

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Application No. 3 of 2004**

**BETWEEN**

**RAHAMAN ALIE-CASSIM**

**Appellant/Respondent**

**AND**

**FEROZA ALIE-CASSIM**

**Respondent/Petitioner**

**In Chambers**

**Before The Honourable Mr. Justice Archie J.A.**

**Appearances:**

**Ms. D. Rameshwar-Mc.Leod for the**

**Appellant/Respondent**

**Ms. L. Seebaran-Suite for the Respondent/Petitioner**

**Date: 6<sup>th</sup> July 2004**

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**REASONS FOR JUDGMENT**

[1] In this application, the Court had to determine whether, for the purposes of an appeal, a property adjustment order made by a judge in chambers was a final or an interlocutory order. The distinction is important, because different time limits apply for the filing of a notice of appeal.

**[2]** The appellant sought leave to file and serve notice of appeal out of time in the belief that it was an interlocutory order and therefore subject to a 14 day time limit. On 23<sup>rd</sup> June 2004 I ruled that it was a final order, which meant that the application was unnecessary as a 6-week time limit applied. The appellant's summons was dismissed with costs. At the request of counsel, and because there does not appear to be any written decision in this jurisdiction on this particular point, I now set out my reasons for doing so.

**[3]** The appellant applied to a judge in chambers for an order for periodical and lump sum payments and a property adjustment order in respect of a specified property. The application for periodical and/or lump sum payments was not pursued and the judge made a property adjustment order in two parts. In the first part it was ordered that the specified property be divided in the ratio 60:40 in favour of the respondent/petitioner. The second part of the order, which was expressed to be by consent (although that appears to be a matter of contention in the proposed appeal) dealt with the mechanics of the sale and division of the property and contents. It provided, among other things, for the sale of the property at a specified upset price (unless the parties agreed to a lower price in writing) and valuation of furniture, fittings and equipment.

**[4]** The proposed notice of appeal contains no challenge against the second part of the order. It is directed solely at the 60:40 division of interests. The appellant contended that the order was interlocutory in nature for the following reasons:

- (i) It was a an order emanating from a judge in chambers;
- (ii) There were still matters to be worked out under the second part of the order;
- (iii) In the order it was expressed that there was 'liberty to apply';
- (iv) In the absence of any special provision in the local statutes or rules of court, the practice and procedure in England, which is to treat such orders as interlocutory, should be followed.

**[5]** The first proposition may be disposed of immediately. The applications that routinely come before chamber court judges are many

and varied in nature. Both interlocutory and final orders emanate from the chamber court. The fact that an order emanates from the chamber court is not in any way determinative of the question whether it is interlocutory or final.

[6] The second and third propositions focus on the form of the order (the ‘order test’), as opposed to the nature of the application that prompted it (the ‘application test’). In **Durity v The Judicial and Legal Service Commission 49 WIR 433**, the Court of Appeal decided that the proper approach to be taken in this jurisdiction, is to regard an order or decision as final if, irrespective of whose favour the application before the court is resolved, the nature of the application is such that the order made at its conclusion would, unless overturned on appeal, finally determine the matter in litigation. In this case, once the nature of the matter in contention is correctly identified, the nature of the order is not difficult to identify. The issue to be determined on the application for the property adjustment order was the ratio of the parties’ respective interests in the subject property, not the absolute value of those interests.

[7] In any event, the only part of the order against which the intended appeal is sought is the part that declares the parties’ respective percentage interests. An order may be final in part and interlocutory in part<sup>1</sup>. Arguably, the part of the order that gives directions for the manner of carrying out of the sale of the house and valuation of contents may be regarded as interlocutory<sup>2</sup>. In that regard, the appellant relied on **Blakely v Latham**<sup>3</sup> but that case is of no assistance for the purposes of this application because the appellant has not complained about the second part of the order.

