Neutral Citation [1999] 1 FLR 392

IN THE SUPREME COURT OF JUDICATURE CCFMI 98/1197/2
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(HER HONOUR JUDGE PEARLMAN)

Royal Courts of Justice
The Strand
London WC2

Wednesday 23rd September, 1998

B e f o r e:

LORD JUSTICE OTTON
LORD JUSTICE THORPE

JENNIFER DALMENEY CHALMERS
Respondent

- v -

MICHAEL JOHNS
Appellant

(Computer Aided Transcript of the Palantype Notes of
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Official Shorthand Writers to the Court)

MISS L FLEISCHMAN (Instructed by Messrs Trott & Gentry, London N1 8EQ) appeared on behalf of the Appellant

MISS J DODSON QC and MR M EMANUEL (Instructed by Messrs Hopkins Murray Beskine, London N4 3EA) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

JUDGMENT

LORD JUSTICE OTTON: I shall ask Lord Justice Thorpe to give the first judgment.

LORD JUSTICE THORPE: Mr Johns, the appellant, is 56. Miss Chalmers, the respondent, is 49. The parties commenced their relationship in 1972 and their first child, I, was born the following year. Their joint tenancy of 1 Everleigh Street in North London commenced as long ago as October 1976. It seems that there was a separation in 1989 when Miss Chalmers left Mr Johns and the home. But they were reunited again the following year and in July 1991 their second child, A, was born. It seems that their relationship has always been tempestuous at times and an incident in October 1996, when the mother's face was slightly cut by a beer tin that had been flicked or thrown at her by the father, led to the first issue of proceedings.

On 12th November the mother was granted an injunction *ex parte* and a power of arrest was attached. However, happily their differences were made up. Three days later the mother's application was adjourned generally and in the following month they resumed cohabitation. One of the problems that has undoubtedly had its impact on the relationship has been alcohol, and particularly the mother's use of alcohol. It seems that to her great credit in the summer of 1997 she took responsibility to give up drinking entirely, and she has been aided in that by the support of Alcoholics Anonymous. We have in the papers a police report on the involvement of the local station with the family. That shows that in the last year before the separation, which I will come to, the station has been called out on four occasions. On 5th April 1997 it was the father who called in the police saying that he had been assaulted. The officers observed a small scratch to his left arm. The mother was drunk and abusive to the police. She was arrested and subsequently, when sober, released without further charge.

On 2nd November the police were called, again the complainant was the father. The police observed minor injury to his face and neck. Both the father and the mother made allegations and the father on this occasion was arrested for his conduct but released with no further action. There was another call out on 12th December, again the father complained of assault, again he was observed to have very minor injury, again the mother was drunk, again she was arrested but when sober released with no further charge. It seems that on that occasion the mother had relapsed from her resolution to abstain from alcohol.

The final call out came on 5th May. On this occasion it was the mother who called the police. On this occasion she was observed to have minor injury. On this occasion the police seemed to have taken a more robust line, for they arrested the father and charged him with common assault. Apparently he was bailed on condition that he vacated the family home pending trial. That trial took place on 5th June. The Justices acquitted the father and so he was free to return to the family home.

The mother's emotional reaction is not established but can be imagined. She exercised her right to leave, taking A with her and sadly that has to date constituted a final separation. I say that because it does seem very sad that this couple after 25 years of shared family life and obvious attachment each to the other should have determined, at least on one side, that a continuing relationship is impossible.

There have been a welter of applications to the court following the mother's departure. On 11th June she applied for a non-molestation and an occupation order. On 19th June the father applied for a residence order and an occupation order. On 13th July she applied for a transfer

of tenancy and for a residence order. Those applications have been before the court either for directions, or for conciliation or for interlocutory application.

The case came before Her Honour Judge Pearlman on 27th July when she made a contact order, the effect of which was to allow A's return to stay with her father at the family home during the summer holidays. Since the commencement of the Michaelmas School term she has been spending Sunday with her father at home and being taken to school by him on Monday morning. There certainly has been one occasion on which she has also spent Thursday night with her father at the family home, and he has taken her to school on the following morning. How often that has occurred is a matter of some dispute.

When with her mother she is in unsatisfactory temporary council accommodation, which is said to be a mile and a half from school. The family home is about 10 minutes walk from school. One of the features of this case, which goes greatly to the credit of the parties, is that both children have done exceptionally well. They seem to have grown up into well balanced and sensible people. Of course in I's case that is achieved into adult life. In A's case there is still a long way to go but she has had glowing school reports and a social worker who gave evidence to the Court spoke extremely well of her good sense and resilience.

