[1999–00 Gib LR 429]

MOSS v. MOSS

SUPREME COURT (Pizzarello, A.J.): March 2nd, 2000

Civil Procedure—appearance—striking out for non-appearance—restoration—under Rules of Supreme Court, O.32, r.5(4), may restore summons in interests of justice—applicant to show summons has reasonable chance of success

Family Law—financial provision—fraudulent disposition—no order setting aside disposition of property with intent to defeat claim for financial relief unless order obtained or sought for relief as defined by Matrimonial Causes Ordinance, s.43(7), i.e. lump sum or periodical payments, not distribution of property in specie by consent

The respondent applied to set aside a disposition of shares allegedly made with the intention of defeating her claim for financial provision in divorce proceedings.

In divorce proceedings the parties agreed to distribute the matrimonial property between them *in specie*, and a consent order was made. The respondent did not seek an order for periodical payments. She later applied for the setting aside under s.43 of the Matrimonial Causes Ordinance of a disposition of shares by the petitioner, but did not appear on the date set for hearing, and the summons was dismissed for non-appearance. The respondent's attorneys believed that they had secured the vacation of the hearing date but the court was satisfied that it had not been

vacated and they had been requested to attend. The respondent applied to have the summons restored.

She submitted that (a) the court had a discretion to restore the summons under O.32, r.5(4) of the Rules of the Supreme Court on receiving a satisfactory explanation for the non-appearance without enquiring into the merits of the summons; (b) her attorneys had reasonably believed that the hearing date had been vacated; (c) although, for the purposes of s.43(5) of the Matrimonial Causes Ordinance, the court had made no order for a lump sum or periodical payment, the share transfer could be set aside, since her petition for ancillary relief contained a prayer for maintenance, and s.43(1) permitted an application to set aside a relevant disposition once she had commenced proceedings for financial relief; and (d) the consent order already made was an order for financial relief contemplated by s.43(5), since it equated to a property adjustment order under s.24 of the English Matrimonial Causes Act 1973, which was expressly mentioned in s.37, the equivalent section to s.43.

The petitioner submitted in reply that (a) the attempt by the respondent's attorneys to vacate the hearing date for summons had failed, since they had not obtained the consent of all parties, and the court had refused to adjourn; (b) to satisfy the court that it would be just to restore the summons, the respondent had to show that she had a reasonable chance of obtaining the order sought; (c) the court had no power to set aside the relevant disposition, since the respondent's prayer for maintenance was no longer live, and the consent order made was not an order for financial relief as defined by s.43(7); and (d) since the Gibraltar Matrimonial Causes Ordinance did not permit the making of property adjustment orders, s.43 should not be construed as equivalent to s.37 of the English Matrimonial Causes Act 1973.

Held, dismissing the application:

(1) The court had a discretion to restore the respondent's summons under O.32, r.5(4) of the Rules of the Supreme Court if it thought it just to do so. Although the hearing date could not be unilaterally vacated once the court registry had fixed it, the court was prepared to accept the respondent's explanation regarding the missed hearing and look sympathetically on the application to restore. The burden of showing that it was just was not a heavy one, but the respondent had to show at least that the application had a chance of success (para. 18).

(2) The court would not restore the summons, since the application was bound to fail. An order setting aside a disposition made to defeat a claim for financial relief could only be made if the respondent had obtained an order for financial relief as defined in s.43(7), namely, an order under ss. 33(2) and (3) or 34(2), for a lump sum or periodical payments, or if there were live proceedings for the purpose of obtaining the same. Section 43(5) could not be construed as covering property adjustment orders,

since such orders were not recognized in Gibraltar and therefore s.37 of the 1973 Act was not relevant to the construction of s.43 (paras. 16–19).

