Case No: B4/2008/1651

Neutral Citation Number: [2009] EWCA Civ 1427
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY
OF THE FAMILY DIVISION
(MR JUSTICE BODEY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 21st October 2009

Before:

LORD JUSTICE THORPE
LORD JUSTICE WALL
and
MR JUSTICE COLERIDGE

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Between:

M	**Appellant**
- and -	
M	**Respondent**

- -

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Mr A Khan (instructed by Messrs C T Emezie) appeared on behalf of the **Appellant**.

Mr G Crosthwaite (instructed by Messrs Crouther) appeared on behalf of the **Respondent**.

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Lord Justice Thorpe:

1. The appellant husband is Nigerian and was born in Nigeria. The respondent wife is of Nigerian origin but was born in London. The parties met in the United States in 1989 and commenced a relationship. Their marriage was celebrated in Lagos on 3 December 1994. By 2001 the marriage was in difficulty and broke down irretrievably within the month of August 2002.

2. The wife filed a divorce petition in Lagos in November 2002, but on 15 February 2006 she withdrew her petition in Lagos, leaving the husband's cross-petition still on foot. On 7 March 2006 she filed a petition in this jurisdiction and that attracted from the husband -- not surprisingly -- an answer, a summons challenging the courts' jurisdiction and a summons for a discretionary stay under paragraph 9 of schedule 1 to the Domicile and Matrimonial Proceedings Act 1977.

3. The wife's first successful application led to a maintenance pending suit order made by District Judge Segal on 15 June 2006 in the sum of £20,000 per month. That order was discharged by Singer J on the husband's appeal on 2 November 2006. It appears that one of the bases for Singer J's decision was that the order made by the district judge did not rest on the foundation of any issued application. This setback for the wife was short-lived for she obtained, on 14 December 2006, a substitute order from Wood J in the reduced sum of £10,000 per month. The husband challenged that in this court by an application for permission, which was dismissed.

4. On 8 April 2008 Moylan J declared that the husband was the beneficial owner of a property in north London and he made the nisi charging order against that property absolute. This is an important development because the North London property is the only asset owned by the husband in the jurisdiction and thus is the only security for the enforcement of orders or maintenance pending suit and costs made against the husband. In the course of his judgment, Moylan J not only held that the husband's evidence had been reliable; he went so far as to hold that it had been deliberately untruthful.

5. On 25 May 2008 the husband was granted a decree nisi on his cross-petition. However, on 16 June 2008 the wife appealed that order. A remarkable aspect of this case is that the summonses issued by the husband seeking trial of the preliminary issue as to jurisdiction and grant of a discretionary stay, although on their face seeking an expedited hearing, were never pursued with any sort of expedition. Accordingly, the Maintenance Pending Suit Order of 14 December grew from week to week, from month to month, from year to year, the husband ignoring the orders as if they had never been made. So, as well as mounting arrears, there was mounting interest due and also a mountain of costs' debt as the husband ignored Costs Orders made against him at various stages.

6. This challenge to jurisdiction, to forum, and, through those challenges, to the Maintenance Pending Suit Order, did not come for hearing until 8 July 2008 when

they were listed before Bodey J. Five days was allowed for the hearing to commence on 7 July. On that Monday the judge took a reading day. He heard oral submissions but no evidence on Tuesday, Wednesday and Thursday. On Friday afternoon, towards the end of the day, he delivered an extended judgment. The whole purpose of that contested hearing shifted dramatically when, on the first day, the wife conceded that she would not proceed further in this jurisdiction and withdrew her petition. Obviously the consequence was that the Nigerian decree would dissolve the marriage, if the wife's challenge to that decree was not upheld. But that did not enable the judge to turn his attention to other work, since, as he records in his judgment, on the working day immediately before the case was due to start Mr Umezuruike, the husband's counsel, submitted a skeleton argument to which he attached a draft summons and a draft affidavit in support, seeking the discharge of the Maintenance Pending Suit Order made by Wood J. So Bodey J in paragraph 4 thus summarised the issue:

> "In view of the wife's concession that the English court is not now going to be asked to take jurisdiction, the issue is as to whether or not the husband is still bound in law to pay her those arrears of maintenance pending suit or whether, on his very late application, the court should either discharge or order as from the date it was made (described during this hearing as '*ab initio*') or else remit the arrears."