The mother's application for an occupation order came on for interim hearing before Judge Pearlman on 3rd September and she reached her conclusion on the following day. She made an order requiring the father to vacate the family home seven days later. The father's advisers immediately applied for a stay and for leave to appeal. That application was considered by this court at an oral hearing on 14th September. The court granted leave to appeal and ordered a stay until this day's hearing. The court has today the advantage of a transcript of the judgment of Judge Pearlman, as well as a transcript of evidence given by the social worker, to which I have already referred, and a transcript of oral evidence given by the elder child, I. I, who spent a year in Australia in 1997/1998, made a statement for the attention of the court which was actually dated 4th September, the second day of the trial. Counsel for the mother did not have it in his possession until a very late stage. The statement suggests strongly I's competence and his love for each of his parents and his attachment to the home and to the family. It also suggests a mature capacity to view with objectivity the failings of each of the parents whom he loves. However, towards its conclusion he made perfectly plain his view as to where merit lay, since he expressed his conviction that his mother was adapt at engineering and manipulating a situation. Unfortunately, that important observation was not tested in cross-examination because counsel had hardly had the opportunity of reading the statement, let alone digesting it. It seems that it was equally not registered by the judge, since she nowhere refers to it in her judgment nor makes any attempt to evaluate it.

The judge plainly developed during the course of the hearing a clear sympathy for the mother and a clear antipathy towards the father. Of course she alone has seen and heard the witnesses and it was exactly her function to carry out such an evaluation, and I have every respect for her conclusion. However, I do have some anxiety about her reason for accepting the evidence of the mother in preference to the evidence of the father wherever there was conflict. For she expressed herself in these terms:

"I have to say that I accept I as being a truthful witness albeit somewhat ´blinkered' in favour of his father and I have to say that when I have to consider the evidence of the applicant and the respondent I prefer the evidence of the applicant to that of the respondent. It is

corroborated to a large extent by the evidence of I Banks." [It is agreed between counsel that the judge intended to say I J.]

I simply do not understand, having read his statement and having read the transcript of his oral evidence, how the judge could possibly have construed his contribution as being corroborative of the applicant when he was not only called to support the respondent's case but plainly did so.

Be that as it may, my principal misgiving in relation to the judge's conclusion and order is in her construction and application of section 33 of the Family Law Act 1996. This section applies to those cases where the applicant has an estate or interest in the family home. It is common ground that these two are joint tenants. In those circumstances the court may, under subsection (3) order the prohibition, suspension or restriction of the exercise by the respondent of his right to occupy the residence. Equally under that subsection the court may require the respondent to leave the dwelling house.

Now the exercise of that power is ordinarily governed by subsection (6). Subsection (6) is in these terms:

"In deciding whether to exercise its powers under subsection (3) and (if so) in what manner, the court shall have regard to all the circumstances including-
(a) the housing needs and housing resources of each of the parties and of any relevant child;
(b) the financial resources of each of the parties;
(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3) on the health, safety or well-being of the parties and of any relevant child; and
(d) the conduct of the parties in relation to each other and otherwise."

However, the following subsection, subsection (7), is designed to cater for an altogether more extreme situation, where it appears to the court that any applicant or any relevant child is likely to suffer significant harm attributable to conduct of the respondent if an order under this section containing one or more of the provisions mentioned in subsection (3) is not made. In that more extreme circumstance, the court's discretion is much confined. The statute says that in such a situation:

"... the court shall make the order unless it appears to the court that-
(a) the respondent or any relevant child is likely to suffer significant harm if the order is made; and
(b) the harm likely to be suffered by the respondent or the child in that event is as great as, or greater than, the harm attributable to conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made."

So it seems to me that in approaching its function under this section, the court has first to consider whether the evidence establishes that the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent if an order is not made. If the court answers that question in the affirmative, then it knows that it must make the order unless balancing one harm against the other, the harm to the respondent or the child is likely to be as great. If, however, the court answers the question in the negative, then it enters the discretionary regime provided by subsection (6) and must exercise a broad discretion having regard to all the circumstances of the case, particularly those factors set out in the statutory

check list within sub-subsections (a)-(d) inclusive. I do not think that the judge perceived that as being her function. She said at page 11:

"When I look and consider, as I do, s.33(6) of this Act
´the housing needs and housing resources of each the of parties and of any relevant child ..."

She continued by finding that neither had any significant resources. She then later in the judgment said:

"Returning to the statute when I consider s.33(7), I find that the applicant and [A] are likely to suffer significant harm attributable to the conduct of the respondent if they were to live in the same house and if an occupation order is not made."

It is apparent from those brief references the judge never clearly focused upon the alternative nature of these adjoining subsections. She seems to have treated them as if both were applicable as it were simultaneously to the facts of the case. I hazard that had she directed herself more closely to the statutory language, she would have seen that this was not a case that came anywhere near subsection (7). I do not understand how, had she looked at it in that light, she could have satisfied herself that either the applicant or A was likely to suffer significant harm attributable to the conduct of the respondent if an order under subsection (3) were not made. She herself understood that this was not in any ordinary forensic language a domestic violence case. She herself said in relation to a risk that the father might not be rehoused by the housing co-operative if he lost this tenancy:

"It is for the housing co-operative to make up its own mind, but I would have thought that in a relationship that had lasted the length of time it has, the housing co-operative might not consider the respondent on the few occasions that I have been able to consider guilty of domestic violence. Certainly it is not domestic violence as so frequently comes before these courts."

