Henderson

5/5/10

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. D50/06

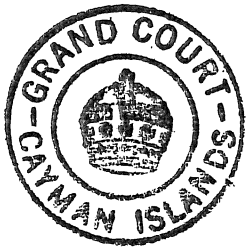
BETWEEN: ROBERT EARL GIBB **Petitioner**

AND: BRENDA MAE GIBB **Respondent**

Appearances: Mr. David McGrath of Samson & McGrath for the Petitioner

Ms. Sheridan Brooks of Brooks & Brooks for the Respondent

Before: Hon. Justice Henderson



Heard: April, 29, 2010

RULING

1. In my judgment delivered April 16, 2010 I made a number of determinations intended to settle the ancillary issues between the parties. This ruling is concerned with three incidental matters. Mrs. Gibb argues that my judgment, which has not yet been issued in final form, should be amended to reflect the fact that Mr. Gibb cannot deduct from his obligation to pay occupation rent on the matrimonial home a sum which he spent to repair that home after Hurricane Ivan; and cannot deduct three months of notional occupation rent for the period immediately following the hurricane. Mr. Gibb has applied for his costs on an indemnity basis as the result of a Calderbank letter sent to Mrs. Gibb shortly before the hearing.

2. In my earlier ruling, I found that Mr. Gibb, who has been living in the matrimonial home on Grand Cayman since the couple separated in March, 2001, would have had to pay a notional rent of US $341,463 for the rental of that home over the years. From that figure, Mr. Gibb was permitted to "deduct" various items of overhead pertaining to the home for the purpose of determining the net rental income which Mrs. Gibb should have received. I permitted Mr. Gibb to deduct both the insurance premiums he paid for house insurance over the years and the sum of US $24,318 which he paid for house repairs after Hurricane Ivan. Mrs. Gibb suggests that this was an error because, since he had a house insurance policy, Mr. Gibb

should have made a claim on that policy rather than absorbing the cost of the repairs himself. To refute this assertion, Mr. Gibb has filed a brief affidavit confirming that he did not make a claim under the insurance policy because the policy's deductible amount exceeded the cost of the repairs. I accept that evidence and dismiss Mrs. Gibbs request for an amendment to the judgment.

3. Mrs. Gibb also asserts that it was wrong to permit Mr. Gibb to deduct three month's rent from the calculation to reflect conditions which prevailed immediately after Hurricane Ivan. Mrs. Gibb argues that the evidence does not demonstrate that the house was "uninhabitable" during this period. That puts the burden on too high a level. The question is whether, given the conditions prevailing in the house after the hurricane, the full amount of rent or some lesser amount would have been payable had that question been referred to a Court for adjudication. The premises may well be habitable in the sense that it was possible to live in the house but the notional occupation rent would fall to be reduced because many of the amenities of the home before the hurricane were not available immediately afterwards.

4. The evidence shows that the home was without electricity for a period in excess of three months immediately after Hurricane Ivan (which occurred on September 11, 2004) and was without running water for a period of one week. Clearly, these deficiencies would justify a lower rent. I think it right to say that some occupation rent should still be payable, in light of

the fact that Mr. Gibb continued to reside in the matrimonial home. I will amend my earlier ruling to this extent: the amount of occupation rent to be "charged" for the three month period is US $6,000 instead of US $12,000.

Calderbank Letter

5. By letter dated March 16, 2010 (marked "without prejudice save as to costs") Mr. Gibb made an offer of settlement which Mrs. Gibb did not accept. (An earlier offer was also made and not accepted but nothing turns on that for present purposes.) The offer contained two components: an offer to pay the sum of US $480,000 within forty-five days, and to pay the sum of US $6,000 per month for four years. The present value of the offer was significantly more generous than the total amount I awarded to Mrs. Gibb in my judgment. Mr. Gibb now says that the Calderbank principle entitles him to his costs on an indemnity basis.

6. Counsel have advised that there is no reported decision addressing the use of Calderbank letters in matrimonial litigation in the Cayman Islands. The position in the United Kingdom is governed by the decision of the Court of Appeal in *Gojkovic* [1991] 3 WLR 621 (CA). The material part of that decision says this:

> "What are the principles governing costs in applications for financial relief in the Family Division and, in particular, in cases where open offers and Calderbank offers are made? In particular, what is the starting point of entitlement to costs?
>
> The general principles as to entitlement to costs in civil litigation are to be found in R.S.C., Ord. 62, r. 3(3) which states:

> 'If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall 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.'

Rule 3(5) states: 'Paragraph (3) does not apply to proceedings in the Family Division.'