Legislation construed:
Matrimonial Causes Ordinance (1984 Edition), s.33(2): The relevant terms of this sub-section are set out at para. 5.
s.33(3): The relevant terms of this sub-section are set out at para. 5.
s.34(2): The relevant terms of this sub-section are set out at para. 5.
s.40: The relevant terms of this section are set out at para. 5.
s.43(1): The relevant terms of this sub-section are set out at para. 11.
(5): "The preceding provisions of this section shall have effect for enabling an application to the court to be made thereunder by a woman after she has obtained an order against her husband or former husband under any of the relevant provisions of this Ordinance as they apply for enabling an application to be made in proceedings for such an order . . ."
(7): The relevant terms of this sub-section are set out at para. 4.

Matrimonial Causes Act 1973 (c.18), s.37(1):
"For the purposes of this section 'financial relief' means relief under any of the provisions of ss. 22, 23, 24, 37, 31 (except subsection (6)) and 35 above . . ."

Rules of the Supreme Court, O.32, r.5(4):
"Where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the Court, if satisfied that it is just to do so, may allow the summons to be restored to the list."

A.J. MacDonald for the applicant;
S.V. Catania for the intervenor.

1 **PIZZARELLO, A.J.:** On January 20th, 2000 the respondent's application by summons dated November 2nd, 1999 to set aside a disposition of shares made by the petitioner in favour of the intervenor came before me. There was no appearance by the respondent and I was satisfied, on the papers produced to me and on hearing Mr. Catania, that the respondent was well aware that January 20th, 2000 had been set down as the date for the hearing of the summons. My note reads:

> "Mr. Catania produces letters to show that Messrs. Phillips & Co. suggested that January 20th had been vacated, but I do not have copies of letters he [Mr. Catania] refers to. The Registry can find no record of the date being vacated and he informed him by fax yesterday and requested him to appear today and asks for the summons to be dismissed."

I thereupon requested information from the court associate (Mr. Chiappe) and he told me that a search had been made in the Registry and that the

date had not been vacated. In those circumstances, I promptly dismissed the summons with costs.

2 Mr. MacDonald applied by summons dated January 25th, 2000, returnable on February 23rd, 2000 for that summons to be restored pursuant to O.32, r.5(4) and he filed an affidavit in support to clarify the reasons why the respondent's solicitors did not appear on January 20th, 2000. He submits that the summons having being struck out for non-appearance and not having been heard on its merits, this court may in its discretion allow that course to be followed, since a satisfactory explanation is offered.

3 Mr. Catania submitted that the court ought not to allow the application and he makes three points:

(a) The respondent's attempt to vacate the date given by the Registry for the hearing of the summons did not conform to the common practice obtaining in this court that when an adjournment is sought a date is vacated by consent of all parties in writing, and if there is no such consent then the parties attend and then the adjournment is in the hands of the court. It cannot be right, he says, that a party may seek to vacate a date unilaterally.

(b) While it is correct to say that the court has power to restore a summons which has been dismissed for the failure of a party to attend, the court must "be satisfied that it is just to do so" and that, he submits, means at the very least that the applicant must show that the application, if restored, has some chance of success since it is not "just" to make groundless applications.

(c) In this case the applicant (the respondent) has no chance of success because s.43 of the Matrimonial Causes Ordinance, on which the application is based, cannot apply in law nor on the facts, having regard to—

(i) the statements made by the respondent in her affidavit of November 8th, 1999 where she says: "I have agreed to accept a division of the matrimonial assets and not to seek an order for periodical maintenance," and later: "I ask that this honourable court should make an order to set aside the disposition and a further order that the shares be assigned into my sole name," and

(ii) the fact that the respondent's claim against the petitioner has been settled by an order of November 29th, 1999. This order gives effect to the parties' agreement to distribute the property *in specie* and there is no lump sum order or order for part-payment. The order is not an order made under one of the relevant provisions as defined in s.43(7) and it is therefore not a subsisting application for financial relief under s.43.

4 Section 43 of the Matrimonial Causes Ordinance, submits Mr. Catania, provides for the avoidance of dispositions made to defeat a wife's claim for financial relief. The reason why s.43 does not apply in the instant case is that there has to be an application for financial relief within the meaning of that section. "Financial relief," as defined in s.43(7), means "relief under any of the relevant provisions of this Ordinance," and the relevant provisions are ss. 33(2) and (3), 34(2) and 40.

