COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 67 of 2022

B E T W E E N

CHRISTOPHER JEROME SYMONETTE
Intended Appellant

AND

KATRINA ELEASE SYMONETTE (NÈE WALKER)
Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA

APPEARANCES: **Mr. Roberto Reckley, Counsel for Intended Appellant**

Ms. Justine Smith, with Ms. Berchel Wilson, Counsel for Intended Respondent

DATES: **2, 24, 30 November 2022; 19 January 2023**
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Civil appeal – Application for extension of time – Family law – Divorce – Matrimonial property - Ancillary proceedings – Equal sharing – Non-disclosure of assets – Full frank disclosure – Whether judgment interlocutory or final Appeal from an Interlocutory order - Section 29 of the Matrimonial Causes Act – Sections 11 and 13 of the Court of Appeal Act

A decree nisi was granted to the intended respondent on 14 January 2021. Ancillary proceedings followed and the trial Judge made an Order on 19 November 2021. On 3 December 2021, the intended appellant made an application in the court below for leave to appeal the ancillary Order. The intended respondent, being of the view that the Order was final and did not require leave, consented to the grant of leave. However, leave to appeal was not granted until 27 April 2022. On 3 May 2022, the appellant filed an appeal on various grounds and an extension of time application as the 14 day time period for appealing an interlocutory order had expired.

Held: Application for an extension of time refused.

Orders made in ancillary proceedings in the family division are interlocutory orders and not final orders. Interlocutory appeals should be filed within 14 days from the date the order is made.

The jurisprudence as to the exercise of the discretion whether to extend the time for appealing to the Court of Appeal is well settled. The Court looks to the length of the delay, the reasons for the delay, the prospects of the success of the proposed appeal and the prejudice to the proposed

respondent. In this case, the length and reasons for the delay are the time it took for the application for leave to appeal to be heard and determined by the court below.

The length of delay and reasons for the delay, in this case, are not such to warrant the refusal of the application for an extension of time. In the Court's view, whether to accede to the application depends on the prospects of success.

In the Court's view, this proposed appeal has no prospects of success. The husband cannot show that the decision of the trial Judge did not apply the correct principles. He cannot show that the Judge has taken into account matters which ought not to have been taken into account or left out of account matters which should have been be taken into account. The decision is not outside the generous ambit of the discretion which has been entrusted to the court.

Guerrera v Guerrerra [1975] 1 WLR 1542 considered
Hale v Hale [1975] 1 WLR 931 mentioned
Raymond Rolle v Michael Preuss SCCiv App No 70 of 2020 applied
Sawyer v Sawyer SCCiv App No 134 of 2014 considered

J U D G M E N T

Judgment delivered by The Honourable Sir Michael Barnett, P:

1. This is an application by Christopher Symonette ("the husband") for an extension of time to appeal an order made by Bowe-Darville, J. on an application for ancillary relief, consequent to a divorce.

2. The Order was made on 19 November 2021.

3. The husband was the respondent to the Petition. The trial Judge made the following order:

> **1. The Respondent shall continue to maintain the Petitioner's medical insurance coverage and to pay all of her reasonable medical expenses not covered by the insurance.**
>
> **2. There shall be no adjustment in relation to the Petitioner's Florida property, the Wells Fargo Account in Florida and the sale proceeds of the Harrold Road Property.**
>
> **3. The Respondent shall pay to the Petitioner the sum of Thirty-five Hundred Dollars ($3,500.00) monthly in**

respect of her ongoing maintenance with effect from 28 November 2021 such payments to be made directly to the Petitioner's bank account on the 28th day of each month following;

4. The Respondent shall transfer to the Petitioner all his one half right title and interest in and to the matrimonial home/property situate at Lot No. 97 Lake Cunningham Estates in the Western District of the Island of New Providence;

5. The Respondent shall pay the sum of Seventy-five Thousand Dollars ($75,000.00) toward the settlement of the Real Property Taxes now due and owing on the matrimonial home by 31st January 2022.

6. The Respondent shall pay to the Petitioner the sum of One Hundred and Seventy Thousand ($170,000.00) in respect of her one-half (1/2) interest in the vacant property to the rear of the matrimonial home in Cunningham Lake Subdivision in the Western District of the Island of New Providence within three (3) months of the making of this Order. Should the same not be paid then the subject lot shall be sold and the proceeds of sale divided equally between the parties such sale to be effected by 31 May 2022.