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 per Cumming-Bruce L.J. in *Singer (formerly Sharegin) v. Sharegin* [1984] F.L.R. 114, 119) but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court. One important example is, as the judge pointed out, that it is unusual to order costs in children cases. In applications for financial relief the applicant (usually the wife) has to make the application in order to obtain an order. If the financial dispute can be resolved it is usual, and normally in the interests of both parties, that the applicant should obtain an order by consent; and if money is available and in the absence of special circumstances, such an agreement would usually include the applicant's costs of the application. If the application is contested and the applicant succeeds, in practice in the Divorce Registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is prima facie entitled to, and likely to obtain, an order for costs against the respondent. The behaviour of one party, such as in material non-disclosure of documents, will be a material factor in the exercise of the court's discretion in making a decision as to who pays the costs.

The incidence of legal aid, the inadequacy of the financial assets available, for instance, to house both parties or even one spouse and the children, are major circumstances which may affect or even distort an order for costs that would otherwise have been expected to be made. In the vast majority of cases, where one party is or both parties are legally aided, and where the assets are insubstantial or at least inadequate for the needs of the family, the question of who pays the costs may be academic. Indeed, by *Practice Direction (Family Division: Costs)* [1988] 1 W.L.R. 561 and following judicial observations about the impact of costs upon ancillary relief litigation (see *Singer v. Sharegin* [1984] F.L.R. 114, 119, per Cumming-Bruce L.J), the court is to be provided with information as to the costs incurred by the parties. In many cases the incidence

of costs has a marked impact upon the availability of sufficient funds for the needs of the family. It may substantially diminish the cake which has to be cut. In some cases those costs are specifically allowed for in the substantive orders made. The ambit and extent of the discretion of the court is consequently, and rightly, far wider than in other civil proceedings.

There is, however, a minority of cases, of which the present appeal is an example, where the assets are substantial and an order for costs can (if appropriate) be made. In such cases the parties are likely to negotiate, and such negotiation, which may lead to a settlement, is much encouraged by the courts. 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 from *Calderbank v. Calderbank* [1976] Fam. 93 (a claim by a husband) in which Cairns L.J. referred to an apportionment offer in Admiralty proceedings, and said, at p. 106:

> '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.'

This useful practice has since been followed in the Family Division, and has now been extended to the other divisions of the High Court by R.S.C., Ord. 22, r. 14 – a written offer 'without prejudice save as to costs.' Ord. 62, r. 9 states: '(1) The court in exercising its discretion as to costs shall take into account … - (d) any written offer made under Ord. 22, r. 14…'

Later decisions referring to the effect of a Calderbank offer have accepted, in my view, the basic assumption as expressed by Cairns L.J. that if an applicant spouse failed to exceed the sum offered, prima facie she/he would pay the costs after the date of communication of the offer. For example, in *McDonnell v. McDonnell* [1977] 1 W.L.R. 34, this court applied Calderbank's case to a legal aid case subject to the limitation on her legal aid certificate, on the basis that the offer in the letter should have been accepted by the wife.

In *Singer v. Sharegin* [1984] F.L.R. 114 Cumming-Bruce L.J., at pp. 119-120, considered the impact of the costs of litigation

upon the assets available and the usefulness of the estimates provided by the parties' solicitors. He said:

> 'The estimates enable the judge to work out the possible beneficial hypothetical orders and he can proceed on the basis that the party costs will be paid by the respondent unless the respondent has protected himself or herself by a Calderbank offer. Then if the applicant has refused what the judge regards as a reasonable offer, he must face the consequences of his refusal by paying both his own costs and the costs of the respondent in so far as they accrued after a reasonable period for consideration of the offer. When all this has been explained by the solicitors to their clients, their understanding of the financial risks should have a salutary effect in persuading the respondent to offer, and the applicant to accept, a reasonable compromise sum.'

Oliver L.J. in *Cutts v. Head* [1984] Ch. 290, in which the practice was extended to the Chancery Division, explained, at p. 306, the nature of the public policy upon which the rule rests, and added:

> 'As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much or more than everything to which he is entitled in the action.'

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 Ord. 62, r. 9 (and the equivalent Ord. 11, r. 10 of the *County Court Rules* 1981 (S.I. 1981 No. 1687 (L.20)), as amended, 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 the court in awarding costs, and as Ormrod L.J. said in *McDonnell v. McDonnell* [1977] 1 W,.L.R. 34, 38, the Calderbank offer should influence but not govern the exercise of discretion.
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> There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation: for instance (as I have already indicated earlier) 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 the County Court Rules 1981 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 offer 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.

