Neutral Citation Number: [2024] CA (Bda) 12 Civ

Civil Appeal No. 35 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. JUSTICE STONEHAM
CASE NUMBER 2022: No. 035

Sessions House
Hamilton, Bermuda HM 12

Date: 19/06/2024

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL IAN KAWALEY

- -

Between:

GARETH FINIGHAN

Appellant

- and -

KATHERINE MARGARET LILLA ZUILL

Respondent

Appellant in person
Mr. Adam Richards of Richards Limited for the Respondent

Hearing date: 19 June 2024
Ruling date: 27 June 2024
- -

INDEX

Family law-remote hearing of ancillary relief application-order made in absence of respondent-failure of appellant to participate in hearing by other means after his computer audio and video failed-whether Judge entitled to proceed

REASONS FOR DECISION

KAWALEY JA:

Background

1. On 28 March 2022, Stoneham J, at a hearing convened by video-link, dismissed all claims of the respective parties against each other for ancillary relief (the "Order"). The recitals to the Order recorded that:

    (a) the Respondent attended the hearing via the link provided and indicated that his camera was not working. The Court indicated video participation was required and adjourned for him to attempt to fix the problem;

    (b) the hearing resumed and the Appellant called the Court to advise that neither the microphone nor video on his computer were working;

    (c) the Respondent declined to avail himself of the opportunity to attend the Court or the Petitioner's attorneys' office to participate in the hearing;

    (d) the Court proceeded in the absence of the Respondent.

2. The final draft of the Order was filed in Court on 30 June 2022 and was perfected on or about 1 July 2022. By Notice of Appeal dated 12 August 2022, the Appellant filed a Notice of Appeal challenging both the merits of the Order and the fairness of the Court's decision to proceed.

3. On 19 June 2024, this Court invited the parties to address the fair hearing ground alone because:

    (a) if that ground succeeded, the matter would have to be remitted to the Supreme Court for rehearing; and

(b) if that ground did not succeed, the half-day fixed for the appeal hearing was inadequate time to address the merits of the appeal.

4. Having heard the Appellant, appearing in person, and counsel for the Respondent, the Court determined that the complaint that the Supreme Court ought to have done more to ensure the Petitioner's attendance before making the Order lacked merit and must be dismissed. The further issue whether, based on the material before the Judge, she erred in making the Order in question, was adjourned to be heard (based on the material which was before the Court on 28 March 2022) at the next Session.

5. These are the reasons for this Court's decision to dismiss the Appellant's fair hearing ground.

The Merits of the fair hearing ground

6. A transcript of the hearing before the Supreme Court confirms that the hearing commenced at 9.30am with the Appellant being heard but not seen. After some discussion about the hearing bundles, the hearing adjourned until 11.30 am after the Appellant said he would prefer to go to his office to try and fix his video problems rather than attend Conyers' office. When the hearing resumed, the Appellant could neither be seen nor heard although it appeared that he had joined the Zoom call. The Judge adjourned a second time inviting the Appellant to contact the Petitioner's attorney and the Court confirming whether he wished to attend the Court or Conyers' offices to participate remotely in the hearing.

7. When the Court resumed the second time, the Appellant's counsel informed the Court that the Appellant had rejected both offers. Stoneham J then ruled:

> "*….Having regard to the Overriding Objective…to deal with matters expeditiously, and not only fairly, this Court is of the view that the offers made by Conyers to have Mr Finighan use their facilities as well as the Court's offer to provide him with a laptop, and sit within the Court precincts, are indeed reasonable and conducive to ensuring a fair trial. And of the view having regard to these matters and the fact that the parties have separated some five years ago, this matter must proceed today…I take the view that Mr Finighan's refusal to accept the offer of Conyers as well as the offer of the Court is highly unreasonable… The Overriding Objective includes that the Court must allot an appropriate amount of time for Court resources and have regard to the need for these facilities to be used in other matters… Mr Finighan…has been provided every opportunity to participate and to ensure that a fair outcome is reached and he has refused it. So we will proceed.*"

8. It was impossible to view the decision to proceed as anything other than an unimpeachable case management decision. The Overriding Objective did indeed oblige the Court to have regard to the needs of expedition as well as avoiding wasting the Court time which had been set aside for the case. The Appellant's inexplicable refusal to accept either of two alternative means of participation in the remote hearing, after discovering he could not participate via his own computer as he originally planned, was understandably adjudged as being "*highly unreasonable*".