7. (i) The parties shall agree an appraiser for determining the market value of both properties at South Beach being Lots Nos. 19 and 21 in Block 13 South Beach Estates Subdivision within three months from the date hereof.

(ii) On the appraised value thereof, the Respondent shall pay to the Petitioner a sum representing her one-half (1/2) interest in the said appraised value of the said properties thereupon the Petitioner shall relinquish all her one half right title and interest in and to the same.

8.Upon a proper valuation of the Commonwealth Brewery Limited and CIBC Trust Company Limited shares the Respondent shall pay to the Petitioner her one-half (1/2) interest therein.

9.The Respondent shall pay to the Petitioner the sum of Twenty Thousand Dollars ($20,000.00) per year for the next five (5) years which sums represents her one-half

(1/2) interest in the Respondent's stated yearly bonus of Forty Thousand Dollars ($40,000.00) therein. Such payments to be made on a quarterly basis beginning 31st March, 2022.

10.The Respondent shall pay to the Petitioner the sum of $350,000 being her interest in the Respondent's businesses. The parties and their counsels can discuss a method of payment but such payment shall be paid in full within the next five (5) years with the first installment being made on or before 31 December, 2022.

11.The Respondent shall pay all costs and expenses for effecting this Order.

12.The Respondent shall pay $20,000 towards the Petitioner's cost of this suit.

13.Each party has liberty to apply."

4. The husband applied for leave to appeal that order. That application was made on 3 December 2021.

5. For reasons which are wholly unsatisfactory, but for which the husband is not responsible, the order granting leave was not made until 27 April 2022.

6. The application for an extension of time was then made on 3 May 2022.

7. The application for an extension of time is resisted by the wife.

Discussion.

8. As this is an appeal from an interlocutory order, the time for appealing is 14 days after the order was made.

9. In **Raymond Rolle v Michael Preuss** SCCivApp. No. 70 of 2020, this Court said at paragraph 10 that "**the time for appealing an interlocutory order is 14 days from which it is made, not 14 days from which leave is granted**".

10. During the hearing of this application, the Court inquired whether the order of 19 November 2021 was a final or interlocutory order. That issue has already been considered by the courts. In **Guerrera v Guerrera** [1974] 1 WLR 1542, on an appeal from an order in ancillary proceedings, requiring a husband to transfer his interest in a house to his wife, the issue arose whether the order was an interlocutory order or a final order. The English statutory provision was similar to section 11 of the Court of Appeal Act. The English Court of Appeal said at pages 1543-1544:

> **"We are told that considerable doubt was expressed by those to whom inquiry was made as to whether leave to appeal was necessary and, it may be, as to whether this appeal should be treated as an interlocutory or a final appeal. For the assistance, not only of these parties, but of others, it should be clearly stated that appeals against orders made in these ancillary matters in the Family Division, which are constantly coming before this court, are treated by this court as interlocutory appeals and should be put in the interlocutory list, generally require leave either from the judge or, if he refuses it, from this court, and have to be brought within the shorter period which is required for such appeals, namely, 14 days, and not six weeks."**

11. This was followed in **Hale v Hale** [1975] 1 WLR 931, which was an appeal from an order relating to the matrimonial home in divorce proceedings. The English Court of Appeal at page 934 said:

> **"On the authority of the decision of this court in Guerrera v. Guerrera [1974] 1 W.L.R. 1542, in accordance with the practice of this court, a matter of this nature is treated as an interlocutory matter."**

12. I hold that orders made in ancillary proceedings in the family division are interlocutory orders and not final orders. Interlocutory appeals should be filed within 14 days from the date the order is made. In the circumstances, the Order of 19 November 2021 was an interlocutory order for the purposes of section 11 of the Court of Appeal Act.

13. The jurisprudence as to the exercise of the discretion whether to extend the time for appealing to the Court of Appeal is well settled. The Court looks at the length of the delay, the reasons for the delay, the prospects of success of the proposed appeal and the prejudice to the proposed respondent. In this case, the length and reasons for the delay are the time it took for the application for leave to appeal to be heard and determined by the court below. This delay was aggravated by the fact that the trial Judge was demitting office as a judge of the Supreme Court in December 2021 and the application for leave had to be heard by a different judge.

14. In my judgment, the length of the delay and the reasons for the delay, in this case, are not such as to warrant the refusal of the application for an extension of time.

15. In my judgment, whether to accede to the application depends on the court's view of the prospects of success. I accept that prospects of success does not mean that the appeal will or is likely to succeed. It means that the appeal has a realistic, and not a fanciful, chance of success.

16. The grounds of the proposed appeal are:

> **"1. That the Learned trial Judge erred in law and in fact by making the said Order which is the subject of this appeal in that no judge appreciative of her duty to act judicially would have made such an order which is demonstrably unfair to the Appellant.**
>
> **2. That the learned Trial Judge erred in law and in fact when considering the future needs of the parties hereto in the absence of expert medical evidence in respect of both parties while only commenting on the absence thereof in relation to the Appellant.**
>
> **3. That the learned Trial Judge erred in law in that she failed to consider whether a clean break could be achieved by the division of the assets of the parties.**
>
> **4. That the learned Trial Judge erred in law and in fact by awarding the Respondent at paragraph 10 of her Order the sum of Three Hundred and Fifty Thousand dollars ($350,000.00) in the absence of any expert or other evidence to support such a valuation and in total disregard of the provisions of the Professional Engineers Act, 2011. Upon a true interpretation of the Professional Engineers Act, 2011, only licensees under that Act may engage in the practice of professional engineers. The Respondent is not a licensee under the aegis of the Professional Engineers Act, and as such wasl/is incompetent to own shares in professional engineering business of the Appellant. Indeed, the Learned Trial Judge erred by failing to advert to the Professional Engineers Act, 2011 as a good reason depart from the starting point of an equal division of assets.**
>
> **5. That the learned Trial Judge erred in law by ordering at paragraph 9 of the order the subject of this appeal that the Appellant pay the Respondent over a five (5) year period the sum of One Hundred Thousand dollars ($100,000.00) "representing her one-half (%) interest in the Respondent's stated yearly bonus of $40,000.00 therein." The learned Trial Judge in error speculated about the future economic performance of the Appellant's businesses without adverting to the evidence**

of the Appellant that he had for a three (3) year period prior to the Petition of the Respondent not received any bonus from his businesses or for that matter the produced bank statements provided by the bankers of the Appellant and his businesses. Moreover, future bonuses cannot be regarded as community property of the family as any such future bonuses are properties acquired after the Decree Absolute. In any event, the Professional Engineers Act, 2011 prohibits the Respondent from having any interest in the Appellant's engineering businesses.

6. Alternatively, to grounds 4 and 5 hereof, the learned Trial Judge erred in not considering the statutory and fiduciary responsibility of the Appellant as trustee of funds provided to his businesses by his clients. Having rejected the Appellant's evidence and that of Terah Johnson, there was no evidence of the value of the funds held by the Appellant as trustee. The learned Trial Judge erred in failing to order an audit of the accounts of the business accounts of the Appellant for the purpose of determining the value of funds held for the accounts of clients and the value of the funds held for the accounts of the Appellant's businesses as well as the value of the Appellant's said businesses.

7. The learned Trial Judge erred in treating Chris Symonette and Associates as a company incorporated under the Companies Act, Cap. 308. Having found that as a sole practitioner licensed under the Professional Engineers Act, 2011, and to have treated the Respondent as excluded from any interest in the Appellant's sole practice.

8. The learned Trial Judge erred in failing to consider the impact of the property adjustment orders being made by Her Ladyship on the Respondent who would have by such property adjustment have benefited by large capital gains which might be invested to provide for the Respondent the economic independence and thereby negated the need for orders numbered 1 and 2.

9. The learned Trial Judge erred in failing to consider the impact of the property adjustment orders being made on the Appellant's businesses and on his ability to comply

> **with orders numbered 1, 3, 9, and 10 of the Order appealed from. there were no partners of the Appellant, she ought to have treated the Appellant."**

17. I am mindful that the wife consented to the grant of leave to appeal. This might suggest that she agreed that the appeal had some prospects of success. However, a review of the evidence and her submissions indicate that her consent appears to have been based on her belief, albeit erroneously, that leave was not required as it was a final order. In the circumstances, I do not find that the grant of leave by Newton, J. was based on any considered view of the prospects of success.