5 In more detail, s.33(2) is to secure to the wife "such gross sum of money or annual sum of money . . . as . . . the court may deem to be reasonable," and s.33(3), to pay to the wife "such monthly or weekly sum for [her] maintenance and support . . . as the court may think reasonable." These sub-sections, he submitted, do not apply. Section 34(2) provides for "the payment of alimony" "after a decree for judicial separation" and thus this does not apply. Section 40 provides for a case of "wilful neglect to provide reasonable maintenance" and that also does not apply in the instant case. Furthermore, s.43(5) provides for an application where an order has been made in the proceedings, again under any of the "relevant provisions" and there has been no such order because the order of November 29th, 1999 is not such an order, being merely an asset-distribution order and not an order for a lump sum or periodical payment.

6 The result, Mr. Catania says, is that s.43 applies only when there is an application for the payment of a lump sum or part-payment. The procedures which cover these applications also make it clear that the application of November 2nd, 1999 is misconceived. Therefore, it is clear on the face of it that the applicant has no chance of success and, consequently, the court should not allow the reinstatement of the summons of November 2nd, 1999.

7 In reply, Mr. MacDonald observed that Mr. Catania is bringing into play the merits of the application which is no part of the court's function at this stage. The court has merely to decide the narrow question of whether the summons should be reinstated as it was dismissed with no regard to the merits. As to the s.43 point, regard must be had to the contents of the petition. Regarding the submission of Mr. Catania that the respondent has to show a *prima facie* case, that is wrong: all that is needed is that the court must be satisfied that it is just.

8 Mr. Catania protested that he had never suggested that the respondent had to show a *prima facie* case.

9 I reserved my decision, and Mr. MacDonald has requested by a letter dated February 23rd, 2000 a continuation of the hearing, to put before me certain matters which he ought to have elaborated on. I directed that a copy of that letter be served by the respondent to the intervenor's

solicitors and Mr. Catania has replied, so I shall deal with the matters raised without further hearing.

10 Mr. MacDonald complains that he was not given a reasonable opportunity to look at the authorities provided by Mr. Catania, and to respond, but at the hearing of February 23rd, 2000 he did reply to Mr. Catania, and if he required an adjournment he should have asked for it at that stage. But I shall not put him out of court for that. In his letter he returns to the point that the court has a discretion and submits that the court should restore the summons and let the arguments about s.43 (which go to the substantive matters in issue and to the merits of the case) be argued then.

11 Nevertheless, he outlines his case in this fashion. Section 43(1) commences with the expression: "Where under any of the relevant provisions of this Ordinance proceedings are brought against a man by his wife for financial relief," and he submits that the important word is "proceedings," *i.e.* the petition which includes a prayer for maintenance payments and/or lump sum orders. Even though the expression "financial relief" is narrowly defined in the section, the general construction of s.43 does not prevent the court from dealing with the application of November 20th, 1999 which deals with the disposition of shares.

12 Accepting the limited definition of "financial relief" in s.43(7), it must be taken that, provided the wife has already issued proceedings against her husband for a lump sum or maintenance payments in the prayer of the petition, she need not specifically state what she intends to do with the matrimonial asset once it has been brought back within the control, possession or ownership of the husband. The comprehensive prayer in her petition contains all that is necessary to give her liberty to make a specific application in respect of any matrimonial asset, for a lump sum or maintenance payment, at any time, once the asset in question is being discussed before the court.

13 The respondent, it is true, states that she does not wish to apply for periodical payments but merely a distribution of assets, but that should not penalize her when making an application under s.43 just because it does not come within the definition of s.43(7). Mr. MacDonald submits that by including the comprehensive prayer, the respondent comes within the definition of s.43(7). What is recovered after an order is made can then properly be the subject of a lump sum order or maintenance payments and will be the subject of the substantive hearing.

