

HONG KONG / JUDGMENT

NORMAN ERIC TOMLIN v. MICHELE HELENE TOMLIN

COURT

Court of First Instance

DECIDED

30 September 1994

CASE / FILE NUMBER

HCA4036/1994

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1994, No. A4036

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

NORMAN ERIC TOMLIN

Plaintiff

MICHELE HELENE TOMLIN

Defendant

Coram: The Hon. Mr. Justice Barnett in Chambers

Date of Hearing: 20th & 22nd September 1994

Date of Delivery of Judgment: 30th September 1994

J U D G M E N T

In this action, the Plaintiff applies for summary judgment pursuant to Order 14. For her part, the Defendant applies to strike out the writ and statement of claim as being frivolous and vexatious and otherwise an abuse of the process of the Court.

The parties were husband and wife. They married on 19th February 1986. The marriage was not happy. It culminated in exceedingly

acrimonious divorce proceedings. On 23rd February 1994, in those divorce proceedings, I made an order by consent for payment by the Plaintiff to the Defendant of a lump sum by way of a clean break, together with periodical payments for each of the two children of the marriage. Following that, the decree nisi was made absolute on 31st March 1994. The writ in this action was issued on 29th April 1994. In his statement of claim, the Plaintiff alleges that between 1987 and 1992 the Defendant withdrew money from the Plaintiff's bank account by way of cheques previously signed by the Plaintiff, or from the parties' joint account. The Defendant represented that this money had been spent on household necessities, but in fact had been paid into private accounts of her own. The identifiable amounts which had been thus "siphoned off" amounted to some \$168,000.00, although in the divorce proceedings the Defendant had admitted to some \$700,000.00. The Plaintiff now claims damages for conversion of the cheques; alternatively payment of the sum of \$700,000.00 or \$168,292.10; or such amount as the court thinks just by way of interim payment.

There is no dispute that the Defendant did siphon off this money. What is in dispute is the exact amount taken by the Defendant, and more crucially whether the Plaintiff can recover it or damages in this action.

In December 1992, in the divorce proceedings, both parties gave notice of intention to proceed with an application for ancillary relief. On 27th May 1993, Her Honour Judge Chan made by consent an order that the Plaintiff pay the Defendant \$55,000.00 per month by way of interim maintenance. The applications for ancillary relief were due to be heard by the same judge on 24th November 1993. The day before the hearing was due to begin the Defendant through her solicitors disclosed two bank accounts

which had not yet been discovered. As a result, on 24th November the hearing was adjourned to enable the Defendant to file an affidavit dealing with these accounts. When that affidavit was produced the following day, it disclosed another account. The Plaintiff and his solicitors were quite understandably dissatisfied with the whole position. The hearing was adjourned and the divorce proceedings were subsequently transferred to this Court. In the meantime, investigation by the Plaintiff's solicitors revealed the extent of the siphoning of money carried out by the Defendant.

Further affidavits were filed by each party. The Plaintiff was complaining that the Defendant was still not making full disclosure of what money she had taken and what she had done with it. For her part, the Defendant claimed that she had spent a portion on property in France, and the rest on family expenses including things such as holidays. She was unable to be precise as to the amount she had taken but was clear that, the French properties apart, there was no other money remaining.

Through the respective solicitors, attempts were made nonetheless to try and settle the ancillary relief. There was both correspondence and meetings. There was a meeting on about 2nd December at which the Plaintiff's solicitors had with them some rough schedules setting out the requirements of each party and the points which could be argued in each parties' favour. These schedules recognised the existence and value of the French properties which would have to be taken into account. They also recorded that a matter which could be taken against the Defendant was the "effect of squirrelling on family finances", and in favour of the Plaintiff:

"Secreting funds

Known source of funds

Unknown source of funds

Amount of money passed through wife's hands

Unknown destination of funds

Affect on family finances of wife's behaviour"

On 17th December, the Plaintiff's solicitors wrote to the Defendant's solicitors with proposals for settlement. Having set out those proposals, they continued:

"We trust that your client will appreciate the spirit in which this proposal is made, particularly bearing in mind the fact that our client has to come to terms with your client's quite outrageous financial misconduct throughout virtually the whole of the marriage and we are specifically instructed to ask you to convey to your client that our client regards this offer as generous and the only compelling reason he can find to make such an offer is the inevitable cost that will be incurred if settlement is not achieved now."