7. In a full and impressive judgment, Bodey J meticulously introduced the background, summarised all the relevant chronology, dealt briefly with the wife's application for an Atkinson Order, recorded the contrary submissions of Mr Umezuruike for the husband and Mr Crosthwaite for the wife, and then gave his conclusions in the final section of the judgment. His conclusion was first that, as matter of law, the withdrawal of the wife's petition did not clean the slate and that the husband remained liable for all arrears arising between the date of the Maintenance Pending Suit Order and the date of the wife's withdrawal. Secondly, he concluded in the exercise of his discretion that it would be quite wrong to remit any of those arrears.

8. The significant orders in this case have been those of Wood J, Moylan J and Bodey J. As I think I have already recorded, the orders of Wood J and Moylan J were both validated in this court when the husband's application for permission to appeal was dismissed. So it could be said to be conv0entional that the husband applied for permission to appeal the order of Bodey J. The application was considered on paper by Wilson LJ on 18 July 2008 when he refused a stay of execution on the basis that there was no order below that was susceptible to stay, and he further directed the permission application be adjourned to be listed for oral hearing. The oral hearing took place before me on 18 December when I was persuaded by Mr Umezuruike that he was entitled to a further hearing before a fully constituted court, given that he had argued that brief passages in the reported case of Moses-Taiga v Taiga [2005] EWCA Civ 1013 were susceptible to rival interpretations. However, I gave a very strong warning to the husband that the costs risk that he would run

should he choose to pursue the limited ground of a further oral hearing on notice with appeal to follow if permission granted. I concluded by saying:

> "So, although I cannot in conscience say that there is not an arguable point, I do urge the applicant to consider most carefully the wisdom of proceeding further in this court."

9. My warning was not heeded, and there followed an application for security. On 17 March 2009 security in the sum of £15,000 was ordered. It was not brought in by the due date, and an application for relief came before the court on 3 April when my Lord, Wall LJ, granted a brief extension to the end of that month and the money was duly brought in on 28 April. So the husband has established his entitlement to this court's consideration of the legal argument.

10. Now, the argument has shifted in some degree since the case has been taken over by Mr Arfan Khan, who has appeared before us today pro bono. We are very grateful to Mr Khan for his argument, which is contained in a full and careful skeleton argument dated 19 October. The husband should be equally grateful to Mr Khan who has argued from the foundation of that skeleton this morning and has advanced every submission that could possibly be advanced on the husband's behalf. I imply no criticism of Mr Khan in saying that some of his later submissions had very little cause or prospect of success. It was obviously his responsibility to advance every possible argument on his client's behalf.

11. His first submission, as a matter of law, is that when a petition is withdrawn the payer's liability under a Maintenance Pending Suit Order is expunged retrospectively as well as prospectively. That is the heart of his argument. He does not suggest that on withdrawal the Maintenance Pending Suit Order is void *abs initio*. That was Mr Umezuruike's submission below, but it is one from which Mr Khan has distanced himself. He simply says that, as a matter of law, once the petition, the foundation for the jurisdiction to order maintenance pending suit, is withdrawn, or is otherwise dismissed, then the liabilities arising thereunder, whether future or historic, are discharged. He advances no authority within family proceedings in support of a proposition, which I think to specialists would be regarded very bold. When I come to the judgment and rationalization of Bodey J, it will be seen how he dealt with that sort of submission in a comprehensive and persuasive way.

12. Secondly, Mr Khan has sought to advance and argue that the issue of the petition in this jurisdiction was abusive and therefore, according to high authority, any benefit gained by the abusive issue and continuance must be reversed. He particularly refers to a case in the House of Lords, <u>Castano v Brown</u>. That submission requires no further consideration, because there has never been a finding in this jurisdiction that the issue of a petition was abusive. It may well have been strategic but that does not mean that it was abusive. It can be seen that there are obvious foundations to the wife's assertion that she, at the material date, was domiciled in this jurisdiction and Bodey J carefully refrained from endorsing a submission by Mr

Umezuruike that the wife's withdrawal was inevitable since the husband's challenge to jurisdiction would have succeeded.

