never proffered.

(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;

(b) an open offer to settle made by a party;

(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

(f) *the financial effect on the parties of any costs order*."

23. In *GW v RW (Financial Provision: Departure from Equality) [2003] 2 FLR 108* deputy High Court Judge Nicholas Mostyn QC held:

"*In my judgment, a safer starting point nowadays in a big money case, where the assets exceed the aggregate of the parties' needs, is that there should be no order as to costs. That starting point should be readily departed from where unreasonableness by one or other party is demonstrated. This approach, I believe is consistent with the spirit of the judgment of Butler-Sloss LJ in Gojkovic v Gojkovic [1992] Fam 40*."

Dishonest litigation conduct

24. In *Kaur (previously known as Minda Singh) v Randhawa and another [2015] EWHC 1592 (Fam)* Mostyn J rejected the evidence of the husband and his brother and found that their evidence consisted of 'flat lies' so much so that he directed for the judgment and the court bundle to be sent to the DPP for consideration whether proceedings for perjury should be brought against them. Under these circumstances Mostyn J found that an order for indemnity costs was justified.

Unreasonable litigation conduct (re Calderbank Offers)

25. Unreasonable litigation conduct may also include a party's non-response or unconstructive response to a Calderbank offer. In *Gojkovic v Gojkovic*[2] Butler Sloss LJ referred to the origins and character of Calderbank offers in the following way on page 237 of the judgment:

"*…The Calderbank offer, a letter containing an offer only revealed after the order is made, bears some resemblance to, but is not identical with, a payment into court. It takes its name*

[2] (No. 2) (CA) [1991] 2 FLR

from Calderbank v Calderbank [1976] Fam 93 (a claim by a husband) in which Cairns J referred to an apportionment offer in Admiralty proceedings, and said:

'*If that is not accepted, no reference is made to that offer in the course of the hearing until it comes to costs, and then if the court's apportionment is as favourable to the party who made the offer as what was offered, or more favourable to him, then costs will be awarded on the same basis as if there had been a payment in.*

I see no reason why some similar practice should not be adopted in relation to such matrimonial proceedings in relation to finances as we have been concerned with.'

26. At page 238 Butler Sloss LJ stated:

"*It is therefore, clear that Calderbank offers require to have teeth in order for them to be effective. This is recognized by the requirement in RSC Ord. 62, r. 9 (and the equivalent CCR Ord. 11, r.10) for the court to take account of Calderbank offers, and by analogy, open offers, in exercising its discretion as to costs. There are certain preconditions. Both parties must make full and frank disclosure of all relevant assets, and put their cards on the table. Thereafter, the respondent to an application must make a serious offer worthy of consideration. If he does so, then it is incumbent on the applicant to accept or reject the offer and, if the latter, to make her/his position clear and indicate in figures what she/he is asking for (a counter-offer). It is incumbent on both parties to negotiate if possible and at least to make the attempt to settle the case. This can be done either by open offers or by Calderbank offers, both adopted by the husband in this case. It is a matter for the parties which procedure they prefer. There is a very wide discretion in awarding costs, and as Ormrod LJ said in McDonell…the Calderbank offer should influence, but not govern, the exercise of discretion.*

There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation; for instance…material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs, or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate, and possibly be thought to constrain in any way, that wide exercise of discretion. But the starting-point in a case where there has been an offer is that, prima facie, if the applicant receives no more or less than the offer made, she/he 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. That seems clear from the decided cases, and is in accord with the Rules of the Supreme Court and County Court Rules requiring the court to have regard to the offer. I cannot, for my part, see why there is any difference in principle between the position of a party who fails to obtain an order equal to the order made and pays the costs, and a party who fails by the offer to meet the award made by the court. In the latter case, prima facie, costs should follow the event, as they would do in a payment into court, with the proviso that other factors in the Family Division may alter that prima facie position."

27. It is clear on the English authorities and under the more modern statutory regimes that the Courts will have regard to Calderbank offers made in determining whether a costs order

should be made in favour of any one particular party. Mr. Richards helpfully placed before the Court the case of *A v A (Costs Appeal) [1996] 1 FLR 14* where Singer J made the following persuasive remarks:

"*The lesson of this case, which litigants and lawyers alike must recognize and give effect to, is that just because ancillary relief applications have to be conducted and prepared in the fraught emotional atmosphere that so often and understandably exists after marriage and its breakdown, nevertheless that does not mean that common sense and commercial realities can be allowed to fly out of the window. 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. Such a spouse cannot with impunity expect immunity from responsibility for that if, as here, his actions mean that only over 2 years and £60,000 of costs later, on the eve of the hearing, does it emerge that the difference between the parties is £5000 and some chattels: and of course an argument about the £60,000 of costs.*

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. These observations must potentially apply where, as here, the issues were clear and the evidence in relation to them sufficiently established at the time of the offer. If ever, the Calderbank procedure is to be effective, it must, as Butler-Sloss LJ said, have teeth. This is to my mind a clear case where the sanction of costs should bite to bring liability for them home to the person shoes failure to follow the established route has led to them.

28. Singer J proceeded to make a costs order against the husband to be taxed on a standard basis but commented:

"*I add this: that order is the variation sought by the notice of appeal. It still leaves the wife with £12,000 or so of solicitor and own client costs to meet out of her own pocket. It should not be thought that the sanction of indemnity costs will never be applied, more adequately in an appropriate case to recompense the victim of unresponsiveness to Calderbank offers*."

