Case No: B4/2010/1449

Neutral Citation Number: [2011] EWCA Civ 940
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM GUILDFORD COUNTY COURT
HIS HONOUR JUDGE RYLANCE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 30th June 2011

Before:

LORD JUSTICE THORPE
LORD JUSTICE LONGMORE
and
LORD JUSTICE STANLEY BURNTON

- -

Between:

N

Appellant

- and -

N

Respondent

- -

(DAR Transcript of
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Mr Michael Glaser and Mr Byron James (instructed by Gans and Co) appeared on behalf of the **Appellant**.

The Respondent appeared in person.

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Judgment

Lord Justice Thorpe:

1. The parties to this appeal were married in 1993 and separated after some five years of marriage. There are two children. Approximately seven years after the separation the financial proceedings were compromised at a hearing before District Judge Levey sitting in Guildford on 11 January 2005. Both parties were represented and the court recorded their agreement and understanding as it is expressed in the recital to the orders. The first of those recitals provides that:

> "(1) It is both parties' intention the wife will become financially independent from the husband within five years of this order.
>
> 2) The wife shall keep the husband informed that any increase to her current income of £1,000 per month or more which takes place at any point during the term of any maintenance order in her favour."

2. It has been explained to us that the order does not record what her current income was on 11 January 2005 but rather that this provision, this agreed term, enabled her to earn up to £1000 net per month without informing the husband and thus without impact on any periodical payments order.

3. The periodical payments order, which was made by consent, is to be found in paragraph 3 and it is to this effect :

> "The husband shall pay... periodical payments at the rate of £1,000 per month starting on 24 January 2005... for a period of five years until 24 December 2009"

4. That was a fixed term order but one which left the wife free to make a further application for extension or increase or both since there was no provision under section 28(1)(a) to preclude such an application.

5. The wife in due course did apply and her application came before District Judge Raeside sitting in the same court and it was a contested application, the wife by then in person and the husband represented. The District Judge heard evidence and submissions over the course of approximately three days and then gave a judgment, which I believe to have been a reserved judgment, extending to some 15 pages. There was a lot of acrimony and dispute between the couple and accordingly it was incumbent upon the judge to make some fairly trenchant findings. At page 4 of her judgment is an important finding to this effect:

> "The Wife produced some minimal evidence to show that she has attempted to find a job recently;

> she has done some unpaid work experience, and has sent her cv to a few prospective employers. But she has made no serious attempt to ensure that her skills are up to date or relevant, and is still clearly unwilling to work, wondering how she would have the time to do the housework and look after the children if she had to work. The Husband is (rightly) critical of the Wife in this regard, particularly in the light of the agreement between the parties that the Wife would be self sufficient by the end of this year".

6. In relation to the husband the District Judge made a finding in his favour that his episodic absences at work were the consequence of depressive illness requiring rest and recuperation and that they had not been contrived withdrawals in order to diminish the wife's claims. The District Judge was, however, critical of the husband's disclosure when she said :

> "It was probably not until the Wife heard the Husband's evidence that she was able to understand his slightly complicated financial situation and the employment packages that he has had over the years. This is a very unsatisfactory situation and has ratcheted up the costs of these proceedings and the level of mistrust from the Wife."

7. Having had the opportunity of assessing the parties and their allegations and counter-allegations the judge came to these clear findings, which at first blush might have ended with the dismissal of the application. However, in the exercise of her discretion the District Judge extended the term upon which the parties had agreed and continued the periodical payments order to terminate in April 2012. Although the order was not increased, this was a substantial extension which went to the considerable benefit of the wife. Accordingly it is hardly surprising that the District Judge attached to this extension finality by imposing a restriction under section 28(1)(a) on any further application for extension.

8. The hearing before the District Judge had been in September and her judgment was the subject of an appeal or appellant's notice issued within the time prescribed by the rules and the subject of a directions order made by HHJ Sleeman in December. He set the case down for a one day hearing on 14 May 2010 and prescribed that the hearing should be before either himself or HHJ Nathan. In the event the case was listed before HHJ Rylance and that is of no materiality since we are told that HHJ Rylance is a circuit judge ticketed to hear ancillary relief appeals from a District Judge. Again the wife appeared in person to prosecute her appeal and the husband was represented by counsel.

9. Now we have a transcript of the proceedings as well as the judgment that resulted. The transcript, which runs to some 30 pages, shows the judge

inviting Ms N as the appellant in person to present her case, which she did between pages 2 and 11 of the transcript. Counsel for the husband then made his submissions in response and the wife resumed in reply at page 20 continuing to the conclusion of page 30. So it will be seen that the majority of the proceedings was given to the wife and resulted in a considerable forensic success. The effect of the judge's order is to be found in paragraphs 1 to 4 of his order. He extended the term from April 2012 to the end of August 2015. He set aside the provision under section 28(1)(a) and beyond August 2015 he provided for a joint lives order at a nominal rate.

10. That was clearly an unexpected reverse for the husband and his appellant's notice was filed in this court on 10 June 2010. It was considered most carefully by Black LJ, who on 24 November 2010 refused permission provisionally, reasoning herself thus that, although the judge might have given undue weight to the failure of the District Judge to refer explicitly to the terms of section 31 of the Matrimonial Causes Act, he had been justified in his alternative conclusion that the District Judge had reached unsustainable conclusions on the wife's ability to achieve financial independence. The reasoning proceeds to record that the judge was entitled to draw his own inferences about the practicalities of employment and the impact it would have on the children despite the fact that he had not himself heard evidence. Finally it was rightly emphasised that the matters relied upon in the appellant's notice hardly met the test set for a second appeal.