13. Mr Khan's third submission is that, if a payer has complied with an order for maintenance pending suit, then the payee must reimburse all sums recovered on the withdrawal or dismissal of the petition. That, of course, is the twin brother of the first submission and not of a direct application in the present case, since the husband has paid not a penny piece under the Maintenance Pending Suit Order. There is no authority in the family jurisdiction that Mr Khan can advance. The one case that is in point is the case of Board v Board, which is against Mr Khan and which he seeks to distinguish. The case of Board is only reported in family law and dates back to 9 June 1981. The Divisional Court held that the justices were correct to hold money received under an order subsequently discharged to the benefit of the payee and not the payer. The court observed that:

> "The husband had the remedy of seeking a stay of the Maintenance Order pending his appeal but failed to exercise that remedy."

14. Mr Khan's fourth submission is that there is a statutory power to remit to be found in Section 33 of the Matrimonial Causes Act 1973, as amended. That is undoubtedly correct, but it carries Mr Khan nowhere since it is only a discretionary power and it is perfectly plain that the husband never issued the necessary process seeking the exercise of the power. It is equally clear that Bodey J would have declined to exercise the discretionary power since we know that he declined an application to remit arrears. Mr Khan refers to a decision in this court in the case of Vermont v Vermont. He points to an observation in my judgment in the concluding paragraph, but the point cannot be discerned anywhere within the ratio, and a summary of the order which appears at the foot of the only report we have been shown does not concur with paragraph 36 of the judgment, so I reject that point.

15. The answer to Mr Khan's fundamental first submission is skilfully stated by the judge below. He considers the case of Moses-Taiga and particularly paragraph 20, when I said:

> "There is manifestly a risk of unjustified and irrecoverable payments, but that has to be balanced against the risk of a denial of access to justice for the petitioner, if she has not the means to sustain herself and the litigation pending its determination."

16. To like effect, in paragraph 29:

> "In any future case it is of great importance that the trial of the preliminary issue should be prioritized so that, if it is preceded by a maintenance pending suit order, the duration of that order is kept to a minimum to ensure that the payer is

> not put at risk of having to advance irrecoverable and unmerited monies."

17. Mr Umezuruike had submitted to Bodey J that in both those passages the word "irrecoverable" was to be construed as being practically irrecoverable because the money would have been spent and the payee would have no assets against which reimbursement could be enforced. Bodey J rejected that submission. He construed the word as meaning irrecoverable in law. Since I was the author of both paragraphs 20 and paragraph 29, I can make clear that Bodey J was entirely correct in his construction and that was precisely what I meant, and the judgment in Moses-Taiga is and was authority that clearly prevented the endeavour of this husband to escape from his liabilities in this jurisdiction.

18. Bodey J, in paragraph 68 of his judgment, drew the balance. He said:

> "The conclusion which I draw is that if proceedings where maintenance pending suit has actually been paid pending a decision as to jurisdiction on merits, the court has no power to order such payments to be refunded should the payee fail at trial, or, if that is to put it too high, then the court will not exercise any such power as it has unless there is such special circumstances. Plainly it would be unjust to order any such repayment. If money paid as maintenance pending suit had already been spent by the wife in reliance on its being hers to spend, or if she were to have managed to make some savings by frugal living, or even if she were to have come into some unexpected money from elsewhere subsequent to the order. So is the position any different where the husband fails to pay in breach of an order for maintained pending suit? On the wife's discontinuence or failure in the proceedings, is the order rendered unenforceable or else should it be discharged *ab initio*?. On the husband's argument there is an illogicality in his still having to pay when the wife, as is now known, has chosen not to proceed in this jurisdiction. This being Mr Umezuruike's point that public policy should dictate that she is not now entitled to enforce the order. There is, however, another public policy consideration which outweighs any such perceived injustice to the husband, namely that to deny the wife's enforcement would be to reward a party who has been in wilful breach of a court order. If it were the case by disobeying an order to pay maintenance pending suit and by holding out until issues as to jurisdiction or merit had been determined a respondent might never have to pay, then there would be no incentive to comply with such an order. Indeed, quite the contrary, and that would have to be the advice to begin with such a response, a situation would be most unsatisfactory […].

Accordingly, I would hold that where maintenance pending suit has paid been prior to the payees failure at the trial, there is no question of a refund to the payer; and by parity of reasoning that where, as here, maintenance pending suit has been unpaid in breach of an order, there is no question of its becoming unenforceable, nor of the order being discharged *ab initio* so as to eliminate the arrears. If this is to overstate the position in either respect, then I would add the words 'absence some special circumstance as to which there is none here'."

