BROWNE v BROWNE

Court of Appeal

Lord Donaldson MR, Neill and Butler-Sloss LJJ

23 November 1988

[1989] 1 FLR at pages 291-296

Financial provision - Overseas trust assets - Wife's assets held outside jurisdiction on discretionary trusts - Whether foreign assets on discretionary trusts are financial resources - Matrimonial Causes Act 1973, s.25

The parties were married in 1965. The husband had no substantial means whereas the wife was the daughter and granddaughter of women with substantial assets, most of them out of the country. They parted in 1983. In February 1986 the judge made an order for the wife to pay a lump sum of ,175,000 to the husband and costs. On the wife failing to pay within the proper time two applications for committal were granted, both suspended on terms. The wife then made applications for leave to appeal and to extend time for appealing against the order of February 1986 and for

leave to appeal and an extension of time for appealing against the suspended committal orders. By the time of the present hearing the capital sum of ,175,000 had been paid. Nevertheless, the wife contended that the judge had been wrong, first, in finding that she exercised effective control over two trust funds, which had been set up outside the jurisdiction, and of which she was the beneficiary; and secondly, in making an order which would exert pressure upon discretionary trustees.

Held -

(1) There was clear authority that the phrase 'other financial resources' in s. 25 of the Matrimonial Causes Act 1973 included assets held on discretionary trusts and it would be unrealistic to disregard such foreign assets.

(2) With regard to the discretionary trusts in the present case, although it would be wrong for the court to make orders designed to put pressure on discretionary trustees, nevertheless the court must look at the reality of the situation. The evidence demonstrated that the trustees had acted throughout in accordance with the wife's wishes and that she had immediate access to funds whenever she required them., and furthermore that the money due to be paid by the wife from the trusts was perfectly able to be paid and would be paid if the trustees were satisfied that she had to have the money. It followed that the judge had been right to hold that the wife had effective control over the trust funds and that in

making the order he had made he had exerted no improper pressure upon the trustees.

Accordingly, the application for leave to appeal and to extend time for appealing from the judge's order of February 1986 would be dismissed. The applications with regard to committal orders would be granted, since the money had now been paid, so that the orders might be discharged and litigation brought to an end.

APPEAL from an order of Wood J in the Family Division.

Case referred to in judgment

Milburn v Milburn (3 October 1979) unreported, CA

Michael Connell QC and *David Bodey* for the wife;

James Townend QC and *Bruce Blair* for the husband.

BUTLER-SLOSS LJ: These are applications which are four in number:

that is an application for leave to appeal against an order of Wood J of 6 February 1986; an application for extension of time for that application; an application for an extension of time for an appeal against a suspended committal order of 29 August 1986 and an extension of time for an appeal against a suspended committal order of 25 November 1986. There are also two applications for security for costs which do not now arise.

The order made by Wood J on 6 February, which is the main thrust of the applications for leave by Mr Connell on behalf of the wife, was for a lump sum order for , 175,000 and costs against the wife which were estimated by both sides in the agreed figure of , 95,000. Since then there have been inevitably in this particular long drawn out saga additional costs post February 1986 and interest payable on the lump sum.

The wife failing to pay within the appropriate time, there were two applications for committal on 29 August 1986 and 25 November 1986. In each case those committal orders were suspended on terms: in respect of one of them that a sum of , 11,000 odd should be paid and that was in fact paid: and on the other, in more general terms which it is not now necessary on an application for leave to go into, save to say that neither of those orders was entirely satisfied.

The short facts which are relevant to this application for leave are that the wife is now about 45 and the husband about 49. He is a

Member of Parliament and they were married in 1965, the husband with no substantial means and the wife, the daughter and granddaughter of women with substantial assets, most of them out of the country. They parted eventually in 1983 and there have been prolonged and very fraught proceedings between them, very much affected by publicity in the rather prominent positions that these two hold, and the publicity has undoubtedly had an effect to some extent on the course of the proceedings prior to today.

The present position is this. The capital sum of ,175,000 has now quite recently been paid. There may be some interest still due to be paid and there may be some of the subsequent costs which are also not yet paid. But the major part of the order of Wood J of 6 February has now been satisfied. Nevertheless, at this stage the wife - if she will forgive me for so calling her for convenience since the decree has been made absolute - wishes to pursue an appeal against the order of Wood J on the merits of the granting of the lump sum.

The wife's application has to be seen against a background that she first applied for leave by an application on 23 December 1986, nearly 11 months after the order was made. It is pertinent to observe that leading counsel of great experience acting on her behalf on 29 August 1986 indicated to Wood J that they were not intending to challenge the order which he had made on 6 February. It is equally pertinent to note that in her affidavit in support of her application for an extension of time and for leave to appeal she did not seek to overturn the basis of the judgment, but

rather said it was because she could not pay the sums that were still outstanding. But, nevertheless, this court is now asked to say that the judge's order was in essence wrong, and that is based on two propositions in the very attractive argument put to us by Mr Connell. One was that the judge was wrong to find that the wife had exercised effective control over two trusts of which she is a beneficiary and, secondly, that from subsequent events it has become clear that the judge's judgment was inconsistent and wrong in principle in that it provided the requirement to exert pressure on discretionary trustees.