[8] In that context, I rejected the suggestion put forward by the appellant that the words ***“liberty to apply”*** could reasonably be construed as applying to the first part of the order, which sets out the parties respective percentage interests. It certainly does not give the judge power to review that aspect of the order. Ordinarily, when those words are included in an order of the court, they refer to the working out of the actual terms of the order made<sup>4</sup>. It is also instructive that

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<sup>1</sup> Light v William West & Sons Ltd. [1926] 2 K.B. 238

<sup>2</sup> See Blakely v Latham (1890) 43 Ch.D. 23

<sup>3</sup> i.b.i.d.

<sup>4</sup> See Cristel v Cristel [1951] 2 All E.R. 574

sections 31 and 33 of the Matrimonial Proceedings and Property Act Chap. 45:51, [‘the MPPA’], which make provision for application to the court to vary, discharge or suspend orders made under the MPPA do not apply to lump sum, transfer of property, or property adjustment orders. That, to my mind, reinforces the notion that, by their very nature, applications for lump sum or property adjustment orders are intended to effect a final determination of rights and division of assets between the parties.

**[9]** The appellant’s submission that I should be guided by the practice in England was based on s 37 of the Supreme Court of Judicature Act Chap. 4:01 and the English Court of Appeal decision in **Guerrera v Guerrera [1974] 3 All E.R. 460**. S 37 provides that, in the absence of any special provisions in the Act or rules of court, the jurisdiction of the Court of Appeal, so far as concerns practice and procedure in relation to appeals from the High Court, shall be exercised as nearly as may be in conformity with the law and practice in force in England on 30<sup>th</sup> August 1962.

**[10]** Orders for or relating to ancillary relief in England, including property adjustment orders, are now specifically dealt with under their Order 59 Rule 1A(6) and deemed to be interlocutory. However, the general rule as set out in Order 59 Rule 1A(3) is that a judgment or order shall be treated as final if the entire cause or matter would (subject to any possible appeal) have been finally determined whichever way the court below had decided the issues before it. Rule 1A paragraph (6) begins with the words ‘*notwithstanding anything in paragraph (3)*’ and it seems that, but for that deeming provision, property adjustment orders (or at least the order which the appellant seeks to challenge), would ordinarily fall under the definition of ‘final’ contained in paragraph 3.

**[11]** A further difficulty arises in attempting to ascertain the English practice prevailing in 1962, no evidence of which was before me. S 37 does not refer to the current English practice. In my view it is transitional in nature and could not have been intended to fix once and for all the practice and procedure in Trinidad and Tobago. Our Court of Appeal has set out the principle that should apply. In any event, there appears to have been some doubt about the practice even in 1974 among the members of the panel in **Guerrera v Guerrera**. The appeal before the court had appeared in the Final and New Trial list. Scarman L.J. referred to the 11<sup>th</sup> Edition of Rayden on Divorce whose authors

apparently regarded orders for payment of lump sum or transfer of property under the English MPPA 1970 as final<sup>5</sup>. He took the view that the question was still open for determination by the Court of Appeal and, having conceded that the matter had not been fully argued, nevertheless proceeded on the basis of what he described as his “not very long experience” as a judge of the Court of Appeal (this was 1974). In his experience, the Court of Appeal regarded such appeals as interlocutory.

**[12]** The case of **Guerrera v Guerrera** was therefore of little assistance and the matter fell to be determined according to the generally applicable principle set out in **Durity v The Judicial and Legal Service Commission**. The nature of the application before the chamber court judge was such that, whatever the outcome, it was apt to determine once and for all the real issue between the parties i.e. their relative interests in the real and personal property that formed the subject matter of the order. The order is therefore final. Even if the ‘order’ test as opposed to the ‘application’ test had been applicable, the result would have been the same as that part of the order against which the appellant seeks to appeal is clearly final<sup>6</sup>.

Ivor Archie  
Justice of Appeal

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<sup>5</sup> In the 12<sup>th</sup> Edition published that same year they referred @ pp 631 to the test in **Salter Rex & Co. v Ghosh** [1971] 2 All E.R. 865 which is to the effect that regard must be had to the nature of the application made and not to the order made.

<sup>6</sup> See **Light v William West & Sons Ltd.** (infra)