11. That was the subject of an application for oral hearing, which took place before me on 11 March. Having heard Mr Glaser and Mr James in support of the application, I adjourned for a hearing on notice with appeal to follow if permission granted and it is that hearing that we have conducted today.

12. Now Mr Glaser for the appellant husband draws attention to what he says are fundamental procedural flaws. The judge paid lip service to the function of the District Judge in hearing oral evidence and making findings. He allowed the litigant in person to testify as much as to make submissions and he then accepted her words as justifying findings inconsistent with those that had been made by the District Judge. So on the basis of independent findings he proceeded to conclude that he was entitled to exercise an independent discretion. All that, says Mr Glaser, is thoroughly unprincipled. He should have had regard to the narrow margin that he exercised in sitting in appellate judgment on the findings and discretionary conclusions of another judge in the same court.

13. The argument for Ms N has obviously not been easy. She is in person. She has no familiarity with the practice in this court and she has to respond to a skeleton argument that demonstrates considerable expertise in this area of specialist law. I record at once that she has advanced her case with considerable skill. She has prepared a respondent's bundle which is meticulously tabulated and paginated and it has enabled her to advance a number of well expressed points by reference to documents in her bundle.

14. Her submissions to this court today have given me some insight into how it was that HHJ Rylance arrived at conclusions fundamentally at variance to those reached by the District Judge. Ms N is a persuasive person who presents her predicament graphically, vividly and movingly. I have reached the conclusion that the case that she advanced, which we have word by word thanks to the transcript of proceedings, led the judge to a response which was humane and understandable but which was without the bounds of his function.

15. In the skeleton argument written by counsel for the hearing of the appeal below, the function of the judge was correctly described thus :

> "The court will be aware that 8.1 appeals against decisions of ancillary relief are subject to the general rules on appeal. Accordingly the general basis for allowing an appeal is that the decision of the court below was ' wrong' (CPR 1998 R52.11(3)) with respect to:
> [i] the law
> [ii] the facts, albeit to a restrictive degree (Piglowski v Piglowska [1999] 2 FLR 763); and,
> [iii] Where a decision is based on judicial discretion the decision must be shown to be 'plainly wrong'. Only if the decision made is so plainly wrong that he must be given far too much weight to a particular factor is the appellate Court entitled to interfere (G v G [1985] FLR 894; V v V [2005] 2 FLR 697)

And then there are references to the authorities of G v G [1985] FLR 894 and V v V [2005] 2 FLR 697.

16. The judge, in his careful judgment, which was delivered some 12 days after the hearing, does not specifically refer to this submission nor does he direct himself as to the nature of the appellate process that he conducted. He does at the outset of his judgment record that the District Judge had carried out a thorough investigation and had reached careful findings. Indeed in the transcript of proceedings we see him making the same acknowledgment. However there can be no doubt that the judge then proceeded, as he explained himself, to set out views as to the capacity of the wife to resurrect herself financially that were fundamentally at variance with those reached by the District Judge.

17. We see this discrepancy emerging in the transcript of proceedings, particularly in an exchange between the judge and counsel for the husband, where the judge says that he has identified three alternatives, three possible ways of dealing with the appeal. One, as he put it, was to leave things as they were, another to provide for nominal maintenance for the three years beyond and the other to have maintenance until the youngest child achieved 18. To that, counsel for the husband added a fourth way, which was not to uphold the District Judge but to introduce some fourth refinement.

18. So it is plainly implicit from those exchanges that the judge was moving to the exercise of an independent discretion and counsel was not warning him that it was not open to him so to do unless he had reached the conclusion that the District Judge had misdirected herself in law or had otherwise reached a conclusion which is plainly wrong.

19. Counsel for the husband did, however, on the following page of the transcript make a plain statement of his first position that the maintenance should be left as it was for the reason that the judge was not plainly wrong in the exercise of her discretion. The judge does in his judgment justify independence by drawing attention to the fact that there was no reference to the statutory checks on variation set out in section 31 of the Act. He said, in the alternative, if he concluded that there was no misdirection in law it was still open to him to interfere on the basis that the District Judge's decision was unsustainable or in other words plainly wrong.

20. So it is in the end clear to me that Mr Glaser makes good his criticism. It is clear to me that the judge has not sufficiently directed himself as to the limited nature of his function. He has then been swayed by the presentation of the appellant to accept her view of her financial predicament and of her financial prospects, which is plainly at variance with the very clear findings of the District Judge.

21. It is very important that the limited function of the circuit judge in hearing appeals from the District Judge should be recognised and honoured. This is not a process that allows any rehearing *de novo*. It is not a process that allows for the admission of fresh evidence unless exceptional circumstances demand that. Essentially much of the speech of the wife on that occasion was an endeavour to introduce a fresh view of the history and fresh evidence as to subsequent proceedings and prospects. That could not be admitted in any principled way and in that lies the explanation for a variation which is particularly substantial in that the election for a joint lives order is a fundamental departure from what the parties had agreed in front of HHJ Levey in 2005.

22. So for all those reasons I would simply propose that the application for permission be granted; the appeal be allowed; the order of HHJ Rylance set aside; and the order of District Judge Raeside restored.

Lord Justice Longmore:

23. I agree. If it is clear that an appellate judge is wrong to interfere with the discretion of the judge who hears the evidence and the original submissions of the parties, that is in my view a compelling circumstance which justifies giving permission for a second appeal. That is this case and I agree with my Lord's disposal.

Lord Justice Stanley Burnton:

24. I agree with both judges.

Order: Application for permission to appeal granted; Appeal allowed