COLIN ERNEST PHILP

A **v.**

ANNA FRANCISCA PHILP & SIONE TUPOUNIUA

[HIGH COURT, 1989 (Jesuratnam J) 20 January]

Civil Jurisdiction

B *Family law- application for ancillary relief- whether a separate action subject to the law of limitation- Matrimonial Causes Act (Cap. 51) Part XIII.*

Several years after her marriage was dissolved the Respondent sought a property settlement order. On behalf of the Petitioner it was suggested that the application constituted a separate cause of action which was subject to the Limitation Act.
C Rejecting this submission the High Court HELD: that (i) an application for ancillary relief is dependent on the proceedings in divorce and is not a separate and distinct cause of action and (ii) a delay in applying is a relevant factor to be taken into account in assessing the relief to be awarded.

Cases cited:

D *Bradley v. Bradley* (1878) 3 P.D. 47
Legge v. Legge (1928) 45 FLR 157
Pooley v. Pooley [1936] NZLR 598
Scott v. Scott [1921] P. 121

B.N. Sweetman for the Petitioner
E *H. M. Patel* for the Respondent

Interlocutory application in the High Court.

Jesuratnam J:

This is an application by the petitioner to strike out the respondent's application
F for ancillary relief - more particularly - for property settlement. There is also pending for disposal an affidavit filed by the respondent on 14.10.88 in response to the permission granted by Fatiaki J. to file it within the extended time.

This case has had somewhat of a long and chequered history.

Decree absolute dissolving their marriage on the ground of the respondent's
G adultery was entered on 11.11.77. The respondent sought ex-parte on 2.5.84 (i.e. about 6 years later) leave to apply for ancillary relief for property settlement which was granted by Kearsley J. on 1.6.84.

It may be relevant to remark at the outset that Kearsley J. made an order which he was competent to make and had jurisdiction to make in the circumstances. One would have thought that that would have been the end of the matter so far as leave to apply was concerned. All the subsequent complications could have been

avoided if the matter had ended there as, in my opinion, it should have.

Kearsley J's order granting leave should normally have been final and conclusive since the petitioner neither appealed against that order nor sought to get that ex-parte order set aside. But I find that on 16.10.84 Rooney J. had made an order requiring the respondent to file an additional affidavit within 10 days to account for the delay in making the application for ancillary relief. Probably Kearsley J. was satisfied on the question of delay before he made order granting leave in absolute terms. Nevertheless the respondent was required to explain anew her delay.

Be that as it may, the respondent delayed again to file the required additional affidavit although the blame may not have been entirely hers. On 17.8.87 the respondent gave notice of intention to proceed and filed on 25.8.87 an application for extension of time within which to file the additional affidavit ordered by Rooney J. on 16.10.84.

Fatiaki J. granted the respondent's application for extension of time on 30.9.88 after contested proceedings. I am relieved that I need not go through the reasons for the respondent's second delay (if I may say so) of about 3 years to file the affidavit ordered by Rooney J. on 16.10.84. Fatiaki J. has, if I may say so with respect, in a comprehensive ruling excused the respondent's delay and granted leave extending the time within which to file the additional affidavit (which has now been filed on 14.10.88).

It now remains for me to deal with the additional affidavit filed by the respondent on 14.10.88 explaining her delay of about 6½ years in making her application for ancillary relief. There is also the petitioner's application dated 11.7.88 seeking an order striking out the respondent's application for ancillary relief on the grounds that:-

(a) the application reveals no reasonable cause of action;

(b) the application is an abuse of the process of the Court; and

(c) that the application is time-barred under the Limitation Act.

I think it is convenient to deal with both applications simultaneously as the one impinges on the other and both are intertwined. The rejection of one would necessarily involve the acceptance of the other.

The substantive argument of Mr. Sweetman, who appeared for the petitioner, is that like all actions the respondent's application too is based on a cause of action and is likewise subject to the law of limitation.

However it seems to me that the respondent's application for ancillary relief springs from the decree absolute that was entered in this case. I am strengthened in my view by a perusal of the scheme of the Matrimonial Causes Act. The relief which the respondent seeks is an ancillary relief. The word "ancillary" must necessarily

have reference to the "principal relief" which in this case is the decree for divorce. "ancillary" cannot stand on its own. Ancillary relief cannot fairly be described as a separate and distinct cause of action which would attract the provisions of the Limitation Act.

It does not however therefore mean that the respondent will be at liberty to make an application for ancillary relief at any time as a matter of right. The respondent is obliged by law to come to court for leave under section 55 (3)(b) of the Matrimonial Causes Act. The Rules also provide for the filing of the application for ancillary relief in the court in which the principal proceedings are pending or were completed. It seems to me that the application for ancillary relief is subordinate to, connected with, and integrally related to the principal action to be dealt with by the same court. It seems to me that the scheme is such that the discretion of the court in granting leave takes the place of the provisions of the Limitation Act. Although there may not be any specific time-limit the court is obliged to look into all the circumstances, including delay, before it exercises its discretion in a particular way.

In the New Zealand cases delay has been reckoned from the date of "on any decree". The question there for the exercise of the discretion is the length of time which has elapsed after the date of the decree absolute. On going through all the authorities I find that in England and New Zealand the principles that have been followed are similar, It appears from the authorities that delay itself is not fatal to an application for ancillary relief, it depends on all the circumstances of the case.

Lord Sterndale M.R. said in Scott v. Scott [1921] P. 121:-

> "It does however point in the direction I have already, indicated namely, that the word "on" does not mean an unlimited time within the Judge's discretion but it does mean within a reasonable time having regard to all the circumstances of the case." (The underlining is mine).

I find that the circumstances in this case favour the respondent, the odds seem to have been against her. She changed her solicitors no less than 6 times from the date of her divorce. I find from the affidavits filed by her and the correspondence that had passed between her and her successive solicitors that the delay and lethargy in prosecuting her claim can fairly and squarely be laid at the door of some of her solicitors, It should also be mentioned that the respondent was a non-resident operating from outside Fiji.

The respondent did not participate in her divorce case in 1977. Nor was she represented by counsel. In the case of Legge v. Legge (1928) 45 F.L.R. 157 the wife made an application for maintenance four years after decree absolute. At the time of granting of the decree absolute she was not represented by counsel. She also said that she did not know that such an application was available to her. The Court of Appeal allowed her application. Lord Hanworth M.R. said in that case:-

> "When Scott v. Scott was examined it became clear that it said no more than that on the facts of that case there was not any ground for allowing the application after a lapse of seven years and that the other material considerations did not overcome the inference to be drawn from so long a lapse of time."

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In the instant case not only was the respondent absent and unrepresented at her divorce trial but all her subsequent efforts to prosecute her claim to ancillary relief proved futile due to her failure to obtain the services of diligent solicitors. I find from the correspondence that she had given detailed and comprehensive instructions to her solicitors in one instance.

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On the whole it seems to me that the respondent has been more sinned against than sinning in this case in the matter of property settlement.

Another remarkable feature in this case is that on the unchallenged affidavit evidence in this case the property settlement in this case will be no more than the apportioning to each family number the shares allotted to each in the family business of Bilo Ltd and allied companies. I find from the annexures filed by the respondent along with her various affidavits that the respondent had regularly reminded the petitioner about her shares in the family companies. It also seems to me that the petitioner had led her into a sense of security on those matters. There is, for instance, a letter dated 1.4.79 written by the petitioner to the respondent detailing the progress of the family companies. It is clear that he would not have written letters in that strain if the respondent did not have shares in the family companies.

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He says:-

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> "I will keep you posted on progress with the Craft Co. and would appreciate your letter approving of the selling up of all assets".

Here is an undoubted admission of the respondent's stakes in the family companies. All this would indicate that the respondent took an abiding interest in the family companies. These companies are still functioning. She has never relinguished her claims in the family companies. On the contrary the correspondence of the parties show without doubt that she was constantly reminding the petitioner about them and that the petitioner was temporising. I also find from the annexures that the respondent has one preference share and 44 shares in the companies which seem to be worth much on the balance sheets.

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In this case it may not be necessary to probe into the private accounts and assets of the petitioner to arrive at a property settlement. All the assets of the petitioner are contained in the family companies of which the respondent is an admitted shareholder. The petitioner is the Managing Director and as such is, in one sense, in the position of a trustee particularly where a private company is concerned. No provision of the law of limitation can override or negate the uninterrupted continuance of the shares of the respondent in the family companies unless and

until they are wound up. It seems to me that the property settlement in this case may not amount to much more than winding up of the family companies and the
A distribution of the assets among members including the respondent. It may be nothing more than giving to the respondent her due under the law. One may well adopt Aristotle's definition of Justice as "giving to every man his due"

No prejudice can therefore be caused to the petitioner by permitting the respondent to proceed with her application for property settlement.

B Reid A.C.J. said in Pooley v. Pooley [1936] N.Z.L.R. p. 598 at 608:-

> "There is no evidence that the appellant has been prejudiced by the delay. This is, in the view of Sir James Hannen, a factor for consideration. Bradley v. Bradley (1878) 3 P.D. 47, 52"

C For all these reasons it would be hard and harsh on the respondent if she is denied a chance of prosecuting her claim which/in the main, pertains to assets which are vested and continue to be vested in her by right of law and not by the grace of the petitioner.

I therefore allow the respondent's application for leave to apply for ancillary relief for property settlement and dismiss the petitioner's application to strike
D out the respondent's application.

I make no order as to costs.

I also direct the Chief Registrar to fix the application for property settlement for hearing at an early date convenient to both counsel.

E *(Application allowed.)*

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