Application of Law to the Facts

29. Mr. Pachai submitted that the net payment made by the Husband to the Wife was in the sum of $31,904.96. He described this as a relatively small amount for the Husband to reconcile once all of the off-settings had been taken into account. However, having found that the correct starting point in matrimonial proceedings in Bermuda is that no order for costs will be made, I need not further explore Counsel's arguments on which party was the more successful litigant or what the 'event' was to be followed. Of course, the Husband's litigation conduct in this matter is an entirely different and relevant factor.

30. Mr. Richards directed my attention to two Calderbank offers made on behalf of his Client. The first offer, dated 5 January 2018, was unanswered by the Husband. The Wife proposed an equal division of assets and invited the Husband to make a lump sum payment of $68,906.55 to her. Mr. Richards paralleled this with the net payment she received in the approximate sum of $67,000. The Wife further proposed, moving forward, that the Husband would pay two thirds of the children's expenses. Mr. Richards argued that this was broadly in line with the Court's judgment that the Husband would pay 60% of the children's expenses once the mortgage had been paid.

31. In MDM's 5 January 2018 letter to WQ, Mr. Richards contended that the Husband had been expressly opposed to an equal division of the assets and went so far as to cite various reasons for such departure. Mr. Richards, in the same offer letter, referred to, *inter alia*, *Miller v Miller and McFarlane v McFarlane [2006] 2 AC 618*.

32. MDM subsequently wrote to WQ by letter dated 13 March 2018. On this occasion the Wife's attorneys asserted that her case had been strengthened by the Husband's actions which culminated in the Wife's s. 41 application. The letter also expressed a view that the costs of the proceedings would be granted in favour of the Wife given the Husband's litigation conduct throughout the proceedings.

33. The offer made by the Wife in the 13 March 2018 letter also went without reply from the Husband. This letter proposed that $100,000 held in the Wife's Butterfield account in addition to the $52,000 held in the investment account be preserved for the children's educational fees. Mr. Richards submitted that this offer aligned with the Court's final judgment in respect of these funds.

34. The bottom-line argument advanced by Mr. Richards is that in both offer letters, the position proposed to the Husband was more advantageous to him than was the judgment of the Court.

35. In Mr. Pachai's oral submissions in reply, he said his client's main point of contention against both offers was in relation to the proposed coverage of the children's expenses. He submitted that this, (as measured against my final judgment that such expenses would be apportioned equally for two years and then split 60% to 40% from 1 August 2020) did not entitle any one of the parties to a costs order.

36. I accept Mr. Richards' submissions that the Calderbank offers made in both the 5 January 2018 and the 13 March 2018 letters outlined proposals which were, in the end, substantially more favourable to the Husband than the final determinations made by my judgment delivered in July 2018. I am also persuaded that the Husband's failure to provide any or any adequate response or agreement rendered potentially avoidable litigation indeed inevitable.

37. The Wife's argument that the Husband's litigation conduct was not only unreasonable but dishonest is a meritorious one. In my judgment I made numerous findings of dishonesty against the husband's evidence.

38. At paragraph 229 I found:

"*Further, it is not to be forgotten that the Husband never stated in his affidavit evidence that he had intended to withdraw from his current lease to take advantage of a new residential opportunity in Connecticut. These oddities were compounded by my separate finding that the New Jersey lease story is a sham in any event.* ***For these reasons, I come to the inevitable conclusion that the Husband was being dishonest with the Court when he said that he withdrew the cash to pay for a new down-payment on the Connecticut lease so to end the supposed New Jersey lease. I find that that he used this story to conceal his true intention which was to dissipate the matrimonial funds in his HSBC account so to defeat the Wife's claims***."

Paragraph 232:

"*Earlier in his evidence in chief, when asked about his financial support to his parents, the Husband said that he supports his father to the best of his ability but that he was unable to refer to a precise monetary figure as his provision of assistance arose on a need basis during his father's travel for treatment. In estimating the total sum given, he made no specific mention of the $4000 gift but said that the total sum would probably tally up to $5,500 over the course of a one year period.* ***I find that the Husband used his father as an opportunity to dishonestly stash matrimonial funds from the Wife****. This Court must not allow sympathy evidence (ie the father's ill state) to distract it from assessing the evidence logically and with clarity. The Husband's grant to his father of $4000 of matrimonial funds during such a litigious period was obviously done to sabotage the Wife's entitlement to her share of matrimonial savings*."

Paragraph 239:

For all of these reasons, ***I am satisfied that the withdrawals and expenditures are not only a reviewable transactions but ones which were dishonestly carried out by the Husband to defeat the Wife's claim***:

(i) $798.00	withdrawn on 15 November 2017
(ii) $9,300	withdrawn on 16 November 2017
(iii)$5,500	withdrawn on 24 November 2017
(iv)$5,000	withdrawn on 1 December 2017

39. Furthermore, I made various findings that the Husband had willfully breached his disclosure obligations to the Wife at the pre-trial stage of the proceedings and that he had knowingly breached the Court's directions and orders to make full and frank disclosure.

Decision

40. In my judgment the evidence of the Calderbank offers in this case, as measured against my final findings made in the 23 July 2018 judgment, entitles the Wife to 65% of her costs on a standard basis. However, the Wife ought not to recover any costs occasioned by the adjournment of the trial date which was fixed for 5 February 2018.

41. In respect of the costs associated with the Wife's s.41 application, I grant costs in her favour on an indemnity basis by reason of the Husband's dishonest ligation conduct.

42. I make no order as to costs in respect of this application for costs.

Dated this 9th day of January 2019

JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT