

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

(Matrimonial)

FH No. 00185 of 2006

H.C.A. No. M-422 of 2001

BETWEEN

PHILLIP VILAIN

Petitioner

AND

SHIRLEY VILAIN

Respondent

RAY GOMES

Co-Respondent

Before the Honourable Madam Justice Dean-Armorer.

Appearances: **Mrs. Ruth Van Lare instructed by Ms Marcelle Ferdinand for
the Petitioner;**
 Mrs. Seebaran-Suite for the Respondent.

Decision on Costs

1. On the 27th January 2006, I delivered judgment in the Wife's Application for Financial Relief. In my judgment, I made no order as to costs.
2. A few hours prior to the delivery of my judgment, I received a copy of a written request by learned Counsel for the Wife. Learned Counsel, by her request addressed to the Clerk to the Judges, asked that it be drawn to my attention that she wished to make submissions on the issue of costs.

3. I had provided Attorneys-at-Law for both parties with notification of the date of my judgment since the 6th of December 2005. The timing of the request of learned Counsel was therefore quite unfortunate.
4. Following delivery of the judgment on 27th January 2006, a day was fixed for submissions on the issue of costs. The matter was transferred for hearing at the Family Court and given a new number.
5. Three (3) issues now engage my attention:
 - i) Is a High Court Judge empowered to alter his or her decision as to costs following the oral pronouncement of judgment;
 - ii) If such power is invested in the High Court Judge, should I vary my order for costs;
 - iii) If so, what should the varied order be.

In respect of the first issue, learned Counsel for the Husband has relied on the authority of *Mc Knight v Mc Knight* 44 W.I.R. 349, in support of the submission that following the oral pronouncement of a decision, the Judge has power to correct only clerical errors.

With respect, I disagree with learned Attorneys-at-Law. In my view, the authority cited asserts that following the filing of a Notice of Appeal, the trial judge is *functus officio*. No Notice of Appeal has been filed in this matter. If one has been filed it has not been brought to my attention.

The rule, as I understand it, is clearly stated in the decision of *Abdool Latif v Tani Persad* 17 W.I.R. 263, itself cited in *Mc Knight v Mc Knight* and indeed set out in Written Submissions which had been filed on 9th February 2006 on behalf of the Petitioner/Husband. The Judge may alter or recall a decision as long as it has not been entered or perfected.

In respect of the second issue, learned Attorneys for the Wife, on my directions, filed an affidavit exhibiting without prejudice correspondence on the basis of which they have argued that an order for costs should be made in the Wife's favour.

On the 9th February 2006, learned Attorneys for the Wife filed an affidavit sworn by Attorney-at-Law, Lydia John. This affidavit exhibited six (6) letters, which represented negotiations between Attorneys-at-Law for the parties on the issue of property settlement.

Included in the bundle is the letter dated 12th January 2004 and signed by Mrs. Suite, learned Counsel for the Wife. This letter was addressed to Attorneys for the Husband. There is no dispute that the letter of 12th January 2004 may be regarded as a *Calderbank* offer proposing that the Husband pay to the Wife \$800,000.00 in full and final settlement. Mrs. Suite wrote:

“This letter is without prejudice but we reserve our right to place its contents before the court in the event an issue of costs later arises....”

On 24th May 2004, Ms. Ferdinand for the Husband counter-offered in the sum of \$700,000.00. On 1st June 2004, Mrs. Suite for the Wife rejected the offer of \$700,000.00.

The principles which ought to guide a Court on the issue of costs were set out in *Gojkovic v Gojkovic* No. 2 [1992] 1 All E.R. 267. At page 269, Butler-Sloss, LJ said:

“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) 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. The starting point, in my judgment, is that costs

prima facie follow the event (see Cumming-Bruce LJ in Singer (formerly Sharegin) v Sharegin [1984] FLR 114 at 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."

At p. 270, Butler-Sloss, LJ observed:

"The ambit and extent of the discretion of the court is consequently.....far wider than in other civil proceedings...."

Butler-Sloss, LJ later referred to the **Calderbank** offer at p. 271:

"Later decisions referring to the effect of a Calderbank offer have accepted.....the basic assumption expressed by Cairns, LJ that if an applicant spouse failed to exceed the sum offered prima facie....she/he would pay the costs after the date of the communication of the offer...."

Butler-Sloss, LJ quoted Cummings-Bruce, LJ in ***Singer v Sharegin***:

*“...the estimates enable the judge to work out the possible beneficial effect of 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.....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.”*

At p. 272, Butler-Sloss, LJ considered the converse situation:

“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 a party who fails by the offer to meet the award made by the Court....”

Of the case of ***Gojovic***, Butler-Sloss said:

“I cannot see why the lack of a sufficient offer by the Husband should not on general principles entitle the Wife to her costs after January 6th.....”

Mrs. Van Lare, Counsel for the Husband argued against an award of costs in favour of the wife.

Learned Counsel cited the case of ***Mc Donnell v Mc Donnell*** [1977] 1 All E.R. 766 and quoted Omerod, LJ at P. 770:

*“A **Calderbank v Calderbank** offer should influence but not govern the exercise of the discretion. The question to my mind is whether on the basis of the facts known to the wife and her advisors and without the advantage of hind sight, she ought reasonably to have accepted the proposals.....bearing always in mind the difficulty of making accurate forecasts....”*

Learned Counsel referred as well to the case of Gojkovic and in particular to the pre-conditions formulated by Butler-Sloss, LJ to the use of a *Calderbank* letter. Learned Counsel submitted that the evidence before me failed to satisfy the pre-conditions.

The pre-conditions formulated by Butler-Sloss, LJ are:

1. Both parties must make full and frank disclosure;
2. The Respondent must make a serious offer worthy of consideration;
3. If he does so it is incumbent on the applicant to accept or reject the offer;
4. If the offer is being rejected the Applicant should make his or her position clear and indicate in figures the counter-offer which is being made.

Learned Counsel, Mrs. Van Lare argued that the offer by the Husband for \$700,000.00 was serious and that the Respondent/Wife ought to have continued negotiations.

Learned Counsel Mrs. Van Lare alluded to the Wife's refusal to participate in a Court-assisted mediation process.

Learned Counsel argued that the Husband acted reasonably in making his offer. Learned Counsel also reminded the Court that there was no dramatic difference between the Husband's offer and the final award.

In her skeleton submission, Learned Counsel, Mrs. Van Lare contended that in considering the issue of costs, the Court should have regard to the party whose conduct gave rise to the litigation. The Learned authors of the 14th ed. of *Rayden on Divorce* wrote at para. 6:

“The general rule prima facie applies the successful party obtains an order for his or her costs. But if the Court investigates the question of costs, it will no doubt pay considerable attention to the question whose conduct gave rise to the litigation.”

Learned Counsel alluded to the Wife's admission of adultery and to the eventual breakdown of the marriage.

Her final contention was that the Court should consider the impact of an order for costs on the finances of the Petitioner. Learned Counsel cited the case of *Martin v Martin* [1976] All E.R. 625.

Martin v Martin (supra) had been cited during the hearing of the Wife's application for ancillary relief. It was a case of a childless couple whose principal asset was a farm. The Husband's reckless spending resulted in a considerable overdraft, the liquidation of which would have required the Wife to sell the farm house and obtain a caravan to live in.

At first instance, the learned trial judge ordered that having regard to the husband's conduct he should be required to make a substantial lump sum payment which was assessed at £5,000.

The Court of Appeal upheld the ruling on conduct, but reduced the quantum of the award on the ground that it "*would be wrong to allow to stand an order which it does not appear the Husband had any prospect of paying....*" See [1976] 3 All E.R. 631g.

The Court of Appeal also set aside the trial judge's order for costs saying:

"Costs in matrimonial cases do not necessarily follow the event...."

It is clear from the authorities that the *Calderbank* letter does not operate to deprive the Court of its discretion in making an award for costs. As stated by Omerod, LJ in *Mc Donnell* a *Calderbank* offer should "*influence and not govern....*" the exercise of the Court's discretion.