19. I am in complete agreement with the judge's reasoning. I could not better it in any statement of my conclusion. I would also want to particularly emphasise paragraph 73 of his judgment when he said:

> "Similarly, as Thorpe LJ stressed in Moses-Taiga, it is vital in cases where an order for maintenance pending suit is made in place of a challenge to the jurisdiction that the hearing of that challenge be expedited. Thorpe LJ expressly emphasises the point in April 2007 on the husband's own application for leave to appeal. Unfortunately for the husband, however, the delay was not kept to a minimum. He did not apply for a date for the stay hearing until October 2007, nine months after the hearing before Wood J's order in December 2006, at which time he obtained this date in July 2008, and therein essentially lies the mischief."

20. I would say therein lies the answer to any injustice that the husband may assert. He has only himself to blame for not having ensured that the challenge to the court's jurisdiction or to the exercise of powers on *forum conveniens* grounds issued on 19 May 2006, and expressly seeking expedition, was not in fact listed until 8 July 2008. Furthermore, in so far as he has asserted in modern times that the quantum of the Maintenance Pending Suit made by Wood J was unwarrantedly high, it is to be noted that at no stage has he issued any application for downward variation. I see no merit in this application nor do I see any sustainable point of law. However, given that the point is not directly covered in any previous reported case other than Moses-Taiga, and given that my language in Moses-Taiga has been said to be ambiguous, I would, for that reason alone, grant permission but dismiss the appeal that arises.

Lord Justice Wall:

21. I agree. My Lord described Bodey J's judgment as full and impressive. That is an accolade which I would like to endorse. The hearing began on 7 July, a day which Bodey J took to read. He heard, we are told, submissions on the following Tuesday, Wednesday and Thursday and delivered judgment on the Friday. On any view, that

is an impressive achievement. The judgment, in my view, is full and compelling, and, like my Lord, I see no merit whatsoever in this application and I would refuse permission to appeal. Alternatively, if permission is given, I would dismiss the subsequent appeal.

Mr Justice Coleridge:

22. The principal, short question which seems to be posed by this appeal is this: is a Maintenance Pending Suit Order properly made during pending divorce proceedings automatically discharged *ab initio* (and so sums due under it unenforceable) if the proceedings are subsequently dismissed for want of jurisdiction or otherwise withdrawn? To that question I would answer, equally shortly: in my judgment, no, it is not, and sums ordered to be paid are enforceable. So much is clear from the case of Moses-Taiga referred to by my Lord, Thorpe LJ. And, if I add, I have never before heard that proposition argued in cases where jurisdiction is in issue and an application for maintenance pending suit is issued and prosecuted. An order for maintenance pending suit is, as Bodey J observed, "a creature different in form and substance from substantive orders made upon the making of decree nisi". It is designed to deal with short-term cash flow problems, which arise during divorce proceedings. Its calculation is sometimes somewhat rough and ready, as financial information is frequently in short supply at the early stage of the proceedings. It is nonetheless valid until discharged.

23. As counsel for the wife, Mr Crosthwaite says at paragraph 8 of his careful written argument:

> "It should be noted that if the appellant's arguments in support of his appeal are right then this would mean that where a petition for divorce is being challenged, whether on grounds of jurisdiction or otherwise, there would be a powerful incentive for the payer under an order for maintenance pending suit to pay nothing at all, in the hope that the petition would be dismissed and that he would therefore have no obligation to pay any of the arrears. It is submitted that this simply cannot be right and, as recognised by Bodey J in paragraph 68 of his judgment, this would 'be to reward a party who has been in wilful breach of a court order'."

24. This court certainly does have power to remit arrears or vary an order on proof of a later change of circumstance and order repayment (see section 31 and 33 of the Matrimonial Causes Act 1973). However, those powers are exercisable entirely at the discretion of the judge hearing such an application. In this case Bodey J covered the whole discretionary field exhaustively and there is no conceivable crack in what is an immaculate and clear judgment or in his reasoning which would justify this court interfering. I too would give permission but dismiss the appeal.

Order: Application Granted
Appeal Dismissed