IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION
IN CHAMBERS

CAUSE NO. FAM 39/2015

BETWEEN

AK

Petitioner

AND

TK

Respondent

Before:	Hon. Gunn J (Actg)
Appearances:	Mr A. Walters of Campbell's for the Husband
	Mr D McGrath of McGrath Tonner for the Wife
Heard:	19th October 2018
Oral Judgment:	22nd October 2018
Judgment released:	13th November 2018

Preamble

This Judgment is distributed with the strict understanding that, in any report of it, no person, other than the attorneys (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the children and adult members of the family must be strictly preserved.

JUDGMENT

1. On 11th October 2018 I gave an oral judgment on an interim application concerning AK payment of child and spousal maintenance, pending a full hearing of his application for variation of those payments (see perfected judgment and order dated 15th October 2018 for details). During the course of the delivery of my judgment, AK indicated his intention to appeal my order lifting the moratorium on the payments of both child and spousal maintenance. Williams J had previously determined the level and period of maintenance payments on 9th May 2017 ("the Maintenance Order").

2. Upon concluding my oral reasons and giving directions for the hearing of the substantial applications, I adjourned the matter to release my perfected judgment and to hear AK's application for leave to appeal. I heard those applications on 19th October 2018.

3. In addition to leave to appeal, AK seeks a stay of my order until the appeal is heard.

4. These proceedings are now following the decree absolute and are, therefore, governed by the Court of Appeal Law (2011 Revision). AK has given notice in compliance with Rule 11(5) of the Court of Appeal Rules (2004 Revision).

The Principles

5. The guiding principles for the court of first instance are: -

- Leave will be given unless an appeal would have **no realistic prospect of success**. A fanciful prospect is insufficient.
- Leave may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal.
- If the issue to be raised on the appeal is of general importance that will be a factor in favour of granting leave.
- If the issues are not generally important and the cost of an appeal will far exceed what is at stake, that will be a factor which weighs against the grant of leave to appeal.
- The Court of Appeal will rarely interfere with the decision based on the judge's evaluation of all evidence as the primary facts or if an appeal would involve examining the fine details of the judge's factual investigation.

- Leave is more likely to be appropriate where what is being challenged is the inference which the judge has drawn from the primary facts and it is properly arguable that materially different inferences should be drawn from the evidence.[1]
- The Court of Appeal does not interfere with the exercise of discretion of the judge unless the court is satisfied the judge was wrong. It will be rare for a trial judge to give leave on a pure question of discretion. He may do so if the case raises a point of general principles on which the opinion of a higher court is required.

(see Sanderson J in **Telesystems Inter v CVC [2001 CILR Note 21]** applying **Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 2 WLR 2**)

6. On this last point of discretion, the Court of Appeal in **Bellenden v Satterthwaite** [1948] 1 All ER held:-

> *"It is of course not enough for the wife to establish that this court might, or would, have come to a different order. We are concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellant body is entitled to interfere."* Per Asquith LJ.

(See also **Piglowska v Piglowski** (1) [1999] 1 WLR at 1372).

7. The appeal will only have a "real prospect of success" if the award falls outside the spectrum of award which may be reasonable in the circumstances (see F(R.) and H [2010 (1) CILR 524])

[1] The court should give reasons for granting or refusing leave in all factual appeals.

8. Leave to appeal from an *interlocutory order* will be refused, if (a) the point raised by the appeal is not sufficiently significant to justify the resulting costs; (b) if the significance of the point is outweighed by the procedural consequences, *e.g.* the loss of an existing trial date; or (c) it will be more convenient to determine the point at or after the trial (see **CVC/Opportunities Equity Partners v Demarco Almeida** [2001 CILR Note 20])

9. Finally, the court should bear in mind the principle of proportionality; even if a case raises an important point of practice or principle, the court should consider carefully whether it is fair to have to decide it at the expense of parties with limited resources or whether it should wait for a more suitable vehicle (see **Piglowska v Piglowski** *ibid*).

The Background

10. On 9th May 2017 Williams J made final ancillary orders with regards to the financial affairs of the parties, which included both a lump sum payment as well as periodic payments for both child and spousal maintenance. The Court of Appeal dismissed AK's appeal of that order (CICA 3/2017). On 23rd April 2018 AK filed a summons seeking a downward variation of the maintenance payments. When the matter came on for directions on 11th May 2018 the parties agreed a consent order adjourning AK's summons pending further disclosure. Additionally, the parties agreed that although arrears would continue to accrue,

    i. AK was not required to make any payments; and

    ii. TK could not seek enforcement of arrears without leave of the court.

until AK's summons was heard. The conditions have been referred to as the "moratoriums".