The wife has an interest in two trusts - one of them set up in Jersey - both of them as a result of the assets of her mother. On the imminent death of her mother the Jersey trust was set up to redistribute the assets in such a way that they would not attract taxation in this country, a perfectly proper thing to do. Her interest is as the sole beneficiary in this trust worth something in the region, according to the judge's order, of ,430,000. In addition, there was a further trust set up in Switzerland, taking effect in Lichtenstein, which was worth, again according to the figures presented to the judge and given in his Judgment, a sum between ,100,000 and ,145,000. It is not entirely clear whether she is the sole beneficiary of the Lichtenstein trust, but nothing has been said to lead the court to believe that there is any other beneficiary. There is no doubt that in respect of the larger trust in Jersey she is the sole beneficiary.

In considering whether or not, as the judge found, she had effective control over these trusts, it is of some relevance to note that, prior to the divorce and parting of the husband and wife, every application by the wife for funds for herself and for her husband for any of the pursuits that they wished to engage in, pleasure as well as the buying of property, was met and the sums asked for were advanced at the request of the wife. Although, perhaps, the phrase 'effective control' might more appropriately be expressed as 'immediate access to the funds', in my judgment, the judge was entirely justified in coming to the conclusion as at 6 February, that every request had been granted and that she was in a position to ask for money and to have it paid, and there was nothing to show that the trustees would not do so.

The second point that Mr Connell makes is that the subsequent events have shown that the trustees have acted totally independently of the wife, that they are not doing what she wishes them to do and that she has no access to the funds at this stage because they choose not to help her out in the situation in which she now finds herself. But, again, it is of some interest to note that this wife was not at all anxious at many stages of this prolonged litigation that the trustees should pay out. the wife had undoubtedly indicated, both in publicity and in what she had said to the trustees, that she held a very poor opinion of the husband, and the views expressed by the trustees in correspondence which has been shown to this court leads one to see that their view of the husband must undoubtedly be coloured by the wav in which she had expressed her views of him.

The objection of the trustees in both trusts to paving out money to pay off the judgment of the judge of 6 February was that they did not wish this money to go to Mr Browne. As I have already said, that view was fuelled undoubtedly by the observations made by the wife. There was a time in the latter part of 1986 when the wife saw that she was in imminent danger of going to prison because she was not paving the sums outstanding and there were committal proceedings pending, and it is, in my judgment, of some significance that at that stage an initial figure of some , 11,000 was asked for by the husband's side and, although with reluctance, the trustees in Jersey actually paid over that sum, a sum which had been in the hands of the wife and she had passed it over to the trustee who passed it back to her.

Although there was a further suspended committal order on 25 November, within a month of that, on 23 December, she applied for leave to appeal against the order of 6 February. Thereafter, there was not the same pressure upon the wife. There was no further application to enforce the committal orders by the husband. The wife wrote a number of letters of a most illuminating kind, indicating that she was likely to succeed in her application to the Court of Appeal, that she expected to be repaid by the husband and that she was expecting that he would not wish to pursue his efforts to get the money to which he was entitled under the order because it was election year. During that period of 1987 there can be no doubt that the wife was indicating very clearly that she did not wish the husband to be paid out, and certainly that approach of the wife must have been clearly known to the trustees. Indeed. there was no request as such by the wife to pay out these sums during the major part of 1987. There can be

little doubt from reading the correspondence of the trustees that then, were looking very carefully to see what the wife really wanted and whether or not they could avoid having to pay out any money and preserve the trust for the benefit of the wife without paying any of these sums to the husband.

One has, of course, to bear in mind that these are trusts and it would be wrong to put pressure upon discretionary trustees to act in a way which was not in accordance with the discretion which they have. Nevertheless, one has to look at reality, and I would like to refer briefly to *Milburn v Milburn* (3 October 1979), an unreported decision of this court, and to the judgment of Roskill LJ in which, in looking at the position of trusts, he said:

>The whole purpose of this modern legislation is to enable a court to look at the reality of a particular situation. The reality at present is that there are these vast capital assets in Switzerland and Lichtenstein to which the husband has no legal or equitable title, but from which from time to time money can be, and on a balance of probabilities will be, made available if the necessity arises for purposes discharging such obligations as making periodical payments under an order of this court.