The offer did not find favour with the Defendant who through her solicitors sought a more generous settlement. On 21st December, the Plaintiff's solicitors replied to that suggestion to the effect that the Plaintiff was not prepared to increase his settlement proposal. In the letter, they said:

"Finally, again, if the offer is not accepted, we must deal with matters pertaining to movement of funds in and out of the previously undisclosed bank accounts. In view of your client's obvious reluctance to apply her mind to this, may we suggest that she sign the necessary authorities to the Hong Kong Bank, First Pacific Bank, Security Pacific Bank and BNP in Hong Kong, Thionville and Paris Porte Doree to enable us to obtain the information direct."

I find it difficult to put any construction upon the two extracts which I have just cited other than that the settlement proposed by the Plaintiff recognised and took into account the Defendant's financial misbehaviour or dishonesty, the lack of information as to how much was involved and the consequences flowing therefrom. In contrast, however, the Defendant's solicitors indicated that she would accept the settlement contained in the letter of 17th December subject to a variation as to costs. On 28th December, the Plaintiff's solicitors wrote, inter alia:

"Our client instructs us to advise that he will accept this variation expressly on the condition that your client either:-

1. Provides us with the authorities to the various banks set out in the last paragraph of our letter of the 21st December, or
2. She volunteers details of the source and destination of funds from and to her various disclosed bank accounts, and
3. The result of either 1 and 2 above is that no hidden assets are disclosed."

There, I accept, it is made plain that the settlement would be subject to full and honest disclosure and such disclosure not producing further assets.

The Defendant's solicitors replied on 5th January 1994. In their letter, they said:

"Your latest letter puts forward further conditions that effectively means the case is to continue. Under no circumstances can this be appropriate.

The purpose of a negotiated settlement is to be able to obtain an Order from the Court that determines the financial issues between our clients in full and final. settlement of their claims. The parties and the Court seek finality in such an Order. Your further conditions concerning settlement does not provide finality."

The Plaintiff's solicitors replied on 7th January saying:

"Our client would like your client to be aware of the perspective that he has of this whole matter. With much justification, he feels that your client has, by her behaviour, cost him and ultimately her, an enormous amount of money. If she had been able to behave more reasonably and if she had been able to be honest from the beginning, then the financial position of the parties would be nothing like it is now. Had your client not taking the precipitous step of obtaining the ouster injunction and had she given full disclosure of her financial position, then it would not have been necessary to sell the former matrimonial home when they did; if the property had been sold now a price of around \$20 million could easily have been achieved.

Further, not only has your client still not given full disclosure, she has deliberately perjured herself in your affidavits. Had she been honest she would almost certainly not have received interim maintenance at the level that she did and she certainly would not have received the lump sum payment of \$280,000. Additionally, there would have been more money in the joint "pot".

Despite all this, our client was still prepared to settle at a very generous level, all he wanted was to satisfy

himself that at the 11th hour your client had seen the error of her ways. But even now your client seems reluctant or even totally unwilling to accept the consequences of her outrageous behaviour.

Under separate cover, we are sending you a file that we had prepared for the hearing of the 24th November and which will be produced in Court on any subsequent hearing. We would respectively suggest that your client be invited to study this file because it appears from her last two affidavits that either she does not know or is not prepared to accept the extent and magnitude of her dishonesty which continues to this day.