9. At the hearing before this Court, the Appellant offered a fulsome explanation of why he did not accept the offers of alternative participation in the hearing which he accepted he had received that day. He very frankly admitted that, at the time, he failed to put forward any explanation for declining the telephone offers received from Conyers and the Court. The only criticism he made of the Learned Judge is that she could have done more to facilitate his participation in the hearing. Based on the original appeal record, this criticism might have been arguable; but the position was made clear when the Court had before it a full transcript of the hearing. The President took the Appellant through that transcript and it was clear that the Appellant did not join issue with anything material that was recorded in it. The Appellant told this Court that he had digestion problems at the time and that, because of the prospect that he might need to use a restroom, he did not want to go to Conyers or the Court. But, if that was so, it is clear and it was explicitly admitted by him, that he made no mention of this at the time. Nor did he apply for a further adjournment.

10. However, having regard to both the transcripts and the Appellant's admission that he advanced no reasons for declining the two alternative participation offers at the time, it was impossible to see how the approach the Judge adopted could be faulted. As the President observed in the course of the appeal hearing, the position had to be evaluated by this Court on the facts as they appeared to be to the Judge at the time. She was entitled to conclude that the Appellant's non-participation was deliberately obstructive and that the Respondent's right to have her application heard could not properly be denied.

Conclusion

11. For the above reasons on 19 June 2024, we dismissed that part of the Appellant's appeal whereby he sought a rehearing in the Supreme Court on the grounds that Stoneham J unfairly decided to proceed with the 28 March 2022 hearing in his absence.

Postscript

12. At the hearing, I sensed that the Appellant was only really before the Court because, as often occurs with respondents in divorce proceedings, he was unable to fully accept that the marriage was at an end. His written submissions, which did not advance what appeared to be a very coherent case for undermining the merits of the Order, indirectly suggested that this might well be the case. I was influenced in part by recollections of casual encounters I had with the parties some years ago when they appeared to be a happy family. While I have little more than a nodding personal acquaintance with them, I hold them each in high regard. I sought to encourage the Appellant to reflect on the wisdom of protracting these proceedings.

13. Modern Bermudian experience teaches us that it is possible to have a 'happy divorce'. Reflective parties come to realise that marital relationships often rupture under the weight of external pressures, financial, social or otherwise. This partly explains why law has moved on from the notion of 'fault-based' divorce. The Order appears to have the effect of allowing both parties to open new chapters in their lives unconstrained by a financial ball and chain from the marriage. I would commend to the Appellant the following example of how to move with dignity from one life chapter to the next. A man reluctantly leaving the "*best job in the world*" shrugged his shoulders and remarked: "*Them's the breaks*".

14. I wish both parties well.

SIR ANTHONY SMELLIE JA

15. I agree and would only add that from long experience in cases like these, it is seldom through the course of hostile litigation that matrimonial disputes arrive at an end regarded by either, let alone both, parties as satisfactory. I therefore also urge the parties to seek to bring this dispute to an amicable conclusion.

SIR CHRISTOPHER CLARKE, P

16. I agree. The fair hearing ground of the Appellant's appeal stands dismissed. The question of costs is reserved. As I made plain at the hearing, if the Appellant wishes to proceed with his appeal on the basis that the judge was in error on the basis of the material that was before her, he will need to specify (a) what is the relief that he seeks; (b) why he says that the judge was in error on the basis of that material and any matters that she failed to take into account; and (c) what it is, in that material, that he relies on in support of his case.

17. I have little doubt but that the Appellant now regrets the stance that he took at the hearing before Stoneham J. But he, and other litigants, must understand that it is not

acceptable effectively to decline to participate in a 2-day hearing, without communicating any explanation to the Court, or seeking an adjournment. The Courts cannot run a fair and efficient system if litigants can - in effect, so far as it appears to the Court - opt out of participation in proceedings and then appeal on the basis that the judge erred in continuing with them. To do so is not in the interests of (a) the parties or (b) the administration of justice, not least because every aborted hearing will have been one the fixing of which will be likely to have deprived other litigants of the opportunity to have their case determined on the appointed dates.