So far from *Howard v Howard* being authority against the appellant I think it is authority for the proposition that, though the court must not make orders designed to put pressure on discretionary trustees, nonetheless, the court should look at the reality of the situation, at what is, or is likely to be in all

probability, the totality of the resources of a particular party to the marriage. I see nothing wrong in principle in taking into account the fact that there are these large sums from which requests for payments can be made.=

This is not, in my judgment, a case of improper pressure upon the trustees by the court or by the husband's side. Looking at reality, she is the sole beneficiary, of some ,430,000 in Jersey and a lesser sum in Switzerland. The amount of money that was due to be paid by the wife over and above assets in this country at the time of the judge's judgment was some ,60,000 at most. That money was perfectly able to have been paid and the judge was entitled, in my judgment, in February to believe that it would be paid. I, for my part, believe that it would be paid today if the trustees were absolutely satisfied that the wife had to have the money.

There is no doubt, in my mind, that there have been in this case cross-currents and conflicting messages to the trustees from various people including a former legal adviser to the trusts who has a close relationship with the wife. It is not a simple situation and the trustees have undoubtedly been tuned to the wife's feelings at different periods of this rather sad tale.

In any event, the issue raised by Mr Connell in his argument is academic. The wife had assets in England from which to pay the husband's lump sum of ,175,000, but did not have sufficient

assets to pay out the whole of the costs. Now, however, the trustees have paid ,11,000 of the shortfall and, as it happens, the wife has received at least three further sums, according to her own figures: some ,19,000 by way of a sale of chattels, ,20,000 repayment from Lloyd's, a sum paid to her and, in contravention of an injunction, paid by her to her father in France, of which the major part of it has not been returned to this country, and indeed the father has not even been requested to return it, according to what we were told today. That would seem to me to show that the wife is, in respect of that money also, in contempt of court. There has also been some ,50,000 repayment of tax. Those sums extinguish almost the whole of the wife's liabilities towards the husband.

It is said by Mr Connell that the judge should not have taken the foreign trust assets into the computation of her capital figures. But there is clear authority, which he accepts, that under s.25 of the Matrimonial Causes Act 1973 'other financial resources' include monies held on trust for the benefit of a wife or a husband, such monies to include discretionary trusts. Now that there are adequate resources in England to pay the judge's order, which has been largely paid, I have very little doubt that, if the judge had known in February 1986 that those sums of money were available, he would undoubtedly, despite what Mr Connell says, have placed the repayment of tax towards satisfying the lump sum that the husband was by order awarded. It would be quite unrealistic to disregard the foreign assets. If they cannot be utilized to pay a party to the marriage then, can, in my judgment, clearly be taken into account in computing the portion of the English assets that the spouse should receive. On those figures, in addition to the matters

which I have already dealt with, I can see no reason to interfere with the judge's order and no arguable case upon which Mr Connell could base his application for leave to this court which, quite apart from the extension of time, he requires to obtain in order to pursue these arguments. I see no reason to grant leave to appeal or extension of time in respect of the order of 6 February 1986.

In principle, I, for my part, see no reason to give leave on the suspended committal orders of August and November. This is a wife who is in contempt in respect of the ,20,000 from Lloyd's which went to France. That is not great encouragement to come to this court and ask for suspended committal orders to be set aside. It is not of great help in viewing her applications with favour. But the money has now been paid. For convenience, it seems to me, there is much to be said for granting extensions of time to appeal for the purpose, and the purpose only, of discharging the committal orders and bringing an end to this litigation. I would grant extension of time for that purpose and that purpose alone and not in any way to suggest that the orders to commit in August and in November were in any way wrongly made because, in my judgment, at the time they were made they were entirely justified.

I would like to sav one further thing. As I have already mentioned, there has been a great deal of publicity in the past over this case. There has, it appears, been misleading impressions of the types of applications and the purpose of the applications made by this husband, the suggestion, I believe, that he was a man hoping to

live off a rich wife. The facts are very different. This was an application by a husband for financial relief of a capital nature under s.23 and s.24 of the Matrimonial Causes Act 1973 for redistribution of family assets after divorce, an application which this husband made of right. The applications to enforce the order of the judge were also applications which he made of right. These are rights under the 1973 Act as amended of either spouse, husband or wife. An application by a husband for redistribution of assets is not in any way an unusual application and is made where a wife happens to have greater assets than a husband. It is a sad reflection if in these times of much vaunted equality of the sexes a husband should be seen to be acting in some way improperly if he exercises his right in matrimonial jurisdiction to claim a share of a wealthy wife's money in circumstances in which the law provides for him to be permitted, and indeed encouraged, to make these sorts of applications.

I would, therefore, refuse the extension of time and leave to appeal the order of 6 February and grant the extension of time in relation to 29 August and 25 November for the purpose of discharging the committal orders.

NEILL LJ: I agree.

LORD DONALDSON MR: I also agree. It only remains for us formally to discharge the two committal orders and we do that.

Application refused with costs. Committal orders discharged.

Solicitors: *Collyer-Bristow* for the wife:

Peter Carter-Ruck and Partners for the husband.

P.H.

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