In all these circumstances, our client's position on settlement is that the ball is in your client's court. If she would now like to propose a settlement that she believes our client will find acceptable, bearing in mind what is written in this letter, he will give it serious consideration. There will be no further negotiations so whatever proposal your client deems appropriate must, we suggest, be her absolute bottom line and attractive to our client."

The Defendant's solicitors replied at length on 11th January. The letter acknowledged that it had been wrong of the Defendant not to disclose her additional accounts and siphoning of money. It said that she was aware of this and was very sorry about it. The Defendant was now prepared to accept the Plaintiff's terms for settlement set out in the letter of 17th December.

The Plaintiff's solicitors replied on 12th January. Their letter said that the Plaintiff was then of the opinion that he had done more than could reasonably be expected of him to conclude the litigation and withdrew the earlier offer. It was left to the Defendant to come up with further proposals.

Following a telephone conversation between the solicitors in which it was suggested that any further offer should come from the Plaintiff, the Plaintiff's solicitors wrote on 17th January saying, *inter alia*:

"Our client is drawn to an inevitable conclusion that because of your client's abject refusal voluntarily to provide documentary evidence of what she now maintains is complete disclosure of her financial dealings she still has something to hide. In the circumstances, to bring this matter to an end and to avoid total financial run for both parties, our client is prepared to settle as follows"

Terms were then set out. There was no formal response to these terms. There was, however, a telephone conversation in which it was indicated that the terms were not acceptable to the Defendant. Accordingly, on 1st February, the Plaintiff's solicitors wrote saying:

"Contrary to what you and your client believe, our client does not wish this matter to go to court but at the same time, he instructs us to make it clear that he will not be pressurised into settling this dispute on anything other than reasonable terms. In other words, he will not agree to pay more than he believes, take into account all the circumstances of this case, is your client's proper, legal and equitable entitlement. He believes that his offer of the 17th of January exceeded those parameters.

In a last ditch attempt to salvage something from this awful situation, our client proposes the following."

Once more, it is difficult to see how these last 2 extracts contemplated anything other than a settlement fully taking account of the Defendant's behaviour and the consequences thereof.

Returning to the letter of 1st February, again terms were set out. Again, the terms were not accepted, the Defendant's solicitors replying in some detail and repeating that the Defendant was still prepared to settle on the terms contained in the letter of 17th December. Agreement was not, however, reached and accordingly the parties prepared for a hearing before me on 22nd February.

On 22nd February, there were discussions outside of court. Those discussions of course centred upon a settlement. It is clear that during the discussions, which were in fact of relatively short duration, no specific mention was made of the Defendant's siphoning or the consequences thereof. On the following day, terms having been agreed, I made the order by consent to which I have already referred. That order contained an undertaking by the Defendant to indemnify the Plaintiff against any liability in respect of mortgages on the French property, and not to make any claim against the Plaintiff's provident fund. For his part, the Plaintiff undertook to indemnify the Defendant against any liability in respect of a mortgage on property in England and guarantees given in respect of two Hong Kong companies. He also undertook not to pursue any action against the Defendant in relation to a French insurance company against which it was alleged the Defendant had made a fraudulent claim. The Plaintiff also agreed to pay the children's school fees.

The Defendant, through Mr. Payne, puts her case on two grounds. First, the siphoning was implicitly taken into account in the negotiations leading to the consent order. Accordingly, the matter of siphoning is no longer available to the Plaintiff because of issue estoppel. Second, the Plaintiff could and should have taken the question of siphoning into account when negotiating the settlement. The matter is, therefore, anyway not open to him because of issue estoppel.

In spite of Mr. Sarony's best efforts, I have to say that the contention that the Defendant's behaviour and consequences thereof were not taken into account is just about unarguable. I accept that there was no specific mention of it during the negotiations on 22nd February. I accept that, in contrast to the undertakings given in the consent order in respect of other liabilities, no mention has been made of this aspect of the proceedings. But, during the three months between the hearing before Judge Chan and the hearing before me, the Plaintiff was well aware that the Defendant had siphoned off significant sums of money and, according to him, was being less

than forthcoming as to how much she had siphoned and how she had disposed of it. The theme running through the correspondence, as I hope I have shown, was that the Plaintiff felt he was being generous in the proposals he was putting forward having regard to the Defendant's conduct financially. On only one occasion was a proposal made conditional upon full disclosure. Such an approach was not repeated.