7. The power to make Rules of Court governing matrimonial causes is derived from section 4 of the *Matrimonial Causes Law* (2005 Revision). In civil proceedings generally, awards of indemnity costs are governed by Order 62 of the *Grand Court Rules, 1995* (Revised). Order 1 Rule 2 reads in part:

> (1) Subject to the following provisions of this rule, these Rules shall apply in relation to all proceedings in the Court.

...

(4) Except for Orders 3 (Time), 38 Part II (Writs of Subpoena), 39 (Evidence by Deposition), 62 (Costs), 67 (Change of Attorney), 45-51 (Enforcement) and 52 (Committal) 80, these Rules shall not apply to any proceedings which are –

(a) governed by the Matrimonial Causes Rules 1986, as amended,

8. The *Matrimonial Causes (Amendment) Rules*, 2009 contain the following in Rule 22:

> "GCR Orders 3 (Time), 4 (Assignment, Transfer and Consolidation of Proceedings), 5 (Mode of Beginning Proceedings), 38 Part II (Writs of Subpoena), 39 (Evidence by Deposition), 67 (Change of Attorney), 45-51 (Enforcement) and 52 (Committal) shall apply to all proceedings under the Law.

9. Thus, Rule 22 of the *Matrimonial Causes Rules*, which lists those portions of the *Grand Court Rules* applicable to matrimonial proceedings, implies, by its omission of any reference to Order 62, that that Order has no application in matrimonial causes. However, Order 1 Rule 2 (1) and (4) (a) of the *Grand Court Rules* provides expressly that Order 62 does have application to matrimonial causes. This inconsistency need not be resolved on the present application because, as the Court said in *Gojkovic*, there must be some starting point for a cost analysis and the most rational starting point is the rule that costs ordinarily follow the event.

10. I accept that the approach to Calderbank letters in matrimonial litigation described at length in *Gojkovic* is applicable in the Cayman Islands. It is

appropriate, however, to emphasize some of the important points which emerge from that judgment:

(1) the presumption that costs follow the event can be displaced much more easily in matrimonial cases than in other civil cases; the discretion of the Court regarding costs is "far wider" than in other types of civil proceedings;

(2) ordinarily, it will be appropriate to award costs only where the assets are "substantial";

(3) the behaviour of a party, including in particular a failure to disclose material documents, can be a significant factor in a costs application; and

(4) a party receiving an offer of settlement is entitled to "a reasonable time to consider it"; last minute offers to which no response is received will not necessarily result in an award of indemnity costs.

11. The parties separated in March, 2001. Most of the matrimonial assets were held in a corporation called RG & BG Ltd. which was owned in equal shares by Mr. and Mrs. Gibb. Mr. Gibb (without consulting Mrs. Gibb) transferred these assets to a new corporate entity called BEG Ltd. owned entirely by himself. This circumstance, coupled with the passage of an unusually long time between separation and trial, has placed a heavy disclosure burden upon Mr. Gibb.

12. Mrs. Gibb hired a forensic auditor to examine what Mr. Gibb disclosed for the purpose of evaluating the matrimonial assets. In a report dated March 10, 2010 he said that he still required "a detailed explanation" for payments made from a certain account at Merrill Lynch and income received in that account. The account documentation has been produced

but it did not contain the detailed explanations needed by the auditor. Such explanations do not appear to fall within the express terms of Quin, J's ruling of January 28, 2009 requiring specific disclosure, but would certainly be encompassed within the spirit of his order.

13. The information was never provided. A bundle of documents labeled "additional disclosure" was delivered by Mr. Gibb to Mrs. Gibb on the morning of the final ancillaries hearing. Moreover, the settlement offer of March 16, 2010 was accompanied by a separate letter containing certain additional bits of disclosure.

14. Mrs. Gibb initially sought an adjournment of the hearing to permit further disclosure to be made but, after some argument on the subject, abandoned the request and opted to have the hearing proceed.

15. In these circumstances, it was reasonable for Mrs. Gibb to fail to respond to the settlement offer. This is not a case where justice demands an application of the Calderbank principle to penalize a party for an unreasonable failure to accept a pre-trial settlement offer.

16. An award of indemnity costs is appropriate only where the matrimonial assets are substantial. My award to Mrs. Gibb was for the sum of US $521,856, which now increases to US $521,862 as a result of my adjustment described above. That is the capital upon which Mrs. Gibb must rely for income to sustain her in the coming years. An award of

indemnity costs against her would reduce that capital severely. Viewed in this way, I am not satisfied that the family assets here are substantial in the sense given to that term in the *Gojkovic* decision.

17. For these reasons, Mr. Gibb's application for indemnity costs is dismissed. I leave each party to bear his or her own costs.

Dated this 5th day of May, 2010

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS