[2012] JMCA Civ 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 125/2011

BETWEEN	**GREGORY ONEIL GORDON**	**APPELLANT**
AND	**PAULINE VICTORIA GORDON**	**RESPONDENT**

Written submissions filed by Brown and Shaw for the appellant

Written submissions filed by Verleta V. Green for the respondent

2 November 2012

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

IN CHAMBERS

BROOKS JA

[1] On 16 July 2010, the appellant Mr Gregory Oneil Gordon filed a petition for the dissolution of his marriage. His estranged wife, the respondent Mrs Pauline Victoria Gordon, does not contest the petition. She is, however, desirous of having certain other issues settled as well, namely, the custody and maintenance of their daughter

and the determination of their respective interests in specific real property and a business enterprise. On 14 February 2011, she filed a notice of application for court orders in respect of those issues.

[2] When her application came on for hearing before Rattray J on 11 November 2011, counsel for Mr Gordon argued as a preliminary point, that it was improper, in proceedings for dissolution of marriage, to apply for an order for division of property. The learned judge ruled against the preliminary point but gave permission to appeal. Mr Gordon's appeal has come by way of a procedural appeal, pursuant to rule 2.4 of the Court of Appeal Rules 2002.

[3] The essence of Mr Gordon's complaint is that issues relating to the division of property may be considered in the context of a petition for dissolution of marriage, only if it is one of the forms of relief included in the petition. He contends that if it is not included in the petition, it must be initiated by way of one of the other forms of originating process namely, a fixed date claim or an ordinary claim.

[4] In support of this stance, learned counsel for Mr Gordon, Mrs Shaw, in her written submissions, cited rules 76.4(5) and 76.6(1) of the Civil Procedure Rules 2002 (the CPR). The former states:

> "**A petition for a decree of dissolution of marriage**, for a decree of nullity of marriage or for a decree of presumption of death and dissolution of the marriage **may include a claim for maintenance, custody, education of or access to children, division of property** and any other relief relating to matters concerning the marriage, the union

> between the parties or any relevant children." (Emphasis supplied)

The latter rule states:

> "Where **in any petition or fixed date claim form a part of the relief claimed is custody, maintenance, education of or access to children or division of property**, such relief may be granted upon an application for court orders." (Emphasis supplied)

The interpretation learned counsel places on the latter provision is that it is only where the petition or fixed date claim form includes the relevant form of relief that that relief may be granted upon an application for court orders.

[5] If these submissions are correct, and are taken to their logical conclusion, it would mean that only a petitioner who had included the relevant "other relief" in his petition for dissolution of marriage, could seek orders in respect of that "other relief". A respondent, who sought such relief, would instead, have been obliged to file separate originating process. The result would be cumbersome and could well cause delay in both the conclusion of the petition as well as the application for the other relief.

[6] It is well established, however, that respondents frequently, by way of ordinary application for court orders, claim relief such as custody and maintenance of the relevant children of the marriage, when these have not been included in the petition. Admittedly that practice commenced under, the now repealed, section 25 of the Matrimonial Causes Act. The practice has not abated despite the repeal of section 25 by the Maintenance Act of 2005. Section 3 of the Maintenance Act allows maintenance issues to be considered alongside property issues. Section 3(2) states:

> "In any case where an application is made for the division of property under the Property (Rights of Spouses) Act, the Court hearing the proceedings under the Property (Rights of Spouses) Act may make a maintenance order in accordance with the provisions of this Act."

Is there a difference in the approach when the issue is that of property division?

[7] According to Mrs Shaw's submission, as I understand it, section 27 of the Matrimonial Causes Act makes the difference. That section prohibits the grant of a decree absolute unless the court considers the arrangements for the care and upbringing of the relevant children. Learned counsel submitted that the established method of bringing those matters to the court's attention is by way of an application for court orders.

[8] The flaw in that argument is that neither the Matrimonial Causes Act nor the CPR stipulates any distinct procedure, for that consideration. Rules 76.4(5) and 76.6(1), which were quoted above, are the provisions which deal with the issues regarding children and the issues regarding property. They do not discriminate between the types of relief.

[9] The written submissions by Mrs Green, on behalf of Mrs Gordon, are more in line with the tenor of the overriding objective of the CPR. That objective is the dealing with cases in a manner which saves expense and ensures that they are dealt with expeditiously and fairly (rule 1.1(2)(c)). The essence of learned counsel's submission was:

a. The petition for dissolution of marriage, having been filed, Mrs Gordon was obliged to place all issues in contention, in relation to the marriage and the relevant child, before the court.

b. Section 11 of the Property (Rights of Spouses) Act allows an application to the court for a decision concerning division of property, to be made "in a summary way to a Judge of the Supreme Court". In that context "summary" means "without the formality of a full proceeding". The use of the term "summary", contemplates this, less formal, method adopted by Mrs Gordon.

c. Even if the method of proceeding were incorrect, the decided cases suggest that the application should not be struck out merely on the basis of the irregularity.

[10] In support of the latter submission, learned counsel cited the cases of **James Wyllie and Others v David West and Others** SCCA No 120/2007 (delivered 13 August 2008), **Watson v Fernandes** [2007] CCJ 1 (AJ) and **Goodison v Goodison** SCCA No 95/1994 (delivered 7 April 1995). **Goodison** is the authority that is closest, by way of context and subject matter, to the instant case.

[11] In **Goodison**, a wife, in her petition for divorce, included prayers for the determination of property interests as well as for the maintenance of the relevant child of the marriage. The wife also filed a summons for ancillary relief in which she claimed relief concerning the property. The husband complained about that approach and was

successful at first instance in having the summons struck out. On appeal, this court held that the method of approach was irregular, as the Matrimonial Causes Act did not allow for applications of that nature. The correct procedure at that time was to have proceeded by originating summons pursuant to, the now repealed, section 16 of the Married Women's Property Act.

[12] Despite the irregularity, however, the appeal was allowed, as it was held that there would be no prejudice caused by the issues being heard at the same time and that it would have been simpler for that approach to have been used. The court placed reliance on the well known case of **Herbert W Eldemire v Arthur W Eldemire** [1990] UKPC 36; (1990) 38 WIR 234 and stressed the following dictum from that case:

> "In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification." (1990) 38 WIR 238j – 239a).

Those words are much more relevant with the advent of the CPR.

[13] In **Goodison**, Forte JA (as he then was) also quoted, with approval, the judgement of Ormrod LJ in **Ward v Ward and Greene** [1980] 1 All ER 176 (note). Ormrod LJ, said, in part:

> "For my part, I have never understood the advantages of multiplying pieces of paper intituled in particular statutes named at the head of the summons. It seems to me to be quite clear that s 17 of the 1882 [Married Women's Property] Act gives the court power to order a sale (certainly as clarified by the Matrimonial Causes (Property and Maintenance) Act 1958) in proceedings between husband and wife in connection with property. Section 30 of the Law of Property Act 1925 gives the court power to order a sale

> whether there is a trust for sale, and to my mind it cannot matter what the nature of the proceedings are; what matters is whether the circumstances are such as to bring the case within one or other of those Acts which give the necessary power to the court to order the sale. **So I think it may be helpful if we were to say that it is not necessary to intitule proceedings as being under the Married Women's Property Act 1882 or the Law of Property Act 1925, or to issue pro forma summonses to enable the court to exercise its powers to order a sale where the circumstances justify it under one or other of those Acts.** I hope that may be a helpful observation." (Emphasis supplied)

Forte JA then went on to advocate a practical approach to the issue that was then before the court. He said, at page 13 of the judgment:

> "With that background, the question of whether the matter can proceed on the basis of the summons before the court, ought in my view **to be approached in a practical way and with the view, if possible, of avoiding added expense which can result from surrendering to technical objections**." (Emphasis supplied)

Forte JA's tone in that quotation foreshadows that of the CPR.

[14] Based on that reasoning and those authorities, it seems that the appropriate approach to the issue to be resolved, in the instant case, is that, in the absence of any prejudice to Mr Gordon or to the court, Mrs Gordon's application may properly be heard in the context of the proceedings concerning the dissolution of the marriage. Firstly, the property dispute falls within the definition of "matrimonial proceedings" as used in part 76 of the CPR which deals with such matters. Secondly, similar to section 16 of the Married Women's Property Act, section 11(1) of the Property (Rights of Spouses) Act does not state that the application should be by an originating process. It states

that the applicant "may apply by summons or otherwise in a summary way to a judge of the Supreme Court". That formulation does accommodate the use of originating process but does not preclude an application made in the context of other matrimonial proceedings.

[15] In the circumstances, Mr Gordon not having shown that he would be prejudiced in any way by Mrs Gordon's application, the appeal should be dismissed and costs awarded to Mrs Gordon. Such costs are to be taxed if not agreed.

Order

[16] (1) The appeal is dismissed.

(2) The order of Rattray J made on 11 November 2011 is affirmed.

(3) The costs of the procedural appeal are to be borne by the appellant. Such costs are to be taxed if not agreed.