11. If AK's application for a variation were ultimately successful, then there would be a retrospective recalculation of the maintenance payments and arrears (if any).

12. AK secured new employment in August 2018. Counsel communicated about future maintenance payments but the parties were unable to reach an agreement. On 5th October 2018 TK filed a summons seeking, amongst other things, a lifting of the moratoriums so as to reinstate payments in accordance with the Maintenance Order with leave to enforce arrears. TK had thereby withdrawn her consent to the order made on 11th May 2018. Both summonses came on for hearing on 11th October 2018 and I gave directions as to the hearing of AK's summons and ordered that AK resume payments at the level previously set until the substantive hearing of his summons. I also gave TK leave to enforce arrears.

The Application for Leave to Appeal

13. AK seeks leave on eight grounds.

The "Binary approach" (Ground 1)

14. TK withdrew her consent to the moratorium on payments and was seeking for it to be lifted in its entirety. AK's first ground of appeal is that I erred in law in proceeding on the basis that the only two outcomes of TK's application: to (i) keep the moratorium in place; or (ii) to discharge it in its entirety – what I termed the "all or nothing decision" and Mr Walters called the "Binary approach".

15. AK's position at the beginning of the hearing was that he could not afford to pay anything. There was no offer on the table, nor was there an application for an interim variation of the existing Maintenance Order before me.

16. During the course of the hearing AK did make an offer which TK did not accept. Any offer made to pay maintenance at a lower rate is for TK to consider. Had she accepted the offer, it could have formed a consent order.

17. Mr Walters conceded that, during the course of the hearing, I asked both counsel on more than one occasion whether the court's decision was restricted to continuing or lifting the moratorium in full, at the amount set in the Maintenance Order. On all occasions both counsel responded in the affirmative. Mr Walters believes that this may have been a miscommunication, as the binary approach was inconsistent with AK's offer made during the hearing. It was also accepted that at no point during the hearing did Mr Walters expressly invite me to consider making an order for a lesser amount.

18. Mr Walters submitted that, even in the absence of an application for an interim variation of the Maintenance Order and evidence of TK's current financial circumstances, I should have nevertheless considered section 19 of the Matrimonial Causes Law ("the Law") and, if appropriate ordered that AK pay a lesser amount until his application is heard. Mr Walters submitted that, as a matter of law, I fell in error in approaching this as an "all or nothing decision".

19. I find that this argument has little merit because a full section 19 assessment would not have been fair in the absence of TK's financial information. It was not the forum to be conducting a full review of the children's needs, as well as the needs and financial resources of the parties.

20. There was a valid Maintenance Order before me and (as both counsel accepted on the day) the only issue I could properly consider was whether AK could meet that order until his summons is heard. I explained my approach at paragraphs 29-33 of the judgment and I will not rehearse it again.

21. Even if I am wrong and I could have considered varying the Maintenance Order in these circumstances, my decision would have been the same as I was satisfied on the balance of probabilities that AK could meet the Maintenance Order in the short-term. This ground of appeal has no real prospect of success.

My reasoning (Grounds 2-7)

22. Grounds 2-7 are intrinsically linked. AK submits that, my approach to the question of whether the moratorium should be lifted in full was flawed in that:–

(a) TK's summons had not been issued. There was evidence yet to come.

(b) I made a finding as to AK's credibility.

(c) Erroneously, I took TK's affidavit evidence (5th October 2018) as to AK's alleged failure to disclose the furniture purchase into consideration as (i) counsel did not make submissions on the point; and (ii) counsel did not take me to that paragraph of her evidence.

(d) AK had in fact disclosed the purchase of furniture in his affidavit of 23rd April 2018 and, therefore, I had erred in concluding that AK had "*omitted this purchase from his disclosure to the court*";

(e) I failed to *"take proper account of the decrease in the salary of AK and his material change of circumstances and therefore his ability to make maintenance payments previously ordered*".

(f) I failed to take account of the income or means of TK because such evidence was not before the court.

(g) I *"ignor[ed] the fact that unless monthly accruals are made, when the time to make the payments in question falls due, there will be insufficient resources available to meet them*".

23. All of these complaints lead to an overall submission that I wrongly concluded that AK had resources with which he could meet the Maintenance Order, i.e. that my conclusion was outside the realm of reasonableness.