18. The proposed appeal is an appeal from the exercise of a judge's discretionary power to make property orders following a divorce. This is not a trial court and our powers are limited. In **Magner and another v Royal Bank of Scotland International Ltd (Gibraltar)** [2020] UKPC 5 the Privy Council, at paragraph 19 said:

> **"The limitations on the ability of an appellate court to interfere with a discretionary decision of a lower court are well known. In Nilon Ltd v Royal Westminster Investments SA [2015] UKPC 2; [2015] BCC 521 the Board stated (para 16):**
>
> > **'It is also trite law that in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court.'**

19. In **Sawyer v Sawyer** SCCivApp. No. 134 of 2014 which was an appeal from an order made in ancillary proceedings after a divorce I said:

> **"30. In concluding this judgment, we must point out that this is an appellate and not a trial court. It may well be that members of this court or a different judge hearing the application may have exercised their powers differently that (sic) the judge in this case. However, our role is limited to determining whether the trial judge made an error of law or that no reasonable judge could in all the circumstances make the decision that the trial judge has made."**

20. The making of a property adjustment order on an application for ancillary relief, consequent to a divorce, is very much an exercise of a discretion, balancing competing interests to achieve fairness.

21. Section 29 of the Matrimonial Causes Act gives the court a wide discretion and sets out generally the matters the court takes into account.

22. I have carefully read the Ruling of Bowe-Darville, J. and the grounds of appeal. I can identify no error of law which would justify reviewing her judgment.

23. The Ruling carefully considers the relevant law and the Judge did not take into account anything that she ought not to have taken into account. Neither did the Judge not take into account something that she ought to have taken into account.

24. In his submissions on the prospects of success, Counsel for the husband submitted:

> **"Chances of Success**
>
> **24. It is submitted that the conditions set out in the Learned Judge's order are worthy of review on appeal.**
>
> **25. We submit that there are conditions that are not reasonable and are deserved of further scrutiny and exploration.**
>
> **26. Based on the evidence led in the Court below there is nothing to suggests why the learned Judge decided to give 100% of the matrimonial home to the Intended Respondent without having to revert any of the equity to the Intended Respondent. (Paragraph 4 of the order)**
>
> **27. Similarly, the financial obligations that the Learned Judge burdened the Intended Appellant with are extremely onerous and we would go as far as to say completely unreasonable.**
>
> **28. This is submitted as the Court need only peruse paragraphs 3, 5, 6, 10 and 11 of the order which indicate that the Intended Appellant would have to raise $377,000.00 cash within the first twelve months of the order to be fully compliant. This is in addition to relinquishing all his interest in the matrimonial home with no indication from the Learned Judge as to where the intended Appellant was to reside.**

> **29. The Learned Judge did not appear to take into consideration the age of the Intended Appellant, his future earning capacity or future performance of his business when determining how he would be able to meet the obligations that he was straddled with.**
>
> **30. The Intended Appellant is also to pay the Intended Respondent in cash for her 2 interest in the property mentioned at paragraph 7.**
>
> **31. Given the age of the Intended Appellant the chances of long-term financing to meet all of the above mentioned obligations is almost nonexistent.**
>
> **32. We raise the above issues to show that there is a good chance of success on appeal, the issues raised are certainly worthy of an appeal given the unreasonable nature of the Judge's ruling as there was no evidence led that suggests the Intended Appellant could satisfy these obligations."**

25. In my view, these complaints are completely hollow. In her Ruling, the Judge said:

> **"11. From the evidence presented the Respondent as the owner, operator and sole shareholder of the companies listed as Innovative Waves Ltd., Innovative AC and Christopher Symonette and Associates. The Court does not accept the Respondent's assertion that he has partners in these businesses. He provided no evidence in support and, most damning was the evidence of the Respondent's witness Ms. Terah Johnson given on 30th September 2021. At no time did the Respondent proffer audited financials to the Court. These businesses were started and progressed successfully throughout the marriage. Reference is made the exchange found in the transcript of 30th August 2021 Line 29 et seq. The Court also took note that the Respondent failed /refused to disclose the names of his so-called "partners" in his several businesses. The Court can only conclude that the Respondent was the sole owner of the said businesses."**

26. And later:

> **"18. The discovery process also revealed that the Respondent received dividends from his shares in CIBC Trust Company Limited. Strangely, but not surprisingly,**

the Respondent failed to disclose this source of income and when questioned he preferred to play ignorant. The Respondent was cross-examined as to his acquisition of the shares and their nature but chose instead to be evasive and dismissive. The Court was left with no idea of the value of such an investment.