14 I do not understand Mr. MacDonald's reference to s.43 of the Matrimonial Causes Act 1973 in his letter, and I assume he means s.37 of the Act. However, the Act does not apply to Gibraltar, which is different, as s.43 of the Ordinance is founded not on the Matrimonial Causes Act

1973 but on the Matrimonial Causes (Property and Maintenance) Act 1958, s.2.

15 In answer to Mr. MacDonald's letter, Mr. Catania submits that the remedies sought in the prayer in the petition are only relevant when there has been no adjudication on the remedies that the respondent seeks. The order of November 29th is an adjudication which satisfies the prayer and the prayer is no longer live, it has been dealt with. What was left over in that order was the restoration of the respondent's summons on November 22nd, 1999 to better her asset distribution order.

16 Once the order of November 29th, 1999 was made, the respondent was bound by the provisions of s.43(5) and that itself clarifies that the order must itself have been obtained under the relevant provisions as defined by the section. The manner in which the provisions of the section apply is "as they apply for enabling an application to be made in proceedings for such an order," and that clarifies, too, that there has to be either an order for financial relief, as defined in s.43(5), or pending proceedings for such relief. These must therefore be live proceedings, and hence what was claimed in the petition is now irrelevant, as, according to her own affidavit, the relief is no longer being pursued. There are no longer live proceedings for financial relief.

17 As for the relevance of the Matrimonial Causes Act 1973, Mr. Catania makes the same point I have already made. The English Act does not apply. The property adjustment order was introduced in that Act and Gibraltar law does not recognize it. The reasons which Mr. Catania advances in his letter and with which I agree in the context of an application under s.43, are as follows:

> "1. The local legislature used as one of its sources the English Matrimonial Causes Act 1973.
>
> 2. The English Act, at s.24, grants the English courts power to make property adjustment orders in connection with divorce proceedings.
>
> 3. There is no such section in the local legislation, in the sense that the courts do not have express powers to make such orders. Since the English Act was specifically considered, as is indicated by the list of sources to the local Ordinance, and similar powers or a section the same as s.24 granting property adjustment orders was not included, the legislature should be taken to have taken a conscious decision not to extend powers to make a property adjustment order to the local courts.
>
> 4. This explains the reason why the English s.37 makes reference to s.24 and the local s.43 does not. It does not because there is no equivalent to s.24.

5. Therefore, to construe the local s.43 as covering property adjustment orders makes no sense, since the court does not have the power to order a distribution of assets. It can only make such orders by consent.

6. The local position as regards assets *in specie* is the same as the pre-1973 English position, namely that the spouse in question must establish a proprietary claim in the normal way, as between strangers: see Duckworth, *Matrimonial Property & Finance*, 2nd ed., at 7–8 (1983)."

18 I turn to consider the arguments:

(a) As to the vacating date, I accept Mr. MacDonald's explanation on affidavit and these add up to this: There were grounds which the respondent might have misapprehended the matter and I should look sympathetically at his application. However, I want to note the point that a matter cannot be vacated at the bidding of one party alone once a date has been fixed at the Registry.

(b) As to restoring the summons, the order having been perfected, I have a discretion to restore it if satisfied that it is just to do so

(c) As to the threshold burden on the part of the applicant, that threshold is a low one and will depend entirely on the circumstances of each case, but the court has at least to be satisfied that it is just to do so. It cannot be just if the applicant, on the documentation before the court, has no chance of success on the restored summons

(d) As to the meaning of "just," the s.43 point is not one which need wait for a substantial hearing. It has been aired at the hearing of the application to restore and further in correspondence. I do not agree with Mr. MacDonald's emphasis on the word "proceeding" on its own. In my view, that word is qualified by the expression "for financial relief," with all that that entails, and it follows that if I accept Mr. Catania's submission on the construction of s.43, this application cannot survive.

19 I agree with Mr. Catania that on the face of it the applicant is bound to fail and that leave to restore ought not to be given. The application to restore is dismissed.

Application dismissed.