TK's income (Ground 3)

24. Williams J previously made a determination of the appropriate level of child and spousal maintenance based on TK and the children's needs and resources at that time. There was no suggestion that TK had experienced a change in circumstances other than the obvious inference that she has had to adjust her budget to account for the absence of a total of US$51,000 that she had reasonably expected to receive under the Maintenance Order. As I have already stated, there was no application for an interim variation before me on 11th October and would not have been approved to make over as there would have been insufficient material upon which to consider such a variation. The simple issue was whether AK could *temporarily* meet the current Maintenance Order. Consequently, TK's income and expenditure were not relevant at this stage. TK's finances will be relevant when AK's substantial application is heard.

AK's decreased income (Ground 2)

25. AK submits that I failed to *"take proper account of the decrease in the salary of AK and his material change of circumstances and therefore his ability to make maintenance payments previously ordered"*. This ground of appeal overlaps with AK's substantive application to vary the Maintenance Order which is yet to be determined. As I just stated, the issue before me was whether AK could meet the Maintenance Order *until* his summons is heard. This is a matter of discretion having considered the evidence before me. I determined that he could for reasons that I provided, and exercised my discretion accordingly. Mr Walters has not persuaded me that my decision was or may be beyond the scope of reasonableness. I find that this ground has no real prospect of success.

AK's budget (Ground 4)

26. AK's fourth ground is that my analysis of AK's budget *"ignor[ed] the fact that unless monthly accruals are made, when the time to make the payments in question falls due, there will be insufficient resources available to meet them"*. This complaint overlooks the fact that my conclusion that AK had access to sufficient funds/credit was not based *solely* on the budget (see paragraph 39) and that it was made in the context of his abilities to meet the Maintenance Order over a *short period* only (paragraph 37 and 40).

27. Furthermore, any concern as to AK's lack of savings to meet the annual expenses is unnecessary. These annual expenditures will be considered during the substantive hearing of his summons. If AK is granted a variation then these would be incorporated into any retrospective recalculations. If the application results in AK being in credit, or if he is found to have to pay a lesser amount than the current Maintenance Order, then those funds will become available to him. Therefore, this is a matter of a short delay rather than a loss of such funds. This ground of appeal therefore has no real prospect of success either.

AK's other resources (Grounds 5 & 6)

28. TK's summons to lift the moratorium in the face of AK's budget was a clear challenge to AK's evidence as to his current financial circumstances and TK spoke to it in her affidavit prepared for the hearing on 11th October. AK's ability to pay the Maintenance Order was clearly going to be a live issue on 11th October. AK submits that I erroneously found that AK had other resources with which he could meet the Maintenance Order.

29. Mr Walters submitted that, although Mr McGrath raised the issue of AK's resources late in his oral submissions, I could not have found AK's evidence as to his means to be incredible. He argued that as AK's affidavit evidence that he only had a surplus of US$330 at the end of the month was uncontested and, consequently, I could not have made a finding to the contrary. Mr McGrath submitted that AK's evidence was "unchallenged" at that stage simply because there was insufficient information available to TK to determine the issue one-way or the other; the issue of whether TK challenged AK's evidence and assertions would not arise until the hearing of the substantive application.

30. An interlocutory financial relief application is not a hearing at which the court makes findings about either party's credibility. However, Mr Walters has not persuaded me that I was not entitled to critically assess what either party says in their financial position, if there is reason to believe that something is hidden. The court is not confined to the mere say-so of the payer as to the extent of any income or resources. In such circumstances, the court should err in favour of the payee (**TL v ML [2005] EWHC 2860)**. This is a matter of my assessment of the evidence the exercise of my discretion.

31. Only AK and TK's most recent affidavits (dated 8th October 2018 and 5th October 2018 respectively) were included in the hearing bundles. I was permitted to and did review them in their entirety before making any findings as to whether I consider that AK has resources from which he can pay the Maintenance Order. I was mindful that the affidavits were yet untested (paragraph 30). Mr Walters has failed to persuade me that I may have erred in that approach.

32. Unfortunately, neither counsel referred me back to the documents exhibited by AK in his affidavit of 23rd April 2018. On reviewing that document now, I see that there is reference to a future expenditure on import duty on furniture and further purchases of furniture. I now accept that AK did disclose this transaction previously and, therefore, my comment on non-disclosure of that transaction was erroneous. However, as can be seen from paragraph 39, I did not draw any inference from that erroneous belief. It was the ability to meet those expenses at a time when AK said he had "no disposable income" (paragraph 12 of affidavit dated 23rd April 2018) which caused me to infer that he had undisclosed resources. The "error" Mr Walters has identified was neither of substance nor consequence. Neither ground of appeal has a real prospect of success.