19. Continuing on his path of non-disclosure, the Respondent reluctantly acknowledged that he was the owner of CIBC accounts Nos. 259 and 254. However, he responded that these accounts were related to his Freeport, Grand Bahama office which had since closed. The Court is minded to accept the Petitioner's assertion that the accounts remain beneficially owned by the Respondent."

27. And later:

"34. It is the Petitioner's case that she has no income or other financial resources and is unlikely to have in the future. Her employment prospects are very low considering she has not worked for many years and the incidence of her cancer which continues to present challenges. Moreover, the Petitioner has always been financially dependent on the Respondent. The Respondent continues to earn from his three companies. The Respondent could not really fault the Petitioner for her faithful and loyal role as wife, mother, and homemaker. The Court would be remiss if it did not acknowledge that the Respondent, too, had medical issues, although presented in evidence with no medical backup.

35. The Respondent's affidavit evidence and the lack of evidence by him leaves the Court to infer that he is in a better financial position than the Petitioner. The Respondent has sufficient income to provide for the Petitioner and maintain an income and support himself. The family history relates to many years of the Respondent having the financial responsibility of the family and of having a joint bank account and credit card facility with the Petitioner."

28. And later:

"39. At the outset it was most difficult for the Petitioner to obtain the Respondent's financial information despite written requests to his attorney. The Petitioner issued several subpoenas to the Respondent's banks for information. Even though most of the banking statements were presented, there still remained outstanding items that required presentation and testing.

40. The Respondent maintained a very strong demeanor during cross-examination and, when questioned about missing information or his failure to provide such, he was very flippant in his responses. The hearing was remote and despite several interjections by the Court, the Respondent seemed oblivious to the fact that the Court could see his every move, facial expressions and eye movements. The Respondent was undoubtedly unaware that his blatant disregard for full and frank disclosure (failure to comply with the discovery requests and orders) had serious consequences. It was rather difficult to get the Respondent to give full and frank disclosure despite the several affidavits filed. The Court viewed his conduct and non-co-operation as a blatant disregard for the Court and an attempt to mislead and conceal his assets. The Petitioner has asked the Court to exercise its discretion to not only draw negative inferences but also to penalize the Respondent in costs for his misconduct. The Petitioner relies on the Court of Appeal's finding in Chisolm v Chisolm SCCiv App No. 127 of 2020 [and also OG V AG [2020] EWC FC 52. Further at Paragraph 27 of the Chisolm (supra) decision Barnett, PA went on to say:

> **'Moreover, 'parties have an important duty to ensure that the Court has sufficient information regarding their assets. They must make full and frank disclosure and a party who fails to do so runs the risk of the court drawing adverse inferences and robustly attributing assets to him or her.' Barnett, PA also referenced paragraph 74 of LKW v DD [2010 1727'**

42. The Court accepts that a lump sum payment order may afford the best clean break in the circumstances. However, consideration must be given to the practicality

> **of achieving the same and the ready availability of finances/monies to do so. The Court is mindful that financial and other arrangements could delay effecting the complete settlement."**

29. With these observations as to the husband's failure to provide full and frank disclosure to the court, the trial Judge did what she could do in the circumstances. The husband's complaint about lack of evidence is completely without merit.

30. The husband's primary complaint is that the trial Judge did not require the wife to compensate him for his interest in the matrimonial home. Whilst his complaint is not surprising, the reality is that the wife was very dependent on the husband and ex facie did not have the means to pay the husband for his interest in the home. Moreover, the trial Judge was clearly not satisfied that the husband had fully disclosed all of his resources to the court. In the circumstances, the Judge's decision cannot be said to be plainly wrong.

31. In my judgment, this proposed appeal has no prospects of success. The husband cannot show that the trial Judge did not apply the correct principles. He cannot show that the Judge has taken into account matters which ought not to have been taken into account or left out of account matters which should have been taken into account. The decision is not outside the generous ambit of the discretion which has been entrusted to the court.

32. In the circumstances, the application for an extension of time is refused.

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The Honourable Sir Michael Barnett, P

33. I agree.

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The Honourable Madam Justice Crane-Scott, JA

34. I also agree.

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The Honourable Mr. Justice Jones, JA