The judge was right so to classify it. This was, in the range of domestic violence, a very slight case. But the corollary is that it was really not open to her to find that it was a case that fell within the ambit of subsection (7). Had she approached the case in relation only to subsection (6), could she in the proper exercise of her discretion have come to the conclusion that an order requiring the respondent to leave was justified? It is said by Miss Dodson that this was only an interim order and that it was only a suspension pending the final hearing of the cross-residence applications and that it in no way prejudiced the outcome of those applications.

The calendar fixes the cross-residence applications for hearing in this building commencing 26th October. That seems to me a consideration of the very greatest relevance to the exercise of the discretion. On that occasion the court will have before it all the issues and principally which of these two parents, if they have to remain separate, should have the primary responsibility for A's care; which of the two, if they must be separate, should have the sole tenancy of the family home; and whether there should be orders of a more permanent character under the Family Law Act 1996. All those issues will fall for consideration. As a matter of generality, it seems to me that a court should be cautious to make a definitive order at an interlocutory stage with a final hearing only six or seven weeks distant. The gravity of an order requiring a respondent to vacate a family home, an order overriding proprietary rights, was recognised in cases under the Domestic Violence and Matrimonial Proceedings Act 1976 and a string of authorities in this court emphasise the draconian nature of such an

order, and that it should be restricted to exceptional cases. I do not myself think that the wider statutory provisions contained in the Family Law Act 1996 obliterate that authority. The order remains draconian, particularly in the perception of the respondent. It remains an order that overrides proprietary rights and it seems to me that it is an order that is only justified in exceptional circumstances. Of course there will be cases where the character of the violence or the risk of violence and the harm to the victim or the risk of harm to the victim is such that the draconian order must be made, must be made immediately, and must be made at the earliest interlocutory stage. But I simply do not see this case on its facts approaching anywhere near that category. Conventionally the court has given careful consideration to the control of domestic disharmony by the imposition of injunctive orders before resorting to the draconian order. It is to be noted that in the history of this case, there is clear evidence of such judicial management having proved highly effective. The judge in this case said:

"No undertaking by the respondent, as I find it, will protect either the applicant or [A] as, in my judgment, the respondent either cannot or will not control himself and he has said, in effect, that he is not wrong in anything he does."

With respect to the learned judge, there was no evidence that I can perceive justifying that conclusion and certainly nothing in the history. It seems to me that the disharmony, such as it was, was of a character perfectly capable of control by injunctive order.

For all those reasons, I believe that the judge misdirected herself in law, and equally misdirected herself in the exercise of her discretion. I would favour allowing the appeal and simply adjourning the applications for occupation orders to be determined at the principal hearing.

I would only say by way of postscript that it does seem, in view of the level of attachment between the parties, and in view of the interests of both the children, that it would be very sad if the parents did not at least contemplate a reference to mediation. Obviously this court has no power to require that. It is purely a voluntary service. But there are highly specialist and expert mediation services available to the parties. This court itself has a specialist family mediation service to which appropriate cases can be referred, not only appeals that are pending but also appeals which on determination have the prospect of fruitful mediation to avoid future litigation which will otherwise inevitably follow. So I would only urge the parties and their advisers to at least give consideration to the availability of these facilities. Should they decide that they wish to avail themselves of the mediation services of this court, they have only to approach the Civil Appeals Office.

LORD JUSTICE OTTON: I agree. I would only add by way of emphasis that in so far as the learned judge reached her conclusion by virtue of section 33(7) of the Act, she was wrong in principle to do so. Subsection (7) requires the court to make an order if it appears that the applicant or child is likely to suffer significant harm if an order is not made, which is greater than that the respondent or a child is likely to suffer if the order is made. Thus the subsection only operates where the child is likely to suffer significant harm. The expression "significant harm" is also to be found in section 31 of the Children Act 1989. In *Humberside County Council v B* [1993] FLR 257, Booth J considered that "significant" meant:

"... considerable, or noteworthy or important ..."

In my view the evidence fell very far short of establishing that A was likely to suffer considerable or noteworthy or important harm if the order was not made. There was no real risk of violence or any other harm befalling the child. The wife had departed from the matrimonial home taking A with her. There was limited contact with father but by consent. There was arguably some inconvenience to A by the increased journey time to school. This could not amount to harm. Consequently subsection (7) did not fall for consideration at all and the learned judge fell into error by taking it into account.

When this matter came before this court on a previous occasion, on 14th September, it may be that both parties were not present. If they were they would have heard Evans LJ say this:

"It would not be too hopeful, perhaps, to suppose that, in the light of today's hearing, the two parties may think that it is in their best interests to approach this matter as two mature individuals and to consider whether it is not in the best interests of A, if not of themselves, that they should resume the relationship which they enjoyed in more difficult circumstances before."

I would echo that sentiment, and in the light of the hearing today I would express the hope that they would seek the mediation facilities to which my Lord has referred in order to resolve their differences and, I repeat, in the best interests of A, who is clearly a much loved child. I too would agree with the outcome of this appeal.

ORDER: Appeal allowed. Occupation orders to be determined at the substantive hearing. No order for costs, save legal aid taxation.

(Order not part of approved judgment)