33. I am not persuaded that there is a real prospect of an appellate court finding that I fell into error in the manner in which I came to conclude that there were resources.

My overall conclusion (Ground 7)

34. Ground 7 brings together the strands of grounds 2-6. Whether individually or cumulatively, I am not satisfied that there is a real prospect of an appellate court finding that my decision was unreasonable.

Public Policy (Ground 8)

35. Finally, AK argues that the manner in which I approached the making of the order was unjust as it resulted in an order being made which AK cannot afford and would, therefore, almost immediately be in breach of. This ground of appeal focuses on the lawfulness of the process that led me to come to the conclusion rather than the facts underpinning the decision. Mr Walters submits that in the absence of a successful appeal AK will inevitably be in breach.

36. I have considered and dismissed the possibility that this is an exceptional case in which, even in the absence of a real prospect of success, I should refer the issue to the Court of Appeal on grounds of public interest. Although there is no previous authority as to how a court should approach application such as TK made in these circumstances, the issue arose from the unusual circumstances of this case and is unlikely to reoccur again in the future.

37. As his final argument, Mr Walters submitted that if not overturned on appeal (as he believes it would be), my judgment will prejudice AK at the substantive hearing of his summons. He suggests that the next tribunal will be tainted by my finding that AK can meet the order, thereby placing him at a disadvantage, in other words, that he will not receive a fair hearing. I am rather astounded by this suggestion. In family proceedings, this would mean that every unsuccessful party to an MPS application would be able to argue that they will be so prejudiced in future. Following Mr Walters' argument to its logical conclusion, it would create an almost automatic ground of appeal for any unsuccessful party of an interim application. Such an approach would be contrary to the well-established principles of law to which I have already referred and public policy. Mr Walters underestimates the skills and experience of judges to place irrelevant matters out of their minds, as we often do, and to make our own independent findings on matters of credibility (as we do on a daily basis). I reject this final ground of appeal too.

Final observations

38. I will also make some additional observations: Even if there were one or more grounds giving rise to a prospect of success, or there was a valid public policy issue, this is the type of case where leave should be refused, because:–

(a) The cost of the appeal to both parties will significantly outweigh the amount payable between now and the hearing date (if set for November as offered – US$8,500 to US$17,000).

(b) Mr Walters has not canvassed possible hearing dates for the Court of Appeal. Unless the appeal can be heard within the next 6 weeks or so, it is likely that the current timetable for a hearing of AK's summons in November will be lost. Consequently, an appeal would likely cause significant delay to the proceedings which is a significant factor against granting leave.

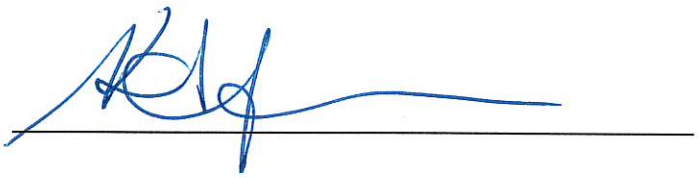
(c) If AK is successful at the substantive hearing (hopefully in November) then any payments made as a result of my order would be subject to recalculation and might result in AK having an overall credit. The issue can, therefore, be quite adequately, and more cost-effectively, dealt with at the hearing of his summons rather than at a separate appeal.

(d) Given the means of the parties, and the costs of further litigating this or any point of public policy (if there were one), this is not the appropriate case for this exercise.

39. In conclusion, AK has failed to persuade me that any of the grounds put forward have a real prospect of success or that this is an exceptional case which should be nevertheless referred to the Court of Appeal. Given the forgoing I need not consider whether to stay my order.

40. I must also make one final observation: TK has offered an undertaking not to pursue any enforcement until the hearing of AK's summons, in essence giving AK the stay that he desires. I am concerned that, despite TK's offer, AK has pursued this application for leave at significant expense to both parties and unnecessarily taking up court time. AK's course of action has been contrary to the overriding objectives to deal with matters not only justly, but in an expeditious and economical way.

Dated this 22nd day of October 2018



Hon Kirsty-Ann Gunn

Acting Judge of the Grand Court