In *Mc Donnell*, Omerod, LJ identified the question in this way:

"The question.....is whether on the basis of the facts known to the Wife and her advisors and without the advantage of hindsight, she ought reasonably to have accepted the proposals...."

In the case which engages my attention, the *Calderbank* proposal was rejected by the Husband. Using the *Mc Donnell* formula, I proceed to consider whether on the basis of facts known to the Husband and his advisors, the Husband ought to have accepted the offer of full and final settlement by paying a lump sum of \$800,000.00.

The *Calderbank* proposal of \$800,000.00 was made on the 12th January 2004. By this time, the parties had had the benefit of the valuation Report which placed a value of \$2.1 million on the matrimonial home

It was a matter of public knowledge and a fact known to the Husband that real estate prices were escalating rapidly.

The vagaries of litigation, the length of time taken for fixing dates, cross-examination, Counsel's submissions and the time for delivery of the Court's decision ought to have been matters upon which the Husband received advice.

By the date of the *Calderbank* letter the Husband would have been seized of three (3) basic facts:

- the value of the matrimonial home on the date in question;
- the rising real estate prices, which would inevitably lead to an increase in the value of the matrimonial home and as a consequence to an increase in the award to which the Wife would have been entitled.
- the slow process of litigation, from which the Husband could have inferred that with the greatest diligence on the part of Counsel and the judicial officer, the trial would not be completed for several months.

Having regard to these facts, of which the Husband must have been seized, it is my view that it would have been unreasonable for him to accept the *Calderbank* proposal, which was made in Mrs. Suite's letter of 12th January, 2004.

In exercising my discretion as to costs, I have paid attention, as required, to the party whose conduct gave rise to litigation.

In the instant matter, the decree nisi had been made on two (2) grounds: the Wife's adultery and the Husband's unreasonable behaviour. It seems to me that the

conduct of both parties gave rise to litigation. For this reason, in the absence of the *Calderbank* factor, the appropriate order should have been that each party bear his or her own costs.

It seems to me that the pre-conditions which have been prescribed in *Gojkovic* are present. There had been no allegation of non-disclosure by either party. A clear offer had been made by the Wife. A clear counter-offer was made by the Husband.

In my view, the Wife cannot be regarded as unreasonable for discontinuing negotiations after the counter-offer. Both the offer and the counter-offer had been made several years after the breakdown of the marriage. The Wife's application for ancillary relief had been filed since September 2002, and had been outstanding for more than a year.

Moreover, the hearing of the application had already begun and there was no time for leisurely negotiations.

In exercising my discretion, I have considered whether the effect of an order for costs will be crippling to the Husband.

The figure claimed in the Wife's Skeleton Bill of Costs is \$167,900.00. This figure will be reduced by taxation. In my view, the instant case is distinguishable from *Martin v Martin*, where the English Court of Appeal reduced the award in the expectation that the payment of the prescribed lump sum would necessitate the sale of the Husband's hotel, which might lose him that home. There is no comparable situation here where the pre-taxed costs of the Wife would be covered by the Husband's gross earnings over four (4) months.

I have considered as well that the Wife had not been successful in achieving the award which was sought by her Counsel in the course of the trial, that is to say \$1.5 million being one half of the equity of the matrimonial home.

It seems to me that the aforementioned factor ought not to dissuade me from applying the principles set out in *Gojkovic*. The *Calderbank* philosophy is one of policy. It operates to encourage parties to avoid the expense of litigation by amicable settlements. If it has been established that a reasonable offer was unreasonably rejected and that the parties were compelled to meet the expense of litigation, the

party whose unreasonable rejection resulted in prolonged litigation should bear the other party's costs from the date of the *Calderbank* offer.

In the case of *Gojkovic*, Butler-Sloss, LJ equated the situations where one party fails to obtain an order equal to the offer made and a party who fails by offer to meet the award made by the Court. See [1992] All E.R. at p. 272. In my view, the Husband in this case falls into the second category.

Orders

1. Order for costs made on 27th January 2006 is varied.
2. The Wife's costs from the date of the counter-offer, that is to say 24th May 2004, to be taxed in default of agreement and paid by the Husband to the Wife.

Dated this 17th day of March, 2006.

Mira Dean-Armorer, J