Further, as between the parties, there cannot be any doubt but that the consent order was intended to achieve a clean break. The idea that the Plaintiff had somehow secretly reserved to himself the right to pursue the Defendant in respect of behaviour during the marriage, which had a direct

bearing upon financial arrangements between the parties, is wholly inimical to the concept of a clean break.

I have no hesitation whatsoever in saying that it is plain and obvious that the Defendant's siphoning was taken into account in reaching the settlement that was embodied in the consent order. In the circumstances, the Plaintiff's claim in this action is wholly untenable. The statement of claim must be struck out and the action dismissed.

It is not, therefore, necessary for me to deal other than shortly with the Defendant's second ground. The second ground depends upon the line of authorities culminating in *Yat Tung Investment Co. Ltd. v. Dao Hang Bank Ltd. & Another* (1975) A.C. 581, where it was held that the doctrine of *res judicata* in its wider sense makes it an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. That principle is not in dispute and it is not necessary for me to go into the authorities cited by Mr. Payne in any detail or indeed at all.

It is Mr. Sarony's contention that the Plaintiff could not have raised the matter of siphoning in the ancillary relief proceedings for two reasons. First, because Section 7(1)(a) of the Matrimonial Proceedings and Property Ordinance Cap. 192, requires the court when making an order for financial relief to take into account "the income earning capacity property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future". Mr. Sarony emphasized the word "has". He said that apart from the French properties which have been brought into account, the other funds siphoned off have disappeared. The

Defendant therefore no longer "has" them. They cannot be regarded as assets available for distribution. For this interpretation, he relied upon Jackson Matrimonial Finance and Taxation 5th Edition p.186 para. 29. Therefore, said Mr. Sarony, the Plaintiff could not, let alone should, have brought or attempted to bring the question of the siphoned funds into the proceedings for ancillary relief.

Mr. Sarony's second reason was that the Plaintiff's claim in the action is primarily for damages which will include claims for damage consequential upon the siphoning of the funds. As an example, he said that if the funds had not been siphoned the Plaintiff would have had better liquidity and been able to keep up the mortgage payments on the then matrimonial home, so that

it need not have been sold when it was. Had the sale been effected later, the value would have been considerably enhanced. Mr. Sarony said this court, sitting in its matrimonial jurisdiction, did not have jurisdiction to deal with such a claim for damages.

I reject this argument. Had this matter been raised in the course of contested ancillary relief proceedings, it would not have been difficult for the court to have investigated the extent of the Defendant's siphoning and where the money had gone. In the event that the court was not satisfied with the Defendant's disclosure, appropriate adverse inferences could have been drawn against her. In deciding what sum if any should be paid to the Defendant, appropriate adjustments could be made to reflect what benefits she had obtained and what losses the Plaintiff had suffered. It was uniquely part of the ancillary relief proceedings. If it had been taken out of the equation; it is difficult to see how the court could have made an order that would have properly reflected the course of the marriage and the parties'

contributions thereto. The court would have been placed in an impossible position if it had felt that a clean break was desirable and appropriate. If the Plaintiff were to be successful in this action, there would be taken back from the Defendant all that she had been given in the ancillary relief proceedings. The whole basis of the order made in those proceedings would be undermined.

The action is accordingly dismissed, as is the Plaintiff's summons under Order 14.

I make an order nisi that the Defendant should have her costs.

(N.J. Barnett)

Judge of the High Court

Mr. N. Sarony, Q.C. and Miss E. Longmore inst'd by Ng & Co. for Plaintiff.

Mr. I. Payne, inst'd by Hampton Winter & Glynn for Defendant.

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